

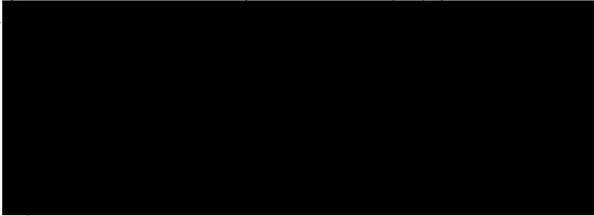
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U.S. Citizenship
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Services

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FILE: EAC 04 261 50054 Office: VERMONT SERVICE CENTER Date: **JUL 18 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.

for Michael T. Kelly
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 an adult day care provider that seeks to employ the beneficiary as a nurses' aide day care provider. 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, 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 denial letter; and (3) the Form I-290B and additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a nurses' aide day care provider. According to the Form I-129 petition, the beneficiary will care for and provide activities of daily living to the elderly and the handicapped.

In denying the petition, the director stated that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reveals that the proposed duties are those of a nursing aide, and that the *Handbook* indicates that such an occupation does not require a baccalaureate degree in a specific specialty.

On appeal, the petitioner states that there is a shortage of nursing aides in the labor market and that the petitioner has demonstrated this to the Department of Labor (DOL).

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.

To establish the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2), the petitioner must show 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 2006-2007 edition of the *Handbook*, a resource that the AAO routinely consults, 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.

The director correctly found that the proposed duties reflect those of a nursing aide as that occupation is described in the *Handbook*, and that the *Handbook* conveys that a nursing aide does not require a baccalaureate degree in a specific academic discipline. A nursing aide is described as follows in the *Handbook*:

Nursing aides—also known as nursing assistants, certified nursing assistants, geriatric aides, unlicensed assistive personnel, orderlies, or hospital attendants—perform routine tasks under

the supervision of nursing and medical staff. They answer patients' call lights; deliver messages; serve meals; make beds; and help patients to eat, dress, and bathe. Aides also may provide skin care to patients; take their temperature, pulse rate, respiration rate, and blood pressure; and help them to get into and out of bed and walk. They also may escort patients to operating and examining rooms, keep patients' rooms neat, set up equipment, store and move supplies, and assist with some procedures. Aides observe patients' physical, mental, and emotional conditions and report any change to the nursing or medical staff.

The *Handbook* states, with regard to the educational requirements of a nursing aide that "[i]n many cases, a high school diploma or equivalent is necessary for a job as a nursing or psychiatric aide." Thus, the AAO finds that 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 particular position. Consequently, the petitioner fails to establish the offered position as a specialty occupation 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 specific degree requirement is common to the industry in parallel positions among organizations that are similar to the petitioner. The submitted evidence fails to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to show that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The proposed duties correspond to those of a nursing aide, which, as established by the *Handbook*, is an occupation that does not require a bachelor's degree in a specific specialty. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence establishes the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is that the petitioner normally requires a degree or its equivalent for the position.

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 such duties is usually associated with the attainment of a baccalaureate or higher degree. The proposed duties mirror those of a nursing aide, which the *Handbook* establishes is an occupation that neither requires nor is usually associated with a bachelor's degree in a specific specialty. Consequently, the evidence of record fails to establish the 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. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the record of proceeding does not contain a certified Labor Condition Application (LCA), Form ETA 9035, which the regulations require that the petitioner submit with the H-1B petition. See 8 C.F.R. §§ 214(h)(4)(i)(B) and (iii)(B). The record of proceeding does contain a certified Application for Alien Employment Certification, Form ETA 750A, for the occupation of nurse

assistant. However, this form does not pertain to a petition for H-1B classification, which is the type that the petitioner has filed. For this reason also, the petition must be denied.

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.