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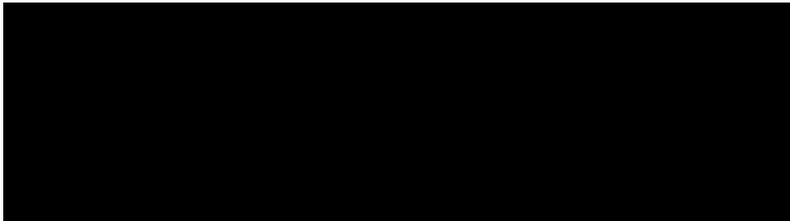
FILE: EAC 04 092 50443 Office: VERMONT SERVICE CENTER Date: DEC 02 2005

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a nursing and rehabilitative center. It seeks to employ the beneficiary as a nursing services supervisor and 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 on the grounds that the record failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision;

and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a 180-bed residential, nursing home and rehabilitative center that offers a full array of nursing care, personal care, physical rehabilitation, speech therapy, occupational therapy, dietary, social and recreational services. The petitioner states that it has over 160 staff members, including administrators, directors, therapists, nurses, and other ancillary employees. The petitioner proposes to hire the beneficiary as a nursing services supervisor to assist the director of nursing and the nursing home administrator in operating the facility, to train and supervise the staff, and to oversee the operation of all departments in absence of the department heads. The specific duties of the position are described as follows:

- Assist in recruitment, hiring, screening, orientation and training of the unit staff.
- Evaluate employee performance and provide guidance and feedback.
- Counsel and discipline supervised employees, as required.
- Recommend stronger disciplinary action or terminate employees, if required.
- Develop staffing patterns and schedules to ensure adequate nurse/resident ratio
- Review work in progress.
- Assign work of subordinate staff and adjust schedules to compensate for fluctuations in resident load, staff shortages, and other factors.
- Assist in developing, organizing and implementing quality assurance programs for resident care.
- Participate in reviewing nursing care programs for the residents to determine their effectiveness in meeting established goals for care, treatment, and/or procedures, adherence to departmental policies and procedures, and conformance with nursing standards.
- Initiate appropriate action to correct or enhance nursing care programs as assigned.
- Assist in determining and implementing changes of standards, participate in educational opportunities and activities.
- Implement adherence to nursing and departmental policies and procedures.
- Interpret policies and procedures for staff and residents/family/visitors.
- Investigate and resolve incidents and complaints or suggestions from physicians, residents, visitors and staff.
- Correct deficiencies, if any, and prepare documentation or explanation as needed.
- Refer issues to the director of nursing of the nursing home administrator, as necessary.
- Record and investigate all incidents/accidents that occur.
- Ensure staff competency and compliance with standards and guidelines promulgated by accrediting and regulatory agencies.
- Participate in preparation for inspections by such agencies.
- Maintain a safe environment in accordance with standards, policies and safety regulations.
- Ensure compliance with infection control policies.
- Regularly conduct staff meetings to disseminate information and monitor employee concerns, needs, and suggestions.
- Participate in committee meetings as assigned.
- Work in conjunction with the director of nursing to plan and maintain facility's budget.

The beneficiary is qualified for the position, the petitioner asserts, by virtue of her bachelor of science degree in nursing from the Indira Gandhi National Open University in New Delhi, India, awarded in April 2002, along with seven years of experience as a registered nurse. The petitioner cites two reports from an educational credentials evaluation service stating that the beneficiary's degree is equivalent to three years of undergraduate study in nursing at a U.S. college or university and that the degree combined with her work experience is equivalent to a bachelor's degree with a major in nursing from a U.S. college or university. The beneficiary is licensed to practice nursing in the State of New Jersey.

