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20 Mass. Rm. A3042, 425 I Street, N.W.
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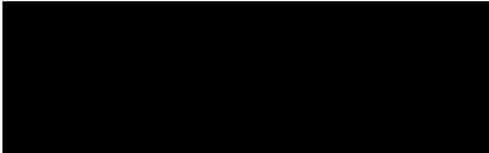
FILE: EAC 02 253 50074 Office: VERMONT SERVICE CENTER

Date: **JUL 13 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

for 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 hospital that seeks to employ the beneficiary as a registered nurse in an intensive care unit (ICU). 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 does not qualify to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional information.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 are 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 proceedings 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) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a registered nurse in an intensive care unit. Evidence of the beneficiary's duties includes the I-129 petition with attached documentation, and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would spend the vast majority of her time in an intensive care unit caring for patients recovering from surgery, or who have post-surgical complications involving, but not limited to, neurosurgery, trauma, and the like. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel states that the requirement of a baccalaureate degree for critical care nurses is standard in the industry. Counsel asserts that the duties of the proffered position are so complex that a nurse without a minimum of a BSN, or its equivalent, is not qualified to fill the position.

The petitioner has not met any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook (Handbook)*, 2002-03 edition at 268, the Department of Labor describes, in part, the duties of a registered nurse:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

Hospital nurses form the largest group of nurses. Most are staff nurses, who provide bedside nursing care and carry out medical regimens. They also may supervise licensed practical nurses and nursing aides. Hospital nurses usually are assigned to one area, such as surgery, maternity, pediatrics, emergency room, intensive care, or treatment of cancer patients. Some may rotate among departments.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000 were at the A.D.N. level. B.S.N. programs, offered by colleges and universities, take 4 or 5 years. More than one-third of all programs in 2000 offered degrees at the bachelor's level. Diploma programs, administered in hospitals, last 2 to 3 years. Only a small number of programs offer diploma-level degrees. Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses. *Id at 269.*

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, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.¹ As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position is in an "intensive care" or "critical care" unit does not necessarily mean that the position qualifies as a specialty occupation.

In support of its contention that the proffered position qualifies as a specialty occupation, the petitioner submitted three opinion letters from medical doctors: [REDACTED] Assistant Professor of Surgery, [REDACTED] a private practice physician in Parkersburg, West Virginia; and [REDACTED] clinical fellowship in oncology-hematology, [REDACTED] Pittsfield, Massachusetts. All three opined that the proffered position is a specialty occupation and that performance of the duties associated with the position requires the theoretical and practical application of highly specialized knowledge normally attained in a baccalaureate nursing program. When determining whether a position qualifies as a specialty occupation, however, the AAO looks beyond the title of the position and determines, from a review of the position's duties and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. The duties ascribed to the offered position are routine to many registered nurse positions. The fact that the beneficiary would perform these duties within an intensive care unit with medically complex

¹ Memorandum from Johnny N. Williams, 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).

cases does not elevate the duties complexity. CIS cannot find, based upon the current record, that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no requirement that a nurse have a baccalaureate or higher degree, or its equivalent, for entry into the position. Thus, the petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this proposition, the petitioner notes that the United States Department of Veterans Affairs revised its hiring standards for registered nurses on November 10, 1999, and that only entry level nurses are presently hired with less than a baccalaureate level education. The Department of Veterans Affairs hiring practices and nurse classification system is not reflective of the current industry standard for employment of registered nurses, however. Nurses are routinely employed throughout the industry in intensive care and critical care units with less than a baccalaureate level education.

The petitioner has also failed to establish that it normally requires a degree or its equivalent for entry into the proffered position, and offers no evidence in this regard. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Assuming arguendo that the petitioner only employed nurses with bachelors degrees in intensive or critical care units, the position would still not qualify as a specialty occupation. The petitioner's self imposed hiring standards are not crucial to the determination of whether the proffered position qualifies as a specialty occupation. The determining factor is whether the position involves the theoretical and practical application of a body of highly specialized knowledge requiring a bachelor's degree for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5th Cir. 2000). The duties of the offered position do not require such highly specialized knowledge.

As previously stated, the duties of the proffered position are routine for registered nurses in intensive or critical care units. They do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. The duties are not so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Nor are they so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4).

The petitioner also asserts that previous agency decisions have classified the same or similar positions as a specialty occupation. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers,

computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a registered nurse. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error, gross error, and a violation of 8 C.F.R. § 214.2 paragraph (h).

The final issue to be considered is whether the beneficiary qualifies to perform the duties of a specialty occupation. The director noted that the petitioner failed to submit an evaluation of the petitioner's foreign education. On appeal, counsel submitted an evaluation from a reliable credentials evaluation service which establishes that the beneficiary possesses the equivalent of a Bachelor of Science degree in nursing from a regionally accredited institution of higher education in the United States. It cannot be determined, however, that the beneficiary is qualified to perform the duties of a specialty occupation in this instance, as it has been determined that the proffered position does not qualify as a specialty occupation.

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.

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 and the appeal shall accordingly be dismissed.

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