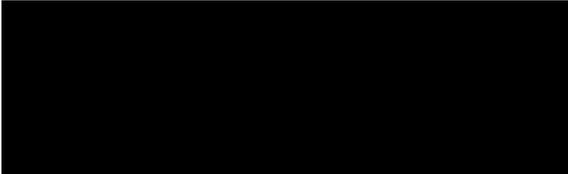


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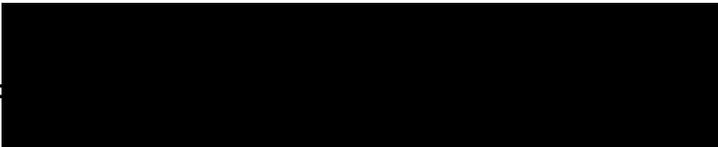


U.S. Citizenship
and Immigration
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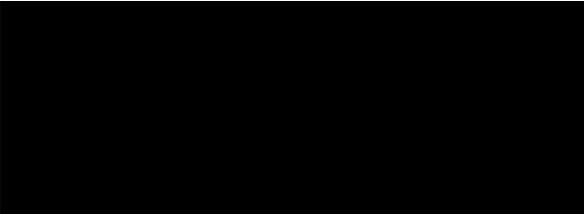
FILE: SRC 03 101 51221 Office: TEXAS SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner manages several nursing homes. In order to employ the beneficiary as a director of nursing at one of the nursing homes, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the evidence of record did not establish that the petitioner was qualified to serve in the proffered position. The director acknowledged that the beneficiary's formal education in the Philippines is the equivalent of a U.S. bachelor's degree in nursing (BSN), but found that this degree and the evidence as to the beneficiary's former nursing positions at Saint Elizabeth's Hospital, in General Santos City, Philippines, did not establish that she was qualified for the management aspects of the proffered position.

On appeal, counsel contends that the director erred. To help substantiate this contention, counsel submits (1) an additional letter from the Saint Elizabeth's Hospital that more fully describes the progressively more responsible positions that the beneficiary held during her employment there from May 1995 to May 2002, and (2) an additional evaluation of the beneficiary's education and experience.

In reaching its decision, the AAO reviewed and considered the entire record of proceeding before it, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE, (4) the director's denial letter; and (5) the Form I-290B as annotated by counsel, counsel's brief in the form of her letter dated May 3, 2003, the additional letter from St. Elizabeth's Hospital, and the April 28, 2003 "Determination of Expertise" letter from an assistant professor of nursing at Ohio State University.

Upon review of the entire record in this proceeding, the AAO has determined that the evidence fails to establish (1) that the proffered position is a specialty occupation within the meaning of 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) that, even if the position were established as a specialty occupation, the beneficiary is not qualified to perform the services required of that position in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

Because the petitioner has not had the opportunity to address to these adverse determinations, the director's decision must be withdrawn and the record must be remanded for further action consistent with this decision.

The beneficiary's qualifications shall be addressed first, as this is the issue on which the director denied the petition.

The nature of the duties of the proffered position, which is critical to the analysis of both the specialty occupation and the beneficiary qualification issues, is indicated in this excerpt from counsel's letter of response to the RFE:

In regards to the RFE, the offered position is that of Director of Nursing. The position involves duties relating to management of a nursing home facility. The duties will be to direct, through head of nurses, activities of the nursing staff, develop and implement nursing care plans to ensure nursing home resident needs are being met in accordance with instructions of physician, and nursing home administrative procedures. Other duties relate to planning and organizing orientation and in service training for staff members; assist in formulating budget. The duties cannot be performed without at least a Bachelor of Science Degree in Nursing (BSN)

In his letter responding to the RFE, the president stated, in part, that each of the petitioner's nursing directors "is responsible for directing, supervising, and coordinating nursing activities and personnel in nursing services in each facility" and "evaluate[s] nursing activities, patient care, and staff relations to ensure efficient delivery of services."

Contrary to the director's finding, the evidence in the record does not establish that the position of nursing home director would require more than the beneficiary's foreign-degree equivalent of a U.S. BSN. However, as described by counsel, it appears that the proposed duties would require licensure, for they involve direction in the areas of nursing care and in-house nursing education.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The 2204-2005 edition of the *Handbook* states, in pertinent part:

In all States and the District of Columbia, students must graduate from an approved nursing program and pass a national licensing examination in order to obtain a nursing license. Nurses may be licensed in more than one State, either by examination, by the endorsement of a license issued by another State, or through a multi-State licensing agreement. All States require periodic renewal of licenses, which may involve continuing education.

Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Therefore, it was incumbent upon the petitioner to establish that either (1) the petitioner was duly licensed as a registered nurse in accordance with the law and regulations of Oklahoma, the location of the proffered position, or (2) the specific duties of the proffered position did not require licensure. As the petitioner did not meet this burden, the petitioner has not established that the beneficiary is qualified in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

Next, the AAO finds that there is insufficient evidence to determine whether the proffered position is a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is satisfied where the evidence establishes that a baccalaureate or higher degree, or the equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

The *Handbook* does not indicate that administrative nursing positions normally require at least a BSN.

As evidence that the proffered position requires a BSN, counsel's letter of response to the RFE enclosed and quoted from the 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). However, the memorandum does not recognize that all administrative nursing positions are, as a class, a specialty occupation. Rather, the memorandum only indicates that such positions

“*may be H-1B equivalent.*” (Italics added.) Thus, the specific duties and the specific business context of each administrative nursing position is decisive.

Finally, the record’s Internet printouts of job vacancy advertisements do not establish that the nursing home director of nursing position here normally requires at least a BSN or a baccalaureate in another specific specialty. Because none of the printouts are for nursing home positions, their relevance is negligible. Furthermore, the printouts are too few to be conclusive on the issue of educational requirements.

Next, the petitioner has not presented evidence that would qualify the proffered position under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

There is no evidence to satisfy the first prong, by establishing that there is a specific-specialty degree requirement that is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As stated earlier, the evidence does not establish the proffered position as one for which the *Handbook* reports a degree requirement in a specific specialty.

There are no submissions from professional associations or from firms or individuals in the industry.

The job vacancy printouts are too few to establish an industry-wide degree requirement. Furthermore, the printouts are not relevant to this criterion. This is because the few positions advertised (1) are not parallel to the proffered position, and (2) do not belong to organizations that are similar to the petitioner’s nursing home.

Next, the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” The general terms in which the position is described do not illuminate any job aspects that are sufficiently complex or unique to require a person with at least a BSN.

Furthermore, the evidence of record does not meet the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position.

It has been noted that counsel and the petitioner’s president state that all of the petitioner’s currently employed nursing directors have “a bachelor’s degree or the equivalent.” This broad statement does not sufficiently identify the actual credentials of each director. In addition, a snapshot of current employees is not sufficient to demonstrate the established hiring history that this criterion requires. Furthermore, unsubstantiated assertions

have negligible weight. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Likewise, 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).

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree. To the general extent that they are described in the record, the proposed duties indicate no such complexity or specialization, but appear to be within the capabilities of an experienced registered nurse with an associate degree or hospital diploma in nursing.

In summary, the AAO has also determined that the petitioner has failed to establish that the proffered position is a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(iii)(A).

The petitioner must be afforded the opportunity to respond to the AAO's determination on the specialty occupation issue, because the AAO has made the first adverse finding on that issue. Also, because the licensure issue was not identified in the single RFE issued in this proceeding, 8 C.F.R. § 103.2(b)(8) requires the director to issue an additional RFE to request evidence regarding that issue.

The director shall then render a new decision based on the evidence of record as it relates to the statutory and regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 3, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.