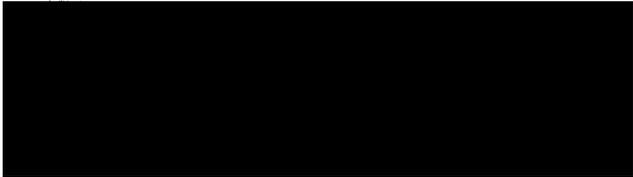


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

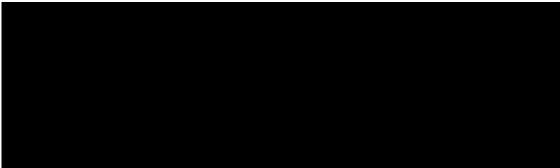


FILE: EAC 02 092 53724 Office: VERMONT SERVICE CENTER Date: **SEP 02 2004**

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

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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 and because the record did not establish that the beneficiary was licensed to practice nursing in the State of New York. On appeal, counsel submits a brief and other documentation.

The AAO will first analyze the evidence in order to determine whether the proffered position is 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.

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 intensive care unit. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's January 10, 2002 letter in support of the petition; 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: providing nursing care to patients who have undergone surgery and are in critical condition. 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 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 asserts that the proffered position is so complex that only a person with a BSN can perform the job duties, and that the position is more specialized and complex than other registered nursing jobs. Accordingly, the AAO will address the second and fourth regulatory criteria described above.

Counsel asserts that the petitioner meets the second part of the criterion described at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), in that the proposed duties are highly complex. Counsel maintains that the instant position is not an entry-level position, and that a BSN is a necessary entry requirement for nurses working in critical care areas such as the intensive care unit. Counsel asserts that the November 27, 2002, CIS policy memorandum on H-1B nurse petitions (nurse memo)¹ supports this contention, because the nurse memo acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse or staff nurse position. On page three, the nurse memo states that certification examinations are available to registered nurses who are not advanced practice nurses, but who may possess additional clinical experience. The memo mentions areas such as rehabilitation nursing and critical care. The record, however, contains no evidence that the proffered position requires a certification examination in a specific area, nor does it establish that the instant position would fall under the nurse memo's guidance on non-advanced practice registered nurses who may be H-1B eligible.

Counsel also provides, on appeal, eight letters from physicians who state that nursing positions such as the instant position require more education than other nursing jobs. These letter writers, three of whom are associated with the petitioner, fail to provide any specific information about the proffered position. In fact, all the letters contain the same generic language. As such, these letters are not viewed as establishing the uniqueness or complexity of the proffered position.

Counsel states that the job entails covering the mistakes of student doctors, who, although supervised by experienced doctors, are more likely to make critical mistakes. The petitioner has not submitted any

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).

documentary evidence to establish this claim, or how assisting student doctors under supervision brings a complexity or uniqueness to the position. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The job description on the record contains duties that are routine to any registered nursing position, such as caring for patients, monitoring equipment, and assisting physicians. Accordingly, the petitioner has not established that the position is a specialty occupation based upon the complexity or uniqueness of its duties.

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. 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.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The AAO will now address counsel's other contention on appeal, that 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, in accordance with the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The nurse memo, discussed above, refers to nursing positions beyond entry-level that may be H-1B eligible. The memo states that petitioners may demonstrate the specialization and complexity of these positions through affidavits from independent experts or other means. The evidence on the record, however, does not support further analysis of the instant position based on this CIS policy guidance. For example, none of the physician letters provided addresses the nature of the duties that the beneficiary would perform within the petitioner's intensive unit. The contents of all the letters are virtually identical, and they do not establish that the offered position is a specialty occupation, as discussed in the nurse memo. 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.

Regarding the beneficiary's qualifications to perform the duties of the proffered position, the director noted that the record does not include evidence that the beneficiary is licensed to practice or is otherwise immediately eligible to work as a registered nurse in New York. On appeal, counsel states that the beneficiary will obtain a limited permit to practice nursing in New York after she takes and passes the New York State Nurse Licensing Examination. The provided information from the New York State licensing body, however, indicates that the limited permit, which allows a nurse to work under the immediate and personal supervision of a licensed registered nurse prior to passing the state licensing examination, can be issued to foreign-educated nurses only after they have been certified by the Commission on Graduates of Foreign Nursing Schools (CGFNS). The petitioner stated in its January 10, 2002 letter that the beneficiary would be evaluated by the CGFNS prior to working in the United States. In other words, she did not yet possess CGFNS certification, and thus would not be eligible for the New York State limited permit to practice nursing. Therefore, the evidence does not establish that the beneficiary is qualified to perform the duties of a registered nurse in the state of New York, and for this additional reason, the petition will be denied.

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As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, or that the beneficiary is qualified to perform the duties of the proffered position. 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.

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