The service center director determined that the proffered position is not a specialty occupation. The director found that the duties of the proffered position are those of a registered nurse with supervisory responsibilities, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and noted the *Handbook's* information that most registered nursing positions do not require a baccalaureate or higher degree in nursing. In the director's view, the proffered position is not so specialized, complex, or unique that it could only be performed by an individual with a B.S.N. degree. The evidence of record did not show that a bachelor of science in nursing (BSN) is the industry standard for nursing supervisor positions, the director declared, or that the petitioner normally requires a BSN for the proffered position. The director also found that the record failed to establish that the beneficiary's education and nursing experience are equivalent to a bachelor's degree in nursing from a U.S. college or university. Accordingly, the director determined that the beneficiary is not qualified to perform services in a specialty occupation.

On appeal counsel asserts that the director erred in finding that the proffered position is not a specialty occupation and that the beneficiary is not qualified to perform the services of a specialty occupation. Counsel submits a brief that, for the most part, reiterates verbatim the claims made earlier in the response to the RFE, which were considered and thoroughly discussed in the director's decision. Counsel also resubmits some documentation that was already in the record.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the duties of the nursing services supervisor at issue in this petition accord with the *Handbook's* description of a head nurse or nurse supervisor, which is a sub-category within the broad occupation of registered nurses. As described in the *Handbook*, 2004-05 edition, at 301-02:

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

Head nurses or nurse supervisors direct nursing activities, primarily in hospitals. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure that the patients receive proper care. They also may ensure that records are maintained and equipment and supplies are ordered.

With respect to the educational requirements for nursing positions, the *Handbook* indicates that there are three alternative paths for registered nurses generally. They include a four-year B.S.N. degree from a college or university; a two- or three-year associate degree in nursing (A.D.N.) from a community or junior college; and a diploma program, usually three years, at a hospital. *See id.* at 302. Thus, the *Handbook* makes clear that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a registered nursing position. Less than baccalaureate level education may suffice for many positions. Certain advanced practice nurses, the *Handbook* notes, have educational and clinical requirements beyond those generally applicable to all RNs. However, there is no indication in the *Handbook* that head nurses or nurse supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. According to the *Handbook*, therefore, a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the minimum requirement for entry into the nursing position proffered by the petitioner, as required to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

A policy memorandum from the legacy Immigration and Naturalization Service in November 2002 (*H-1B Memorandum*) provides additional guidance for CIS on the adjudication of H-1B petitions for registered nurses.¹ In surveying the educational requirements for the nursing occupation, the *H-1B Memorandum* notes that the minimum requirement for entry into the field as a registered nurse is a two-year associate degree in nursing (A.D.N.). Though a four-year B.S.N. can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The *H-1B Memorandum* indicates that certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – require a B.S.N. or equivalent knowledge, making them specialty occupations as well. In addition, some nurses in high-level management positions – “such as an upper-level ‘nurse manager’ in a hospital administration,” according to the *H-1B Memorandum* – require a B.S.N. or higher degree, making them specialty occupations.

¹ Memorandum of [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).

The position at issue in this petition, however, is not an “upper-level nurse manager” within the contemplation of the *H-1B Memorandum*. The petitioner states that a director of nursing is in overall charge of nursing services, and that subordinate to her are three nursing services supervisors. One of those positions is slated for the beneficiary, whose H-1B classification was approved in an earlier petition by another employer. According to the petitioner, the employees supervised by the nursing services supervisor include 3-5 registered nurses, 1-3 licensed practical nurses, and 7-8 certified nursing assistants. The petitioner is unclear as to whether each nursing services supervisor, or the three of them combined, supervise that number of employees. In either case, the nursing services supervisor is a middle-management position. Although the proffered position involves first-line supervision of nurses and other healthcare aides, such duties do not enhance the position to that of an upper-level nurse manager.

