



U.S. Citizenship
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Services

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FILE: EAC 03 023 50544 Office: VERMONT SERVICE CENTER

Date: MAY 09 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:

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 and rehabilitation center that seeks to employ the beneficiary as a charge 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 on the ground that the proffered position is not a specialty occupation. On appeal, the petitioner submits 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) the 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) the 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 charge nurse. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to the petitioner's October 15, 2002 letter, the beneficiary would supervise and coordinate the nursing personnel; serve as liaison between nursing staff and administrative personnel; provide orientation, teaching, and guidance to nursing staff to improve the quality and quantity of service; evaluate the performance of nursing personnel and interpret nursing standards to staff, advisory boards, nursing committees, and community groups; report to the director of nurses and consult with the director of nurses on nursing problems and the interpretation of policies to ensure that patients' needs are met. For the proposed position the petitioner asserts that it requires a baccalaureate degree in nursing and several years of experience. In the March 21, 2003 letter the petitioner states that since the offered position is purely administrative it does not require licensure.

The director found that the proposed position parallels that of a registered nurse (RN) as that occupation is depicted in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). The director found unpersuasive the assertion that the nursing industry distinguishes "non-specialized" RNs from "specialized" RNs, and that the proposed position is specialized, complex, or unique within the nursing industry. The *Handbook* reveals, the director stated, that the nursing industry distinguishes an RN from an advanced practice nurse, and she conveyed that the *Handbook* indicates that a baccalaureate degree is not required for an RN. According to the director, the petitioner failed to explain and document the qualitative difference between a baccalaureate degree and an associate degree curriculum. The director stated that the petitioner did not provide evidence showing how a fully licensed nurse with an associate or diploma is incapable of performing the duties of a charge nurse. According to the director, the nature and scope of the offered position are fundamentally altered because the petitioner authorizes a limited permit or unlicensed RN to carry out the proposed duties and manage licensed RNs. The director stated that the offered position parallels that of a RN and nurse supervisor as those occupations are described in the *Handbook*, and that such occupations do not require a baccalaureate degree in a specific specialty. The director stated that the record contains no evidence that the licensing authority in the state of intended employment requires a bachelor's degree in nursing for an RN license. The director discussed research conducted by the U.S. Department of Health and Human Services, Bureau of Health Professions, and observed that the New York State Education Department, Office of Professions, states that an RN must hold at least a two-year degree or diploma from an acceptable program in general professional nursing. The director concluded that the petitioner does not normally require a bachelor's degree in a specific specialty for the proposed position, and discussed *Defensor v. Meissner*, 201 F.3d. 384 (5th Cir. 2000). According to the director, no evidence shows that the beneficiary is a licensed RN in New York or is immediately eligible to practice as an RN there.

On appeal, the petitioner states that its facility is located in Maryland, not New York, and that the petition was denied in error as the petition related to an alien other than the beneficiary.

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 will first turn to the petitioner's assertion that the director erred in denying the petition because the petition related to an alien other than the beneficiary. Although the director's denial letter mistakenly stated that the beneficiary did not possess RN licensure for New York, the AAO finds that the petition was properly denied by the director on the basis that the offered position does not qualify as a specialty occupation. The AAO will set forth in this decision the bases of its finding the offered position is not a specialty occupation.

To establish that a position qualifies as a specialty occupation at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2), the petitioner must prove that 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 petitioner asserts that the position offered here corresponds to an administrative nursing position. The AAO disagrees. In the November 27, 2002 memorandum¹ CIS discusses nursing services administrators. The nurse memo indicates that nursing services administrators hold an RN and a graduate degree in nursing or health administration. The nurse memo states:

Nursing [s]ervices [a]dministrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.)

With the position offered here, the petitioner requires a B.S.N. (not a graduate degree in nursing or health administration) and a limited permit (not a license) for the proposed position. The AAO finds that given the difference in the petitioner's qualifications requirements from those described in the nurse memo, the beneficiary's position is neither an upper-level nurse manager nor an upper-level supervisory position.

The *Handbook*, a resource that CIS often looks to when determining the qualifications for particular occupations, supports the nurse memo's information. The *Handbook* describes the training and educational requirements for RN positions as follows:

¹ 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).

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. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

Many RNs with an ADN or diploma later enter bachelor's programs to prepare for a broader scope of nursing practice. . . .

Individuals considering nursing should carefully weigh the advantages and disadvantages of enrolling in a BSN program, because, if they do, their advancement opportunities usually are broader. In fact, some career paths are open only to nurses with a bachelor's or master's degree. A bachelor's degree often is necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, and teaching, and all four advanced practice nursing specialties—clinical nurse specialists, nurse anesthetists, nurse midwives, and nurse practitioners. Individuals who complete a bachelor's receive more training in areas such as communication, leadership, and critical thinking, all of which are becoming more important as nursing care becomes more complex. Additionally, bachelor's degree programs offer more clinical experience in nonhospital settings. . . .

All four advanced practice nursing specialties require at least a master's degree. Most programs last about 2 years and require a BSN degree and some programs require at least 1 to 2 years of clinical experience as an RN for admission. In 2004, there were 329 master's and post-master's programs offered for nurse practitioners, 218 master's and post-master's programs for clinical nurse specialists, 92 programs for nurse anesthetists, and 45 programs for nurse midwives. Upon completion of a program, most advanced practice nurses become nationally certified in their area of specialty. In some States, certification in a specialty is required in order to practice that specialty.

In management, nurses can advance to assistant head nurse or head nurse and, from there, to assistant director, director, and vice president. Increasingly, management-level nursing positions require a graduate or an advanced degree in nursing or health services administration.

The 2006-2007 edition of the *Handbook* reveals that the proposed duties are not those of a nurse administrator as managerial nursing positions require an RN and increasingly, a graduate or an advanced degree in nursing or health services administration.

Furthermore, although the *Handbook* reports that a baccalaureate degree often is necessary for administrative positions, because the offered position requires a limited permit and not RN licensure, which is what the *Handbook* reports is a requirement for an administrative position, it does not correspond to an administrative RN position.

Based on the *Handbook's* information and the evidence in the record, the AAO finds the position presented here does not parallel a management-level or supervisory-level nursing position, which are positions that may require a B.S.N. The offered position, therefore, would not require a baccalaureate or higher degree or its equivalent in a specific specialty as the normal minimum requirement for entry into the particular position, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must show that a degree requirement is common to the industry in parallel positions among similar organizations. The AAO finds that no evidence in the record supports the petitioner's contention that the industry requires a B.S.N. for the offered position of charge nurse. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

To establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must establish that the particular position is so complex or unique that it can be performed only by a person with a degree. For the reasons discussed at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The 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 asserts that it requires a B.S.N. or its equivalent for charge nurse positions. However, no evidence in the record reflects that the petitioner has a past practice of normally requiring a B.S.N. for the proposed position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* Consequently, the petitioner fails to establish this criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

To establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) the petitioner must show that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. For the reasons discussed in this decision at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

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