



U.S. Citizenship
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Services

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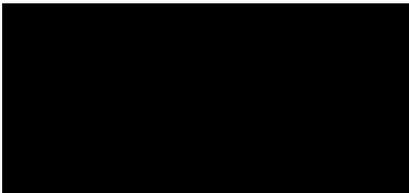
Date: JUN 30 2004

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

DISCUSSION: The director of the service center 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, 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 is not a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

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 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. Evidence of the beneficiary's duties includes: the Form I-129; the January 22, 2002 letter accompanying the Form I-129; 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 in the hospital's medical intensive care unit who have had serious operations or serious medical problems, and who have also had complications caused by these problems. The letter stated that, except for attending meetings, education classes, and performing preparatory work, the beneficiary would spend all of her time there. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in nursing.

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). In part, the director stated that it is well established that the duties and responsibilities of a registered nurse position are not so complex as to require a bachelor's degree in nursing, and the director further stated that the approved H-1B petitions were not persuasive in establishing that the proffered position qualified as a specialty occupation. The director noted that the number of registered nurses that would qualify in the H-1B classification is a very small percentage of the total registered nurse population, and furthermore noted that the certified labor condition application indicated 35 available registered nurse positions. The director found it unlikely that 35 registered nurses would work in positions considered far more advanced than the typical registered nurse. The director explained that an employer's degree requirement, in itself, is insufficient in establishing that a proffered position qualifies as a specialty occupation inasmuch as every job would then qualify for the H-1B classification. Furthermore, the director stated that the evidence from the Department of Veterans Affairs (VA) did not represent the entire industry. According to the director, over 50 percent of all registered nurses – including medical intensive care nurse - do not possess a four-year degree in nursing. The director further found that the proffered position's salary was low and did not reflect the level of complexity and responsibility as described by the petitioner.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and refers to the submitted evidence: (1) a memorandum from the Executive Associate Commissioner of the Office of Field Operations, dated November 27, 2002; (2) prior H-1B approved petitions; (3) three letters from alleged medical experts; (4) a study from the *Journal of the American Medical Association* (JAMA); (5) information about degree programs in nursing; and (6) and documentation from the VA.

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.

Counsel claims that CIS has already determined that the proffered position is a specialty occupation since it has approved other, similar petitions in the past. To support this statement, the record contains 34 approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior 34 cases. In the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to

determine whether the petitions were parallel to the offered position. Furthermore, 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 CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The AAO first turns 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 in a specific specialty 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 Department of Labor's (DOL) *Occupational Outlook Handbook* (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)).

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into a particular position. The beneficiary's duties resemble those described in the *Handbook* which portrays registered nurses as providing direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regimens. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

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. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

. . . .

. . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees.

A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

Thus, according to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation.

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 However, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.²

CIS looks beyond the title of the position and determines, from a review of the duties of the position 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). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

The evidence contained in the record fails to demonstrate that a baccalaureate degree in a specific specialty is the minimum for entry into the registered nurse position. The record shows that the petitioner had asserted that the proffered position is a specialty occupation given that the VA has concluded that only candidates holding bachelor's degrees can occupy a registered nurse positions. This assertion is weak. The VA document entitled "Nurse Qualification Standard," revises the policy on the qualification standard for all persons appointed as registered nurses, but it does not establish that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the offered position. Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which require either associate's or bachelor's degrees in nursing, are registered nurse positions assigned to a hospital's surgery, emergency care, maternity, or intensive care units. Thus, based on the evidence in the record, the petitioner fails to establish the first

¹ 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).

² It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the particular position.

The evidence contained in the record fails to demonstrate that there is a specific degree requirement in parallel positions among similar organizations. The AAO has already set forth the deficiencies in the VA document. The December 18, 1998 press release reveals that the VA and the American Association of Colleges of Nursing (AACN) merely seek to provide nurses with innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. The press release, on page 2, states that only 31 percent of registered nurses hold bachelor's degrees, and 32 percent hold associate's degrees. The JAMA article simply discusses the patient-to-nurse ratio in hospitals. Counsel's December 24, 2002 letter, on page 4, stated:

BA/BS degrees are preferred by the petitioner. Due to the shortage of registered nurses with baccalaureate degrees, the hospital is unable to switch to BA/BS required, which it would certainly due [sic] if the employees were available.