There is no indication in the *Handbook* or in the *H-1B Memorandum* that nursing services supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. Accordingly, the AAO determines that a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the normal minimum requirement for entry into the nursing position proffered by the petitioner, as required to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Counsel suggests that the proffered position fits the *Handbook*'s description of a health services manager, a position that requires a baccalaureate or higher degree in a specific specialty and therefore qualifies as a specialty occupation. The *Handbook* describes the occupational category of medical and health services managers, in pertinent part, as follows:

The occupation, medical and health services manager, encompasses all individuals who plan, direct, coordinate, and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

. . . . Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring at work, and an increased focus on preventive care. They will be called upon to improve efficiency in healthcare facilities and the quality of the healthcare provided

Large facilities usually have several assistant administrators to aid the top administrator and to handle daily decisions

In smaller facilities, top administrators handle more of the details of daily operations

Handbook, 2004-05 edition, at 55-56. The foregoing duties exceed those of the nursing services supervisor at issue in this petition with respect to their scope of responsibility as well as the knowledge required to perform them. The duties of the proffered position, as described by the petitioner, are not at the level of a health services manager. The managerial responsibilities of the nursing services supervisor described in the petition are narrower than those of a health services manager.

Counsel refers to an AAO ruling in 1994 that a “team leader/nurse” position was similar to that of a health services manager and therefore a specialty occupation. The record includes a summary of that decision, which states that the subject position was responsible for the overall administration of the facility’s nursing unit. The position at issue in the instant petition, however, does not have broad administrative responsibility for any unit in the facility. Thus, the AAO decision in 1994 did not involve a similar position to the nursing services supervisor at issue here and provides no legal guidance for the adjudication of the instant petition. Each nonimmigrant worker 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 petitioner’s record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding in this petition does not support counsel’s assertion that the proffered position should be considered a health services manager.

With respect to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel refers on appeal to a letter from the Chief Operating Officer of Healthcare Recruitment Specialists, Inc., who states that the minimum educational requirement for “administrative and supervisory nursing positions” is a baccalaureate degree in nursing, health care administration, or a related field. The author does not discuss the duties of the proffered position or analyze why the position requires a baccalaureate level education in nursing or a related field. The author refers generally to “administrative and supervisory nursing positions” without describing what such positions entail. The author’s assessment that “these positions often require the knowledge and level of functionality that can only be achieved through a baccalaureate degree program” (emphasis added) indicates that such positions sometimes do not require baccalaureate level knowledge and functionality. Counsel resubmits on appeal a series of internet job postings for nurse manager or nurse supervisor positions, most of which specify that a B.S.N. is required. The job announcements do not provide enough information about the employers’ organizational structure and scale of operations to demonstrate that the advertised positions are parallel to the proffered position in this petition, or that the employers are similar organizations to the petitioner. The AAO concludes that the proffered position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) because the evidence of record does not establish that the requirement of a B.S.N. or related degree is common to the petitioner’s industry in parallel positions among similar organizations. Nor has the petitioner demonstrated that its nursing position is so complex or unique that it can only be performed by an individual with a B.S.N. degree, as required to qualify it as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), counsel asserts that the petitioner normally requires a B.S.N. degree for its nursing supervisor position because two previous employees in the position have such degrees, thereby qualifying the position as a specialty occupation. The record includes copies of the subject degrees, but no documentary evidence that the two individuals are actually employed by the petitioner and in what capacity. Simply going on record without supporting documentation does not satisfy the petitioner’s burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972). Moreover, the critical issue in determining whether the nursing services supervisor qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not the employer’s self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). For the reasons previously discussed in this decision, the AAO is not persuaded

that the performance demands of the nursing services supervisor at issue in this petition – which do not exceed the scope of a supervisory nurse as described in the *Handbook* – require a B.S.N. degree. The AAO concludes that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the record does not show that the duties of the proffered position are so specialized and complex that knowledge associated with a B.S.N. is required to perform them, as required for the position to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The duties of the position do not exceed those of a nurse supervisor, a position which does not generally require baccalaureate level knowledge in nursing or a related specialty. Based on the evidence of record, the AAO concludes that the duties of the position could be performed by an experienced individual without baccalaureate level knowledge in a specific specialty.

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

Since the record does not establish that the proffered position is a specialty occupation, the issue of the beneficiary's qualifications to perform the services of a specialty occupation is inconsequential to the disposition of this appeal.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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