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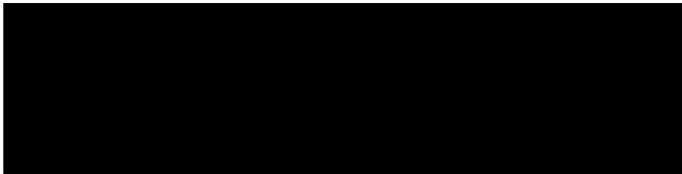


FILE: SRC 04 156 50326 Office: TEXAS SERVICE CENTER Date: NOV 17 2005

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. The petitioner filed a Form I-290B on January 21, 2005. Since the appeal was not received within 33 days, it was treated as a motion to reconsider by the service center director. The director determined that the petitioner had not submitted sufficient evidence in order to overturn the original decision. The matter is now before the AAO on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates as a consultant and employment agency and seeks to employ the beneficiary as an assistant instructional coordinator. 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 on the basis that the proffered position did not meet the definition of a specialty occupation.

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 request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the petitioner's motion to reconsider filed with the director; (6) the director's

decision; and (7) Form EOIR-29 submitted in error and accepted in place of 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 an assistant instructional coordinator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail being responsible for planning, organizing, directing and evaluating academic and related activities of nursing courses/seminars; instructing students and participants in patient care, nursing report techniques, creation and maintenance of dietary records, blood sampling techniques, patient evaluations, supply and appropriate inventory control, SOS emergency techniques, intravenous practices, emergency practices, nursing supervision and patient/doctor techniques and approaches; documenting results of nursing assessments, intervention and evaluations and comparing against foreign policies in order to present differences and corresponding interpretation and required assessment; assisting with testing, curriculum implementation and evaluation of potential candidates/participants; serving as instructional or program leader giving demonstrations, lessons, organizing workshops, writing supplementary material; prescribing instructions on an individual basis and receiving work direction from the petitioner's Head of Nursing Department.

The director requested additional information about the proffered position. The director requested evidence that the petitioner has the requisite license or certification to provide educational services. The director requested a list of instructors, their subject matter and educational credentials as well as the name of the courses, duration of courses and fees charged for services. The director inquired as to number of students that are enrolled in a class and asked for evidence of enrollment in each class. Additionally, the director requested a copy of the corporate federal income tax return for the year 2003 and evidence of wages paid to the 32 employees indicated on the Form I-129. The director requested an explanation of how a degree in nursing from a foreign country qualifies a person to teach or coordinate activities in the United States and prepare a person for licensing.

The petitioner responded and indicated that N.A.F.A. Consultants & Employment Agency, Corp. is a subdivision of N.A.F.A. (National Association for Foreign Attorneys) and submitted a copy of the license granted by the State Board of Non-Public Career Education certifying that "NAFA is licensed to offer the following programs of instruction: degree validation, training and to train individuals who are bona fide members: attorney's assistant, paralegal, and legal assistant for foreign attorneys, medical assistant, phlebotomy for a [sic] people with experience in the medical field." The petitioner submitted information about the services it offers. The petitioner submitted copies of Form 1099 and Form W-2's for various employees and contractors. Additionally, the petitioner submitted a copy of Form 1096 for tax year 2003 indicating that the total amount reported is \$117,714.75. The record contains tax returns for 2002, indicating net income of \$315,281, and 2001, indicating net income of \$87,980.

The director denied the petition and found that the petitioner had not submitted sufficient evidence to establish that the beneficiary has the requisite knowledge or credentials to teach or to prepare professionals for licensing or certification in the United States. The director noted that the petitioner did not submit the requested evidence such as a list of instructors, their subject matter and educational credentials. The director found that based on the information in the record it was not reasonable to conclude that the company has such a large employment base or that the company is capable of creating sufficient employment for its personnel to

be employed on a routine basis. Although the director requested evidence of enrollment, the petitioner failed to provide evidence of enrollment. The director noted that the incumbent in the proffered position would receive direction from the petitioner's head of nursing. The director also found that there was an indication that the beneficiary would be involved in patient care and that patient care would be a greater part of her duties. The director referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) which revealed the following about training and education of 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.

