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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 038 50264 Office: VERMONT SERVICE CENTER Date: JUL 07 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

Mari Johnson

for 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 medical facility that seeks to employ the beneficiary as a registered nurse (RN).[1] In order to employ the beneficiary, the petitioner endeavors 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 because the proffered position is not a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

The AAO has determined that the director's decision to deny the petition was correct, as the evidence of record does not establish that the proffered position qualifies as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO reached this determination on the basis of the entire record of proceeding before it, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the material submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, the petitioner's brief, and the documentary evidence that accompanies the brief.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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

[1] It is noted that an attorney who is currently on the list of suspended and expelled practitioners represents the petitioner. Therefore, the AAO may not recognize counsel in this proceeding.

(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 Form I-129 states that the petitioner would employ the beneficiary as a "Registered Nurse (RN)," and described the proposed duties as "Professional Nursing Care of Ill and/or infirm Patients." Submissions into the record specified that the beneficiary's particular position would be intensive care unit nurse. Submissions also include documentation (1) indicating that the Department of Veterans Affairs (VA) is now requiring a Bachelor of Science in Nursing (BSN) for RNs to qualify above its Nurse I, Level 3 performance-level grade, and (2) reflecting that the American Association of Colleges of Nursing (AACN) "calls for the [BSN] as the minimum educational requirement for professional nursing practice."

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which provides for specialty occupation qualification of those positions whose normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties. The VA and AACN documents that the petitioner submitted are themselves evidence that the healthcare industry has not yet established a BSN as a standard requirement for RN positions such as the one proffered here. Furthermore, the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, includes ICU positions among those "hospital nurses" positions which are filled by RNs with associate degrees or hospital diplomas, as well as BSNs.

Next, the evidence of record has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). The evidence does not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The AAO also found that the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), that is, as one that is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The record contains no persuasive evidence that the proffered position is unique from or substantially more complex than ICU nurse positions at hospitals that do not require a BSN.

Next, the past-hiring-practice criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) is not a factor. The petitioner presented no documentation to establish that it has an established history of hiring only persons with BSN degrees for ICU nurse positions.

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 them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. No evidence in record invalidates the *Handbook's*

information to the effect that RN positions, including those in the operating room, are not normally associated with a BSN.

The AAO notes that on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical RN staff nurse position.[2] The evidence of record, however, does not establish that performance of the proffered position would require a level of skill and knowledge associated exclusively with a BSN. It appears that the proffered position is within the performance range of an RN with an associate degree or hospital diploma.

The petitioner provides a list of 31 receipt numbers that he claims are for approved H-1B petitions for non-supervisory nurse positions. The petitioner contends that these approvals demonstrate that CIS "has apparently come to accept that there are other specialty positions in the registered nurse hierarchy." The approved petitions cited in the record do not have precedential weight. 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 before it. *See* 8 C.F.R. § 103.2(b)(16)(ii). It is beyond the scope of this proceeding for the AAO to speculate about the evidence that was submitted into the individual records of the approved petitions' proceedings, about the specific grounds upon which CIS approved those petitions, or about the correctness of the approvals. Accordingly, the submissions about prior petition approvals have no impact on this proceeding.

It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a registered nurse. For the reasons discussed above, the proffered position does not require attainment of a BSN or higher degree as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error, gross error, and a violation of paragraph (h) of 8 C.F.R. § 214.2.

As the evidence of record does not satisfy any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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[2] Memorandum from [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).

Beyond the director's decision, the AAO also notes that the record before it does not contain a certified labor condition application (LCA). If the director were to determine that the petitioner actually failed to file a certified LCA, that would be an additional basis for denying the petition, in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(B)(*1*) and (h)(4)(i)(B)(*1*).

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. Accordingly, the appeal will be dismissed.

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