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FILE: LIN 03 087 55211 Office: NEBRASKA SERVICE CENTER Date: JUN 02 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.

Mani Johnson

Er 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 licensed nursing home that seeks to employ the beneficiary as a nursing unit manager. The petitioner, therefore, 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 does not appear to be a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation based on the complexity of the duties of the position. Counsel also refers to documentation previously submitted to establish that parallel positions in similar firms require a baccalaureate degree in a specific specialty.

Section 214(i)(1) of the Immigration and Nationality Act (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 petitioner's letter of support; (3) the director's request for additional evidence; (4) counsel's letter, dated April

7, 2003, that responds to the director's request; (5) the director's denial letter; and (6) 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 unit manager in a nursing home. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; the petitioner's letter in support of the petition; and counsel's letter in response to the director's request for further evidence. According to the initial petition, the beneficiary would be responsible for supervising the direct care given by staff nurses and certified nursing assistants to the petitioner's older adult residents in long-term care, short-term care and/or sub-acute care units. The position would include reviewing technical skills, care plans, assessments, physician and medical orders, and participating in care conferences with the residents and families.

In the petitioner's response to the director's request for further evidence, counsel explained that the beneficiary would not be performing any direct care of patients. Further counsel stated that 60 per cent of the beneficiary's time would be spent in management duties; 20 percent would be spent in the reporting of information; and the 20 per cent of the beneficiary's time would be spent in support of other staff members. The petitioner indicated that the position required a baccalaureate degree in physical therapy, occupational therapy or nursing.

The director found that the proffered position was not a specialty occupation and stated that the duties of the position appear to be those of a head nurse or supervisory nurse. The director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of registered nurses and noted that nursing did not require a baccalaureate degree in a specific specialty for entry into the position. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that documentation of job advertisements previously submitted establish that the proffered position requires a baccalaureate degree based on the complexities of the duties of the position. Counsel also asserts that in its response to the director's request for further evidence, the petitioner submitted documentation of similar firms that have required a baccalaureate degree for parallel positions.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; 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.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, as correctly noted by the director, the position appears to be a supervisory nursing position beyond the entry-level staff nurse position. The fact that the beneficiary would supervise staff nurses and certified nursing assistants as well as report to the director of nursing in specific matters further supports this determination. As correctly noted by the director, supervisory nurses, as described under the *Handbook* classification of registered nurses, are not required to have a bachelor of science degree in nursing for entry into the position. It should also be pointed out that if the petitioner is attempting to classify the proffered position as a medical services administrator, the 2004-2005 edition of the *Handbook* states that nursing service administrators usually are chosen from among supervisory registered nurses with administrative abilities and a graduate degree in nursing or health services administration. The petitioner is not requiring any such graduate degree for the proffered position. Thus the *Handbook* does not establish that the proffered position is a specialty occupation. The petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to parallel positions in similar healthcare settings, the petitioner submitted 25 vacancy announcements. Although counsel asserts on appeal that these announcements provide sufficient documentation that parallel positions in similar firms require a baccalaureate degree in a specific specialty, the documentation is viewed as problematic. Some announcements require only a bachelor's degree with no specific specialty noted. Other positions are in health care institutions other than nursing homes. Other positions require a master's degree in a health care related field. One vacancy announcement is for a management operations position with Johnson and Johnson, a pharmaceutical company. With such a large number of vacancy announcements in such varying fields, the documentation is not persuasive in establishing that parallel positions in similar firms require a baccalaureate degree in nursing, occupational or physical therapy. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to 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. The petitioner provided no documentary evidence as to the academic credentials of any other persons holding a unit manager position within the petitioner's nursing center. Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. To the extent that they are depicted in the record, the duties of the position involve work in three distinct programs: management of subordinates, reporting of information, and the support of other staff members. The fact that the beneficiary would work in three distinct areas does not necessarily make the duties of any one area or the duties of all three areas combined so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. For example, the petitioner provided examples of duties in each of the three areas that included assigning the daily work of team members, communicating with family members about changes in patient's condition, and collaborating with the director of nursing to plan the continued implementation of policies and procedures, respectively. While any of these duties may be detail-oriented, none of them are duties that necessarily are so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate degree in a specific specialty. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.¹ 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 detail-oriented, rather than specialized or complex. 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.

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.

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).