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U.S. Citizenship  
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FILE: EAC 01 038 50311 Office: VERMONT SERVICE CENTER

Date:

MAY 08 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*

*to*

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 medical facility that seeks to employ the beneficiary as a registered nurse (RN). In order to employ the beneficiary, the petitioner endeavors to classify her 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 additional evidence.

The AAO has determined that the director's decision to deny the petition was correct, as the evidence of record does not establish that the proffered position qualifies as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO reached this determination on the basis of 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 material submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary evidence that accompanies the brief.

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 Form I-129 states that the petitioner would employ the beneficiary as a “Registered Nurse (RN),” and described the proposed duties as “Professional Nursing Care of Ill and/or infirm Patients.” Submissions into the record specified that the beneficiary’s particular position would be emergency room nurse. Submissions also include documentation (1) indicating that the Department of Veterans Affairs (VA) is now requiring a Bachelor of Science in Nursing (BSN) for RNs to qualify above its Nurse I, Level 3 performance-level grade, and (2) reflecting that the American Association of Colleges of Nursing (AACN) “calls for the [BSN] as the minimum educational requirement for professional nursing practice.”

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which provides for specialty occupation qualification of those positions whose normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position’s duties. The VA and AACN documents that the petitioner submitted are themselves evidence that the healthcare industry has not yet established a BSN as a standard requirement for RN positions such as the one proffered here. Furthermore, the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, includes emergency room positions among those “hospital nurses” positions which are filled by RNs with associate degrees or hospital diplomas, as well as BSNs.

Next, the evidence of record has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The evidence does not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The AAO also found that 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), that is, as one that is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The record contains no persuasive evidence that the proffered position is unique from or substantially more complex than emergency room nurse positions at hospitals that do not require a BSN.

Next, the past-hiring-practice criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor. The petitioner presented no documentation to establish that it has an established history of hiring only persons with BSN degrees for emergency room nurse positions.

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 them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. No evidence in record invalidates the *Handbook’s* information to the effect that RN positions, including those in the operating room, are not normally associated with a BSN.

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 RN staff nurse position.<sup>1</sup> The evidence of record, however, does not establish that performance of the proffered position would require a level of skill and knowledge associated exclusively with a BSN. It appears that the proffered position is within the performance range of an RN with an associate degree or hospital diploma.

As the evidence of record does not satisfy any specialty occupation criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the director's decision, the AAO also notes that the record before it does not contain a certified labor condition application (LCA). If the director were to determine that the petitioner actually failed to file a certified LCA, that would be an additional basis for denying the petition, in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(B)(I) and (h)(4)(i)(B)(I).

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. Accordingly, the appeal will be dismissed.

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

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<sup>1</sup> 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).