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FILE: WAC 04 038 51687 Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2005

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:



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.

*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 provides healthcare and related services to homebound individuals. It seeks to employ the beneficiary as a health services analyst 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 (1) that the proffered position is a specialty occupation or (2) that the beneficiary qualifies to work 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 notice of decision; and (5) Form I-290B and counsel's appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, established in August 2002, provides multidisciplinary care to homebound individuals, including such services as nursing and home health aide; physical, occupational, and speech therapies; social services; nutritional assistance; as well as the use of medical equipment and facilities. The petitioner had 16 employees at the time the instant petition was filed in November 2003, seeking H-1B classification for the beneficiary to work as a health services analyst. The duties of the proffered position, and the percentage of time required for each, are described by the petitioner – in a letter accompanying the petition, in the response to the RFE, and in the appeal – as follows:

1. Monitor the health environment of the patient and assess the services provided by our healthcare professionals, assistants and aides conforming to patients' standards and requirements – 30%.

The beneficiary would analyze and study the current lineup of our activities and programs geared towards a sustained health and well-being of our residents/clients by constantly reviewing quality assurance standards, scrutinizing existing policies and procedures and interviewing personnel and residents to evaluate the effectiveness of the rehabilitation programs in effect in order to identify problem areas or aspects and to convey to our management the need for remedial actions or to introduce appropriate reforms, that may include: tuition-oriented classes, social activities, counseling sessions, self-help orientation, community-oriented seminars, and vocational trainings to instill into our patients' minds and hearts wholesome social values and self-worth despite their transient failings.

2. Conduct research studies on current innovations and breakthroughs in the field of healthcare, attend conferences and seminars regarding residential care, assisted living, rehabilitative and wellness health services to further improve the overall efficiency and quality of benefits that we offer to our consumers – 20%.

To represent our Facility in conferences, trainings, and seminars, or any outside commitments pertaining to rehabilitative services coordination, health management, quality assurance, healthcare activity formulation, and financial issues. Keep track of and monitor the changes in federal, state and county laws, rules and regulations pertaining to healthcare and other statutes relevant to our business.

3. Regularly examine and evaluate the views and responses of patients as well as their families to ensure that they are provided with quality service that they need and want and to ensure that we meet their expectations – 20%.

To lead in the development, implementation, and expansion of rehabilitative programs emphasizing our patients' cognitive, physical, and emotional upkeep to enable them to feel and act as important members of their families and society. Exercise supervisory control over the rest of our healthcare staff in evaluating our existing programs and medical services for research, rehabilitation, and overall healthcare promotion. Review or periodically inspect our facilities for emergency readiness and compliance of access, safety, and sanitation regulations and to recommend structure or equipment modification.

4. Submit a three-part weekly status report on the data gathered that week from basic studies or seminars, patients' evaluations, and the performance and services of our healthcare workers – 15%.

Monitor and appraise the performance of our healthcare staff and personnel. Develop organizational policies and procedures and establish evaluative or operational criteria. Prepare reports and recommend procedures to reduce absenteeism and turnover. Plan, coordinate, and conduct training/seminars to employees to keep them abreast of our facility's rules and regulations, and to keep them updated with new industry trends and methods with emphasis on the fast-changing information technology and related machinations. Participate in the recruitment, hiring, and the performance appraisals of the rest of our healthcare personnel and allied staff members and may also be required to participate actively in on-the-job and practical training of our professional healthcare providers.

5. Conduct monthly meetings with the entire staff to provide an overview and summary of what's happening, propose solutions to problems that arise, and plan for the future – 15%.

Coordinate and liaise with our Facility Administrators, Health Services Managers, and Physicians, and nursing staff members on a weekly, bi-monthly and monthly basis; monitor and consolidate the monthly job inputs of our healthcare personnel for purposes of addressing problems or solving internal manpower difficulties, as well as for budget allocation, capital outlays proposals, and credit and loan applications.

The record includes the petitioner's job announcement for the proffered position stating that the applicant was required to have at least a bachelor of science degree in nursing or a related medical field. The beneficiary earned a bachelor of science degree in nursing from Far Eastern University in the Philippines on April 4, 1998. In a credentials evaluation report dated September 8, 2003, World Educations Services, Inc., located in New York City, rated the beneficiary's degree in the Philippines as equivalent to a bachelor's degree in nursing from a regionally accredited institution in the United States.

