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U.S. Citizenship
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FILE: EAC 02 140 50195 Office: VERMONT SERVICE CENTER

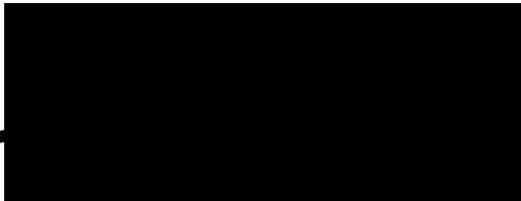
Date **JUL 06 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

fa Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a health care center that seeks to employ the beneficiary as a nurse. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation, and because the beneficiary is not licensed to perform the duties of a registered nurse. The director also noted that the petitioner failed to submit a certified Labor Condition Application (LCA), Form ETA 9035. On appeal, counsel submits a brief and other documentation, including the certified LCA.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a nurse. Evidence of the beneficiary's duties includes: the Form I-129; a letter counsel submitted with the initial filing; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: providing general nursing care; administering medications; preparing equipment; assisting physicians; and supervising licensed practical nurses and nurses' aides. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the duties of the position were routine to any nursing position and, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, counsel asserts that the petitioner has satisfied two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that the proffered position is so complex that only a person with a BSN can perform the job duties, and the degree requirement is common to the industry. Counsel also contends that the petitioner normally requires a degree. Accordingly, the AAO will address these two criteria only.

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Counsel states that the job postings included in the record establish that similar organizations require a BSN for parallel positions. The record contains no evidence, however, to show that the organizations issuing those job announcements are similar to the petitioner, or that the offered jobs are parallel to the instant position. The job advertisements, thus, have little relevance.

On appeal, counsel submits Internet information from the American Association of Colleges of Nursing. The information essentially indicates that a BSN is increasingly preferred and provides the degree holder with greater career flexibility. The Internet information does not state that a BSN is a minimum requirement common to the industry, however. The AAO has also noted the opinion provided by ██████████ of the University of Pennsylvania. ██████████ states that she believes registered nurses at the petitioner's facility must possess the equivalent of a BSN. ██████████ does not represent the nursing industry nor any professional nursing association; thus, her opinion does not amount to evidence of an industry standard.

Counsel also asserts that the proffered position meets this criterion because, due to the type of patients cared for, the duties are more complex than average. However, the job duties listed on the record appear to be routine to any registered nurse position. The petitioner has not submitted any documentary evidence to

establish that caring for geriatric patients brings a complexity or uniqueness to the position. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the petitioner has not established that the position is a specialty occupation based upon the complexity or uniqueness of its duties.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel asserts that several other registered nurses in the petitioner's employ possess a BSN. As evidence, the petitioner submitted copies of those individuals' diplomas. The record does not contain any employment records or other documentation to show the positions the individuals held or when they worked for the petitioner. The record, thus, lacks evidence regarding the petitioner's past hiring practices.

Moreover, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* At 388. In this regard, the petitioner fails to establish that the registered nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

The AAO notes that on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse staff nurse position.² In this matter, however, nothing in the proffered position's job description indicates that the beneficiary would be working in a nursing specialty that requires a higher degree of knowledge or skill. As stated previously, the duties of the position are routine. An individual who does not possess a BSN or its equivalent would be able to successfully execute the duties that the petitioner describes.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

² Memorandum from [REDACTED] Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002).

The director also found that, because the beneficiary is unlicensed, the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. The director requested that the petitioner submit evidence from the state licensing authority verifying that the beneficiary would be immediately able to obtain a provisional nursing license. In response, the petitioner submitted a copy of New York State licensing requirements, but no official information specifically regarding the beneficiary's eligibility for licensure. On appeal, counsel states that the beneficiary is eligible for a limited permit to practice registered nursing; however, the record contains no documentation from the state licensing body to demonstrate this. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will not be granted.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.