The director refers to the petitioner's requirements of a bachelor's degree in nursing for the proffered position and notes that the attainment of a bachelor's degree is not required for entry into a nursing career. The director noted that the instructional part of the proffered position relies heavily on the beneficiary's nursing experience and notes that the petitioner did not clearly establish that all persons instructing in its organization hold the equivalent of a bachelor's degree. Therefore, the director determined that the petitioner failed to establish that the proffered position was a specialty occupation and denied the petition on December 15, 2004.

Counsel for the petitioner filed a Form I-290B and it was received by the director on January 21, 2005. Since the appeal was not received within 33 days, the director treated it as a motion to reconsider. On motion, counsel asserts that the "beneficiary's degree of bachelor in nursing and education is relevant to the proffered position as teacher in nurse and medical assistant [sic]. Both are in the field of health, which is recognized as a specialty occupation under title 8 of the federal regulations." Counsel refers to the *Handbook* in support of his contentions. Counsel asserts that the degree requirement is higher in the field of education and the beneficiary is qualified to meet the requirements of the proffered job. Counsel contends that the instant decision was a departure from previous decisions without a rational explanation and constitutes an abuse of discretion.

The director concluded that the petitioner did not submit evidence to overturn the original decision. The director noted that the record indicated that the petitioner had 32 employees and that its gross annual income was estimated at \$93,617. The director found that the petitioner failed to establish that the proffered position met any of the four enumerated criteria. The director found that the petitioner had not shown that it has required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position. The director found that the petitioner has not shown that a bachelor's degree is common to other nursing teaching facilities and that a requirement of a baccalaureate degree is common to the industry in parallel positions in similar organizations. Again, the director notes that the *Handbook* reveals that a baccalaureate degree is not required for an entry-level position as a nurse or nurse instructor, and disagreed with counsel's contention made on motion that all health field occupations are specialty occupations.

On appeal, counsel submits the same brief and asserts the same points presented on motion.

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

In determining whether a position qualifies as a specialty occupation, 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.

A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by a nursing instructor. The *Handbook* notes that nurses may move into other areas of employment and some nurses move into the business side of health care. Other nurses work as college and university faculty or conduct research.

The *Handbook* discusses postsecondary teachers that instruct students in a wide variety of academic and vocational subjects beyond the high school level that may lead to a degree or simply to improvement in one's knowledge or skills. These teachers include college and university faculty, postsecondary career and technical education teachers, and graduate teaching assistants. The *Handbook* reveals that the education and training required of postsecondary teachers varies widely, depending on the subject taught and the educational institution employing them. The *Handbook* notes that educational requirements for these teachers are generally the highest at 4-year research universities but, at career and technical institutes, experience and expertise in a related occupation is the most valuable qualification. The AAO notes that the petitioner is a consulting and employment agency and not a university.

The *Handbook* states the following about the education and training for technical education teachers:

Training requirements for postsecondary career and technical education teachers vary by State and by subject. In general, teachers need a bachelor's or higher degree, plus work or other experience in their field. In some fields, a license or certificate that demonstrates one's qualifications may be all that is required. Teachers update their skills through continuing education, in order to maintain certification. They must also maintain ongoing dialogue with businesses to determine the most current skills needed in the workplace.

Accordingly, the petitioner has not established 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 has not submitted sufficient evidence to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - or, in the alternative, an employer may show that this particular position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Although the director requested evidence to establish this criterion, the petitioner did not answer the director's request or provide any evidence on motion or on appeal.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner 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. On appeal, counsel contends that the "beneficiary's degree of bachelor in nursing and education is relevant to the proffered position as a teacher in nurse and medical assistant [sic]. Both are in the field of health, which is recognized as a specialty occupation under title 8 of the federal regulations." As noted by the director, the *Handbook* does not support counsel's assertions. To the extent they are described in the record, the duties are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate degree in a specific specialty. The *Handbook* reveals that the proffered position is performed by nursing instructors or postsecondary career educational teachers, occupations not requiring a bachelor's degree in a specific specialty.

As related in the discussion above, and by the statement from the *Handbook*, 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.