

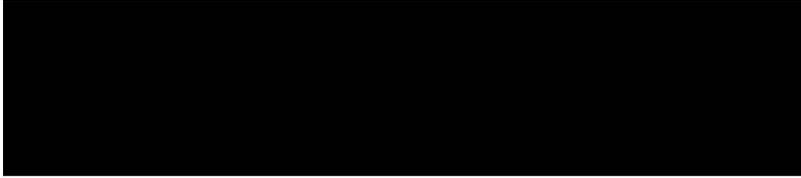


U.S. Citizenship
and Immigration
Services

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FILE: EAC 02 232 53128 Office: VERMONT SERVICE CENTER Date: APR 05 2006

IN RE: Petitioner:
Beneficiary:



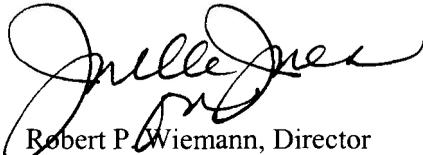
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, 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 a nursing placement agency 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 the beneficiary is not qualified to perform the services of 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.

In the initial petition, the petitioner stated that it was seeking the beneficiary's services as a licensed practical nurse. In response to the director's first request for evidence, the petitioner requested to change the beneficiary and to change the proffered position to that of a registered nurse. The petitioner submitted educational documents for the second beneficiary. The petitioner stated that the beneficiary will be qualified to function in a variety of departments, providing nursing care to patients, administering prescribed medications, formulation of plans of nursing care, patient assessments; working in specialized areas such as geriatric, psychiatric, pediatric, cardiac care; and supervising other nurses or even supervising an entire unit. The petitioner stated that the position requires a bachelor's degree in nursing.

The director issued a second request for evidence that the proffered position was a specialty occupation. The director noted that the petitioner is an employment agency and thereby would not be the beneficiary's actual employer. The director requested evidence that the entity ultimately employing the beneficiary requires a bachelor's degree for all employees in that position. The director requested a written agreement between the petitioner and contracting facility where the beneficiary would be working. The director requested a detailed job description that is on file with the contracting organizations' human resources or personnel office. The director requested a weekly breakdown of the number of hours devoted to each of the beneficiary's proposed duties. The director requested an organizational chart for the contracting facility and the department where the beneficiary will be assigned. The director requested evidence confirming that the beneficiary holds a registered nursing license in the state of intended employment.

In response, the petitioner submitted a second labor condition application for the position of registered nurse. The petitioner submitted the second beneficiary's CGFNS examination result, which the petitioner stated confirms that the beneficiary is eligible to take the Board of Nursing NCLEX-RN Examination. The petitioner stated that it is unable to provide a weekly breakdown of the number of hours devoted to each duty or explain how many employees may be supervised. The petitioner stated that such details will vary with his assignments.

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 the proffered position difficult to assess when the record contained limited information on the actual business where the beneficiary will be working. The director noted that there was little documentation about the actual place where the beneficiary will be working, its requirements for the position, and what the beneficiary will be doing in this position. The director found that the duties of the proffered position paralleled those carried out by registered nurses, as described in the *Handbook*. The director found that the petitioner did not establish that the proffered position satisfies one of the above listed criteria.

On appeal, counsel asserts that the proffered position is a specialty occupation. Counsel asserts that the position as described involved supervisory duties and placements in a variety of specialized hospital or nursing home environments. Counsel asserts that the position involves nursing supervisory duties and working in specialized care departments and is therefore not an entry-level position. Counsel asserts that the petitioner's requirement for a bachelor's degree is not self-imposed. Counsel asserts that the petitioner submitted letters from three facilities that may require the beneficiary's services as an R.N. possessing a bachelor's degree. Counsel contends that it is unfair and impractical to require from the petitioner more

details about the beneficiary's professional commitments until the beneficiary is in the United States. Counsel contends that the petitioner described the second beneficiary's duties in detail as much as possible. Additionally, counsel contends that the second beneficiary may be granted one initial year in H-1B status, in which to obtain the CGFNS Certificate based upon a Memorandum for Service Center Directors dated September 22, 2003 from William R. Yates, Associate Director for Operations, CIS, DHS.

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.

In the *Handbook*, 2006-2007 edition, the DOL states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (A.D.N.), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

[S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

According to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation. Thus, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

There is insufficient evidence in the record to establish the first alternative prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner submitted several advertisements for nurse positions from hospital and medical facilities located in Massachusetts. Many of the advertisements state that a bachelor's degree is preferred but do not

indicate that a degree is required. There is no evidence in the record to establish that the advertising organizations are similar to the petitioner or to the organizations where the petitioner would place the beneficiary. Counsel asserts that the petitioner provided ample evidence that many employers in Massachusetts do require a bachelor's degree in nursing for a registered nursing position. The evidence in the record does not support counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not established that the particular position is so complex or unique that it can be performed only by an individual with a degree, as required to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 states that it had several U.S. employees who are employed in professional nursing positions. The petitioner submits two diplomas. The petitioner did not submit any evidence to establish that the petitioner had employed these individuals such as payroll records or other employment documentation. The record does not contain any evidence of 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 asserts repeatedly that the proffered position is not that of an entry-level nurse. The duties described by the petitioner are those of a registered nurse as described in the *Handbook*. The petitioner submitted letters from three businesses that may be interested in the services of the beneficiary. These letters did not contain a specific job description or confirm that they would hire the beneficiary. Neither counsel nor the petitioner has described the duties of the position in sufficient detail to demonstrate that this position requires a baccalaureate degree. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. The record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the client site will qualify as a specialty occupation. The petitioner has not demonstrated how an experienced, licensed nurse without a degree would be unable to perform the duties of the proffered position. The petitioner has not sufficiently distinguished the duties of a registered nurse in the proffered position from those of an associate degreed nurse. 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).

The second issue in this case is whether the second beneficiary is qualified to perform the duties of a specialty occupation. The director found that the record does not include evidence that the beneficiary is a licensed

registered nurse in Massachusetts or other evidence that the beneficiary is immediately eligible to practice registered nursing in Massachusetts.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Pursuant to 8 C.F.R. § 214.2(h)(v)(B), if a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

On appeal, counsel contends that the second beneficiary may be granted one initial year in H-1B status, in which to obtain the CGFNS Certificate based upon a Memorandum for Service Center Directors dated September 22, 2003 from William R. Yates, Associate Director for Operations, CIS, DHS. The memorandum referred to by counsel concerns the certification of foreign health care workers. The memorandum does not discuss individual states' licensing requirements for health care workers. To practice nursing in Massachusetts one must hold a valid, current license issued by the Massachusetts Board of Registration in Nursing.¹ The petitioner has not established that the second beneficiary is a licensed registered nurse or provided any other evidence that he is immediately eligible to practice registered nursing in Massachusetts.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the second beneficiary is qualified to perform services of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the petitioner substituted beneficiaries and changed the proffered position in response to the director's initial request for evidence. The petitioner stated, "it is our understanding the LPNs do not usually qualify as professionals. For this reason, because we intend to sponsor a professional nurse, and since [the initial beneficiary] is no longer interested in the position, we would respectfully request that we be allowed to substitute [Mr. ██████████] as the beneficiary of our [p]etition." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Substitution of beneficiaries is not allowed on an H-1B petition. The petition was for a position that required less than a baccalaureate level training in nursing, a licensed practical nurse. The petition was on behalf of an individual with less than a baccalaureate level of education. Neither the position nor the beneficiary qualified for benefits as H-1B. For this additional reason, the petition must be denied.

¹ www.nursema.org

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.