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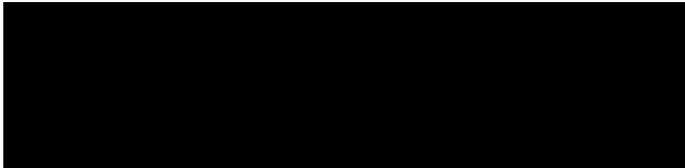


FILE: EAC 02 175 51135 Office: VERMONT SERVICE CENTER Date: NOV 17 2005

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 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

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 an assisted living facility 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. On appeal, counsel submits a brief and additional documentation.

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 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. Evidence of the beneficiary's duties includes: the Form I-129; the March 13, 2002 letter of support; 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: managing nursing care for patients with conditions ranging from a fracture, Parkinson's disease, Alzheimer's disease, and other diseases associated with old age; assessing residents' health conditions and performing preventative health measures; developing treatment plans; supervising licensed practical nurses and nursing aids; performing difficult procedures; starting intravenous fluids; ordering, interpreting, and evaluating diagnostic tests to identify and assess patients' clinical problems and health care needs; recording physical findings; formulating physical findings; formulating plans and prognosis based on patients' conditions in conjunction with medical doctors; discussing cases with physicians and other health professionals to prepare a comprehensive patient care plan; submitting health care plans and goals of individual patients for periodic review and evaluation by physicians; prescribing or recommending drugs or other forms of treatment such as physical therapy, inhalation therapy, or other therapeutic procedures; referring patients to physicians for consultations or to specialized health resources for treatment; and working with specialty care departments such as long-term rehabilitation unit. The petitioner indicated that an individual holding only a two-year nursing degree would not be equipped to satisfactorily perform the duties.

The director requested additional evidence that the registered nursing position qualifies as a specialty occupation. The director requested an explanation of why a registered nurse without a bachelor's degree could not perform these duties. The director requested a detailed statement of the proposed duties signifying which tasks require the expertise of someone holding a baccalaureate degree. The director requested an original letter from the appropriate New York licensing authority stating that a baccalaureate degree is the minimum requirement to obtain a registered nurse license. Additionally, the director requested evidence that the beneficiary is licensed to practice nursing.

In response, counsel for the petitioner asserted that a registered nurse without a bachelor's degree could not perform similar proposed duties and responsibilities. The petitioner referred to an opinion letter that was submitted with the initial petition as noting that because the petitioner's facility does not have doctors around the clock, a four-year degree in nursing prepares a nurse optimally for the responsibilities. Counsel asserted that the duties of the proffered position are so specialized and complex that it requires the knowledge of a four-year degree nurse. Counsel explained that the petitioner does not have registered nurses on staff who do not possess a bachelor's degree and who can be selected for the proffered position. The petitioner provided a list of employees and an organizational chart. The petitioner submitted information from the New York agency that issues licenses for nurses which indicated that in order to become a registered professional nurse the applicant for licensure must hold at least a two-year degree from a program in general professional nursing.

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 the duties of the position were routine to any nursing position and, 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. The director found that the petitioner did not provide evidence that a fully licensed nurse who graduated from an associate or diploma program could not perform the duties of a registered nurse working as a nurse supervisor. The director stated he gives little weight to the job announcement submitted by the petitioner and found that the opinion letter's argument were unsupported. The director referred to the *Handbook* which indicates the following about the training and education of registered nurses:

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. In 2002, 678 nursing programs offered degrees at the bachelor's level. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. About 700 RN programs in 2002 were at the ADN level. Diploma programs, administered in hospitals, last about 3 years. Only a small and declining number of programs offer diplomas. Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

Many ADN- and diploma-educated nurses later enter bachelor's programs to prepare for a broader scope of nursing practice. Often, they can find a staff nurse position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing one of many RN-to-BSN programs.

The director noted that the record does not include evidence that the proffered position is a nurse administrator or an advanced practice nurse. The director noted that the petitioner does not normally require a bachelor's degree in a specific specialty for the position. Additionally, the director found that the record does not include evidence that the beneficiary is a licensed registered nurse in New York or other evidence that shows the beneficiary is immediately eligible to practice registered nursing in the state of New York.

On appeal, counsel states that the director ignored evidence. Counsel asserts that the nature of the job duties at the petitioner's facility is so specialized and complex that it normally requires a bachelor's degree or the equivalent in employment experience. Counsel asserts that the scope of responsibilities of a nurse at an assisted living facility is broader than of a nurse at a hospital setting. Counsel refers to the previously submitted evaluation of the position by a professor of nursing.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the director noted, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a registered nursing job.

The *Handbook* describes the position of a registered nurse as follows:

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.

Additionally, the *Handbook* specifically states the following about nurses in facilities such as assisted living:

Nursing care facility nurses manage care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform invasive procedures, such as starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head injuries.

This is similar to the proffered position in that "managing nursing care for patients with conditions ranging from a fracture, Parkinson's disease, Alzheimer's disease, and other diseases associated with old age; assessing residents' health conditions and performing preventative health measures; developing treatment plans; supervising licensed practical nurses and nursing aids; performing difficult procedures, starting intravenous fluids. . ." These duties are performed by nursing care facility nurses, as indicated above. The petitioner fails to establish the first criterion because the *Handbook* explains that a bachelor's degree is not required for a registered nursing position. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

The petitioner fails to establish that the petitioner's requirement of a bachelor's degree is common to the industry in parallel positions among similar organizations, which is the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the duties of the proffered position are performed by a registered nurse, a position that does not require a bachelor's degree in a specific specialty.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner submitted a list of 40 registered nurses and indicated that they were employees of the petitioner. Additionally, the petitioner indicated that copies of their bachelor's diplomas were attached. Upon a review of the diplomas, the AAO notes that there were approximately four bachelor's degrees in nursing, one bachelor of art's degree that did not indicate the area of study, one master's in

public administration and several registered nursing licenses. This evidence is insufficient to establish the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard.

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 the duties is usually associated with the attainment of a baccalaureate or higher degree. Counsel refers to the opinion letter in support of his assertions that the duties of the proffered position are complex because doctors are not present at the facility around the clock like they are in hospitals. However, as the *Handbook* specifically notes that nurses at assisted living facilities do not require a four-year degree, as discussed above, this opinion letter is not sufficient evidence. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel contends that only registered nurses can intelligently discuss issues like medical insurance, treatments, prognosis, and end-of-life care. Counsel asserts that diploma and associate degreed nurses are provided with only basic clinical skills and are not equipped to carry on sensitive discussions. Counsel further contends that the petitioner is concerned that letting diploma and associated degreed nurses outline choices for patients and family members would “run afoul of informed consent laws because diploma and associate degreed nurses are not aware of all the information they should disclose to patients and family members.” Counsel refers to curricula of several colleges. Counsel concludes that the additional courses in the area of humanities is typical of the in-depth education that is available in a baccalaureate program and allows a nurse to make a better informed decision. Counsel contends that the submitted associate's degree program requires only one humanities course. While a registered nurse at a skilled nursing facility may possess greater skills and experience than an entry-level nurse, the petitioner has not proved that those skills and experience are only acquired by earning a bachelor's degree. Counsel asserts repeatedly that the duties of the proffered position are too complex to be performed by an entry-level nurse, but that does not establish that the duties could not be performed by an experienced nurse with less than a bachelor's degree. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.