Furthermore, on page 5, counsel stated:

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.

Although counsel claims to submit evidence that would support the second statement set forth above, there is no evidence in the record to this effect. The two quoted statements from counsel seem to emphasize that a bachelor's degree is not an industry-wide requirement. The other evidence in the record – the VA document and the AACN and JAMA articles - fail to establish the second criterion: that the industry requires a bachelor's degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. Counsel claims that the petitioner normally requires a bachelor's degree for the proffered position. The record contains: (1) a list of the petitioner's employees who occupy registered nurse positions in the emergency department, recovery rooms, surgical, neurosurgical and medical intensive care units, and trauma center, and the B.S.N. degree held by the employee; (2) a list of the petitioner's registered nurses possessing a B.S.N. license; (3) the petitioner's job posting which indicates that a bachelor's degree in nursing is required for the proffered position; and (4) a job profile for a registered nurse in the petitioner's emergency medicine cost center.

The petitioner's evidence is not persuasive. The 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.³ 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 a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Notably, the petitioner's job profile for a registered nurse in the petitioner's Emergency Department indicates that it accepts a nursing school diploma for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel refers to the November 27, 2002 memorandum to state that critical care nurse positions – such as the proffered position – require a bachelor's degree. Counsel claims that the submitted opinion letters from independent medical experts evince that a bachelor's degree is required to perform the duties of the proffered position.

Counsel's statements and the submitted letters are not convincing. As already discussed, with respect to the November 27, 2002 memorandum, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation. Moreover, the three expert opinion letters state *verbatim* the following language:

Due to the increased complexity of medical care, caused in part by advances in medical technique, medicine and medical technology, registered nurses require far more education than previously in certain areas of the hospital. Registered nurses, in these areas of the hospital require qualified nurses who possess, at the very minimum, a Bachelor of Science in Nursing (BSN) degree, with transcript, or the equivalent.

Registered nurses filling postings in the following areas of the hospital are filling positions in specialty occupations. These positions require the registered nurse to use the theoretical and practical application of highly specialized knowledge attained in a baccalaureate nursing program, or the equivalent.

These areas include registered nurses for all critical care units BSN degrees, or the equivalent, are also required for registered nurses working in Emergency Room and Operating Rooms.

³ 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.

I believe that the knowledge and ability required for a registered nurse to competently and adequately fill a responsible position in any of the above-referenced areas in this facility is no less than the education received in a baccalaureate program in an American university. A registered nurse with less education would require many years of specialized training in order to have the equivalent of a BSN and be able to adequately fill these positions.

I have not received compensation for this letter. . . .

The three letters from “independent medical experts” seem fabricated given their identical language. The individuals have, supposedly independently, written letters containing substantially identical passages. While we acknowledge that these individuals have endorsed the petitioner’s position regarding the requirement for a bachelor’s degree, the passages thereof appear to have been written by an unidentified third party. The exact wording, therefore, carries diminished weight, as it may not necessarily reflect the exact views of the person who signed it.

The AAO finds that the petitioner’s financial documentation and the evidence about degreed nursing programs are irrelevant in establishing that the proffered position requires a bachelor’s degree in nursing. The petitioner’s financial status does not influence whether the proffered position requires a bachelor’s degree in a specific specialty. The IU Northwest School of Nursing Program’s philosophy statement seems nearly identical for the associate of science and a bachelor of science degrees. The associate of science program prepares its graduates “with the knowledge and skills to provide direct care to individuals within the family and community context.” Graduates are a “competent provider of nursing care, a conscientious practitioner who practices within the legal and ethical parameters of nursing, and an accountable/responsible manager of care.” Similarly, the bachelor of science graduate is “capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society.” The philosophy statement merely points out that the baccalaureate nursing education provides a “broad foundation in the sciences and liberal arts necessary for preparing professional nurses who are capable of practicing in a competent and responsible fashion as informed citizens in a dynamic and diverse society.”

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.