U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, MF
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: SRC 02 254 53063 Office: TEXAS SERVICE CENTER Date: JAN 29 2004

IN RE: Petitioner: [redacted]
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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 hospital that seeks to employ 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.

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 in a medical/surgical/telemetry unit. Evidence of the beneficiary's duties includes: the Form I-129; an offer of employment letter to the beneficiary; 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: providing general nursing care, administering medications; preparing equipment; and assisting physicians. Duties more specific to a medical/surgical unit included using preventive measures to prevent infection, protect patients' skin, use of positioning and exercises to prevent injury or further complications for patients, and working to ensure that the required protective apparel was used by all health practitioners in the unit. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

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.

On appeal, counsel states that the director ignored evidence. According to counsel, the petitioner has satisfied two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that the proffered position is so complex that only a person with a BSN can perform the job duties, and that the petitioner normally requires a degree. Accordingly, the AAO will address these two criteria only.

The AAO turns first to the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*) - 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. Counsel asserts that the proffered position meets this criterion because the duties are complex; however, the AAO disagrees. The offer of

employment that the petitioner sent to the beneficiary contains duties that are routine to any registered nurse position, such as making beds, administering medications and assisting physicians. The offer of employment also outlined additional required competencies in areas such as infection prevention, the proper care of patients' skins and mucous membranes, and the avoidance of potentially injurious techniques in administering patient care, among others. The petitioner has not submitted any documentary evidence to establish that these additional duties bring a complexity or uniqueness to the position. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the petitioner has not established that the position is a specialty occupation based upon the complexity or uniqueness of its duties.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the employer normally requires a degree or its equivalent for the position. Counsel asserts that the individual who held this position prior to the beneficiary possessed a BSN. As evidence, the petitioner submitted copies of the individual's employment records and resume.

The AAO is not persuaded that the position is a specialty occupation simply because the individual who held the same position previously possessed a BSN. The term "normally" in this criterion refers to the petitioner's hiring practices of registered nurses in the medical/surgical/telemetry department over an extended period of time. According to the I-129 petition, the petitioner employs 115 registered nurses, of which 75 hold bachelor of science degrees in nursing. The petitioner provided no breakdown as to how many registered nurses working in medical/surgical/telemetry units possess bachelor of science in nursing degrees. To demonstrate that it normally requires a BSN for employment in the proffered position, the petitioner would need to document the credentials of all of its registered nurses working in medical/surgical/telemetry units, not just the one person whose departure from the petitioner has given rise to the vacancy that the petitioner now seeks to fill. Again, without documentary evidence, the petitioner will not meet its burden or proof in these proceedings. *See Matter of Treasure Craft of California, id.*

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the

minimum for entry into the occupation as required by the Act.[1] In this regard, the petitioner fails to establish that the registered nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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 registered nurse staff nurse position.[2] In this matter, however, nothing in the proffered position's job description indicates that the beneficiary would be working in any of the skilled nursing specialties outlined in the nurse memo that requires a higher degree of knowledge or skill. As stated previously, the duties of the position are not viewed as complex or unique. An individual who does not possess a BSN or its equivalent would be able to successfully execute the duties that the petitioner describes.

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.

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

[2] 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).