U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

FILE: EAC 02 253 51580 Office: VERMONT SERVICE CENTER Date: JUN 22 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

for Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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. 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. On appeal, counsel submits a brief.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 registered nurse in the cardiac care/telemetry unit. Evidence of the beneficiary's duties includes: the Form I-129; the July 12, 2002 letter of support; 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: caring for patients recovering from complicated coronary surgery, or who have post-surgical complications; caring for patients who have serious heart problems; monitoring the condition of the patients; monitoring the newest equipment; and utilizing modern technology. 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 states that the director ignored evidence. According to counsel, 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. Counsel also asserts that CIS (formerly the Immigration and Naturalization Service) disregarded evidence from experts attesting that the position is a specialty occupation, and that CIS "regularly requires all four of the tests [rather than just one, as required by the regulations] . . . be fulfilled when adjudicating H-1B petitions from petitioners in the State of West Virginia."

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. As the director noted, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a registered nursing job.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry. The petitioner submitted letters from three physicians, stating that certain specialties within the hospital setting, including the telemetry unit, require nurses who possess a bachelor's degree, due to the increasing complexity

of medical care. The AAO notes the remarkable similarity of the letters submitted to show that a degree requirement is common to the industry. The letters are essentially identical. As the letters appear to have been drafted by the same individual, CIS must question whether they represent the true testimony of the avowed authors. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel also submitted evidence from the Veteran's Administration, which indicates that it will only hire nurses with bachelor's degrees for positions other than entry-level nurses, and information from the American Association of Colleges of Nursing (AACN) stating a bachelor's degree is the minimum preparation need to fill a professional position as a nurse (with professional being any position other than a ward nurse). Counsel asserts that the government is leading the way towards an industry standard of hiring only nurses with bachelor's degrees, and that the petitioner wishes to follow this lead. None of this evidence is probative. At this time, there is no industry standard that nurses as a whole, or nurses in particular specialties, must hold bachelor's degrees. It is understood that employers such as the petitioner may prefer to hire nurses with four-year degrees, but a preference does not either create a standard or establish a requirement.

In counsel's response to the director's request for evidence, counsel explicitly states, "The present industry standard, for medical facilities employing registered nurses in these units [including telemetry units], is [sic] **baccalaureate degree in nursing preferred. . . . Because of the great need, hospitals and other medical facilities cannot adopt a policy that requires a baccalaureate degree. However, they will take a baccalaureate nurse over an associate degree nurse for these positions.**" (Emphasis in the original). In this statement, counsel is clearly indicating that there is no industry standard that requires a degree, even in a specialized unit such as the one in which the beneficiary would be placed.

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 record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard.

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.

While a cardiac telemetry nurse may possess greater skills and experience than an entry-level nurse, it is not clear that those skills and experience could only be acquired by earning a bachelor's degree. Counsel asserts repeatedly that the duties of the proffered position are too complex to be performed by an entry-level nurse, but that does not establish that the duties could not be performed by an experienced nurse with less than a bachelor's degree. 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). To the extent that they are depicted in the record, the duties do not appear 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The AAO notes that while counsel states on appeal that the director raised issues about whether the beneficiary's degree is equivalent to a United States baccalaureate degree, this issue was not raised in the director's decision.

Counsel asserts that the fact that nurses arriving in the United States to work in North Dakota are regularly granted H-1B status due to a state law that requires all nurses to have a bachelor's degree, is somehow unfair to petitioners in West Virginia. Counsel states that the "North Dakota law fulfills only the first three requirements of the above cited regulation. . . . **The fourth requirement,** that the nature of the specific duties of a registered nurse is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, does not turn on North Dakota Sate law. It is a federal requirement." As counsel points out several times, and is made clear in the regulations, a petitioner need only establish one of the four criteria. The fact that one state passed a law ensuring that the first three criteria are met does not disadvantage petitioners in other states. Petitioners can meet any one criterion to establish a position as a specialty occupation. It should be noted that as of August 1, 2003, the State of North Dakota no longer requires that nurses hold a BSN for licensure in that state.

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.