



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

D2



FILE: LIN 04 800 41250 Office: NEBRASKA SERVICE CENTER Date: JUN 16 2006

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:

SELF-REPRESENTED

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 registry that seeks to extend the employment of the beneficiary as a registered nurse. The petitioner, therefore, 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 evidence.

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 denial letter; and (3) 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; and the job definition accompanying the Form I-129. According to this evidence, the beneficiary would perform duties that entail, in part, performing as a primary care giver, diagnosing and

treating common diseases attributed to the aging process; planning and conducting work requiring judgment, independent evaluation, selection, modification and application of procedures and techniques; developing and/or modifying nursing care standards and policies; using advanced skills and diversified knowledge to solve complex problems; writing reports to comply with governmental health regulations and for management feedback; performing assessment of vital conditions during admission process and identifying health and mental problems; diagnosis of ulcers due to any cause through body examination; performing evaluation and checking of medication transcriptions prescribed by monitoring dosages; maintaining documentation of patient/resident prognosis; performing detection and recognition of indications of depression; reviewing and signing patient/resident medical records as they are updated for use by nursing home management and/or required government inspection; reviewing and signing nursing care plans submitted by subordinate nursing staff; serving as a resources person; ensuring compliance with cost containment measures; assuming responsibility to staff the shift; conducting staff meetings; and assuming direct patient care responsibilities on occasion or when necessity dictates. The petitioner stated that the position requires a baccalaureate or equivalent degree in 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 petitioner entered into the record a memorandum issued on November 27, 2002, by Executive Associate Commissioner, Johnny Williams, of the legacy INS (Nursing Memo.)<sup>1</sup> The director noted that when the petitioner submitted its first petition for the beneficiary seeking classification as a specialty occupation in June 2003, the state of North Dakota required a individual to have a bachelor's degree in nursing to be licensed as a registered nurse (RN) in that state. The director noted that in August 2003, North Dakota amended its Nursing Practice Act to change the standards for obtaining a license as an RN to less than four years of academic study. Therefore, the director found that in accordance with the statute and regulations previously cited, the occupation of staff nurse (with no evidence of responsibility for advanced practice beyond the duties normally performed by an RN) does not qualify as a specialty occupation. Furthermore, the director noted that there is no regulatory provision for extending the nonimmigrant classification of an alien worker who is no longer entitled to such classification. As such, the director determined that the proffered position was not a specialty occupation.

On appeal, the petitioner explains that it was not "aware that such drastic changes took place involving the practice of RN [sic] in North Dakota." The petitioner asserts that the proffered position is a specialty occupation and submits additional information on appeal. The petitioner submits a job description for the position of Nurse Supervisor/Nephrologist. Additionally, the petitioner submits several job advertisements for positions in the field of nursing.

The AAO notes that on appeal the petitioner has changed the proffered position title from registered nurse to nurse supervisor/nephrologist, and has also changed the job description and duties. On appeal, 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 the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See*

---

<sup>1</sup> 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).

*Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the AAO will review the description of the proffered position that was submitted in its initial petition.

The AAO notes that this petition is an extension of a previously approved position. 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 record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

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 first considers 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. After a careful review of the *Handbook*, the AAO finds that the beneficiary's proposed duties, such as performing assessment of vital conditions during admission process and identifying health and mental problems; performing diagnosis of ulcers due to any cause through body examination; performing evaluation and checking of medication transcriptions prescribed by monitoring dosages; maintaining documentation of patient/resident prognosis closely resemble those performed by registered nurses who perform basic duties that include treating patients, educating patients and the public about various medical conditions, and providing advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help to perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation performed by a registered nurse as illustrated in the *Handbook*. The supervisory duties of the proffered position such as reviewing and signing nursing plans or staffing the designated shift do not elevate the position to that of a fully administrative position.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

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

The *Handbook* continues:

[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.

Thus, according to the *Handbook*, requirements for the offered position would not include a bachelor's degree for entry into the occupation. The *Handbook* reveals that employers accept candidates with associate degrees in nursing. Thus, based on the evidence in the record, the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence in the record fails to satisfy the first alternative prong of the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner submits several classified job advertisements from the Nursing Spectrum for a variety of positions in the nursing field. The majority of the advertisements are for positions that appear to have duties that are different from the proffered position. Some of the advertised positions are entitled: (1) advanced practice nurse: adult psychiatry, enterostomal therapy, neurosurgery; (2) nurse practitioner/cardiology; (3) clinical specialist, critical care and cardiac services; (4) clinical nurse specialist: ambulatory care (chemotherapy), post anesthesia care unit (PACU); and (5) utilization review/discharge planner. The petitioner has not established that the positions advertised are parallel to the proffered position or that the organizations are similar to the petitioner. Furthermore, it appears that the petitioner selected certain advertisements and did not submit the entire classified page of the publication. Thus, the job postings do not establish that a bachelor's degree is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong of the second criterion. 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 third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner did not submit evidence to satisfy this criterion or address it in its initial petition or on appeal.

The evidence in the record is inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The petitioner has not provided evidence to distinguish the duties of the proffered position from those duties typically performed by a registered nurse as described in the *Handbook*. Accordingly, the petitioner has failed to establish that the proffered position is a specialty occupation.

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

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.