The service center determined that the proffered position was not a specialty occupation. In the director's judgement, the duties of the proffered position reflected a combination of the duties of a registered nurse and a health services manager, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The director concluded, however, among other reasons because the proffered position was described as subordinate to a health services manager, that the majority of the duties were those of a registered nurse. California requires registered nurses to have a nursing degree, the director noted, which is less than a baccalaureate level degree as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The director also determined that the proposed duties and level of responsibility did not indicate a complexity or authority beyond that normally encountered in the field for individuals holding sub-baccalaureate degrees in nursing, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

As for the beneficiary's qualifications to perform the services of a specialty occupation, the director noted that the duties of a registered nurse are not at the level of a specialty occupation. The director also quoted an excerpt from the *Handbook* stating that medical and health services managers must be familiar with management principles and practices. Therefore, even if the proffered position were deemed to be that of

a health services manager, in the director's judgement the beneficiary's nursing degree and five years of experience in nursing prior to the filing of this petition did not qualify her to perform the functions of a health services manager.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook* 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, id.*, at 1165-66.

On appeal counsel argues that the proffered position requires the services of an individual with a baccalaureate degree in nursing or a related medical field, which would qualify it as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The AAO is not persuaded by counsel's argument. The AAO agrees with the director that the duties of the proffered position are primarily those of a registered nurse. In fact, two sub-categories of registered nurses in the *Handbook* – home health nurses and head nurses or nurse supervisors – come closest to describing the proffered position in the full scope of its direct patient care, supervisory responsibilities, and administrative functions. The respective sub-categories read as follows:

*Home health nurses* provide nursing services to patients at home. Registered nurses assess patients' home environments and instruct patients and their families. Home health nurses care for a broad range of patients, such as those recovering from illnesses and accidents, cancer, and childbirth. They must be able to work independently and may supervise home health aides.

*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.

The AAO concludes that the proffered position, based on the duties described by the petitioner, is akin to that of a head nurse or nurse supervisor for a home healthcare service provider.

A recent policy memorandum providing guidance for CIS on the adjudication of H-1B petitions for nurses (*H-1B Memorandum*) confirms that the minimum requirement for entry into the field of nursing as a registered nurse is a two-year associate degree in nursing (A.D.N.). Though a four-year bachelor of science in nursing (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. As indicated in the *H-1B Memorandum*, 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 nurses in high-level management positions require a B.S.N. or higher degree, making them specialty occupations. In addition, 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. The position at issue in this case, however, which the petitioner terms a health services analyst, does not fit any of the examples of an advanced practice nurse or any of the nursing specialties discussed in the *H-1B Memorandum*. Even if the proffered position entails some first-line supervision of nurses and other healthcare aides (which is not reflected in the petitioner's organizational chart showing a clinical supervisor in that role), such supervisory responsibility would not enhance the position to that of an H-1B level nurse administrator. As described in the *H-1B Memorandum*, nurses in administrative positions who may be H-1B equivalent would be those occupying positions "such as an upper-level 'nurse manager' in a hospital administration." The position at issue in this case is well below that level.

There is no indication in the *Handbook* or in the *H-1B Memorandum* 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. Rather, it would appear that a two-year associate degree in nursing is often sufficient educational background. 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 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)(1).

With respect to the second alternative criterion of a specialty occupation, the record does not establish that a B.S.N. degree is common to the industry in parallel positions among similar organizations, as required for the subject nursing position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Though counsel alleges that the Texas and California Service Centers have previously approved H-1B petitions for health services analysts or related positions, counsel has provided no analysis of those decisions, nor shown that the positions in those cases parallel the proffered position in this case, nor shown that the petitioners in those cases were similar to the petitioner in this case. If the referenced petitions were approved based on evidence substantially similar to the evidence submitted in this proceeding, in the AAO's judgement the approvals would have been erroneous. CIS is not required to approve petitions when 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). 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 petitioner's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Only published precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Unpublished decisions are not binding. Thus, the cases cited by counsel have no legal bearing on the AAO's determination of the instant case. Nor has the petitioner shown that its nursing position is so complex or unique that it can be performed only 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).

The record indicates that the proffered position is newly created. Because there is no hiring history for the position, the petitioner cannot show that it normally requires a B.S.N. degree, as required for the

position to meet the third alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the record does not establish that the duties of the subject position are so specialized and complex that knowledge associated with a B.S.N. is required for an individual to perform the services of the job, as required for the position to meet the fourth alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Though counsel argues in the appeal that duties such as reviewing and analyzing facility standards for quality and conducting training and orientation for healthcare personnel cannot be performed by an individual with less than a B.S.N. degree, the petitioner has not demonstrated that those duties could not be performed by a registered nurse with a two-year A.D.N. degree and some experience.

Thus, the petitioner has failed to establish that the proffered position meets any of the regulatory criteria to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The record does not establish that the beneficiary will be performing services in a specialty occupation.

As previously discussed, the director also determined that the beneficiary was not qualified to perform the services of a specialty occupation. Since the beneficiary's credentials are relevant only if the proffered position is found to be a specialty occupation, which is not the case here, the AAO need not further address counsel's arguments with respect to the beneficiary's qualifications.

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.