



U.S. Citizenship
and Immigration
Services

52

[REDACTED]

FILE: EAC 01 260 53847 Office: VERMONT SERVICE CENTER Date: OCT 22 2004

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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

identifying data deleted to
prevent disclosure and warranted
invasion of personal privacy

PUBLIC COPY

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 rehabilitation center. It seeks to employ the beneficiary as a specialty registered nurse, and 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, and because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel states that the proffered position qualifies as a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 are 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 proceedings 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) the Form I-290B with attachments. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a specialty registered nurse. According to the evidence, the beneficiary would: administer appropriate medical treatment and therapies to specialty patients with concentration on subacute specialty patients; read and interpret medical charts; review patient progress with medical personnel; and implement physicians' instructions relating to various medical treatments. The duties of the proffered position were further detailed in response to the director's request for evidence. The petitioner requires a minimum of a Bachelor of Science Degree in Nursing (BSN) for entry into the proffered position.

The petitioner has not met any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook (Handbook)*, 2004-05 edition at 301-302, the Department of Labor describes, in part, the duties of a registered nurse:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions and progress in patients; assist physicians during surgeries, treatments, and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

....

Hospital nurses form the largest group of nurses. Most are staff nurses, who provide bedside nursing care and carry out medical regiments. They also may supervise licensed practical nurses and nursing aides. Hospital nurses usually are assigned to one area, such as surgery, maternity, pediatrics, emergency room, intensive care, or treatment of cancer patients.

Some may rotate among departments.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. . . . ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. . . . Diploma programs, administered in hospitals, last about 3 years. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses. *Id.* at 302.

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 As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position has a title such as "specialty registered nurse" does not necessarily mean that the position qualifies as a specialty occupation.

The AAO looks beyond the title of the position and determines, from a review of the position's duties 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 of 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). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. The duties ascribed to the offered position are routine to many registered nurse positions. CIS cannot find, based upon the current record, that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no

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).

requirement that a nurse have a baccalaureate or higher degree, or its equivalent, for entry into the position. Thus, the petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, or that the duties of the proffered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this assertion the petitioner submitted copies of eleven job advertisements and opinion letters from [REDACTED] Director of Regulatory Compliance with the Greater New York Health Care Facilities Association, and [REDACTED] Administrator, Island Medical Center. The job advertisements submitted do not establish a degree requirement for the industry. Of the eleven advertisements submitted, eight make no mention of a degree requirement at all. One requires a BSN degree for a nurse manager. Two others state that a BSN degree is preferred, but not required, for the advertised position. The advertisements do, in fact, indicate that a degree requirement is not common to the industry and confirm the educational requirements for nurses set forth in the *Handbook*. Likewise, the proffered opinions do not establish that a BSN degree is common to the industry in parallel positions among similar organizations. Mr. [REDACTED] states that it is standard in the industry for medical facilities to require a BSN degree for nurses who provide specialized care in such fields as HIV/AIDS, renal, gerontological and Alzheimer's disease. Mr. [REDACTED] did not, however, provide the basis of his opinion except to state that he was knowledgeable of the education requirements for registered nurses based upon his experience as a hospital administrator. He did not provide copies of, or reference to, any industry study or survey in support of his opinion. As such, the opinion is of little evidentiary value in this regard. This is especially true since the opinion is contrary to the educational findings noted in the *Handbook*. The opinion of [REDACTED] is also of little evidentiary value. Ms. [REDACTED] states that a BSN degree is generally necessary throughout the long term care industry for nurses working in the following areas: respiratory care; HIV/AIDS care; renal dialysis; Alzheimer's care; wound care; and in rehabilitation units. Again, Ms. [REDACTED] bases her opinion on her individual work experience as an RN. She does not offer evidence of any industry survey or study to back her opinion. She does make reference to the *Handbook* and opines that the aforementioned areas of care are included within the term "clinical specialization" as noted therein, and that a BSN degree is required for entry into those specializations. The areas of care mentioned by Ms. West are not areas of clinical specialization requiring a BSN degree, however. As noted in the *Handbook* nurses in the industry routinely work in the cited fields who do not have a BSN degree. The duties of the proffered position are not so complex or unique that they can only be performed by an individual with a degree in a specific specialty.

The petitioner also supplied a letter from its insurance carrier indicating that it requires nurses working in the aforementioned areas of patient care to hold a minimum of a BSN degree. This requirement is a contractual matter between the petitioner and its insurance carrier. The carrier's degree requirements for registered nurses as a prerequisite to providing coverage, however, do not establish an industry standard for the education required by registered nurses to work in the previously mentioned areas of care, as there is no showing that this insurance requirement is standard in the industry. Indeed, it would appear that the contrary is true.

Finally, the petitioner notes that 26 of its 27 registered nurses hold BSN degrees and that all specialty patients are cared for by these degreed nurses, indicating that the petitioner normally requires a degree or its

equivalent for the proffered position. It is further noted that a list (with a fax date of November 5, 1998) of presumably nurse employees of the petitioner contains 20 BSN degreed nurses, and a combined total of 22 RN and LPN non-degreed nurses. No further proof of the special services provided by the degreed nurses is of record beyond the petitioner's statement. Simply going on the record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Assuming arguendo that the petitioner's statements are true, the proffered position still does not qualify as a specialty occupation. The performance of the duties of the position must still involve the theoretical and practical application of a body of highly specialized knowledge. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5th Cir. 2000). This position does not. As noted above, the duties of the position are routinely performed in the industry by individuals with less than a baccalaureate level education.

The petitioner also asserts that previous agency decisions have classified the offered position as a specialty occupation. This reference will not sustain the petitioner's burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a specialty registered nurse. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error, gross error, and a violation of 8 C.F.R. § 214.2 paragraph (h).

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the director's denial of the I-129 petition shall not be disturbed.

The final issue to be considered is whether the beneficiary qualifies to perform the duties of the proffered position. The director found that the beneficiary was not qualified because he did not hold a license from the State of New York to work as a registered nurse. The record does indicate that the State of New York issues limited permits for nurses to work for a period of one year while they obtain their permanent nursing licenses. The record does not establish, however, that the beneficiary has completed all requirements for obtaining that limited permit. The petitioner has not supplied a letter from New York licensing authorities stating that the beneficiary meets all necessary requirements for obtaining the limited permit once he arrives in the United States. Nor does the record contain copies of applicable statutes and/or regulations setting forth the criteria

for obtaining a limited permit to work as a nurse. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the offered position.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

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