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U.S. Citizenship
and Immigration
Services



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FILE: EAC 03 019 54686 Office: VERMONT SERVICE CENTER Date: **JAN 05 2005**

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner, a nursing and rehabilitation center, seeks to employ the beneficiary as an advanced practice nurse and 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 on the grounds that the record failed to establish (1) that the proffered position is a specialty occupation or (2) that the beneficiary qualifies to work in a specialty occupation. On appeal counsel argues that the Vermont Service Center violated the petitioner's due process rights by denying the petition on certain grounds that had not been identified by the director in his request for evidence as areas in which additional information was needed. Counsel also argues that the job description provided by the petitioner demonstrates that the beneficiary will be performing the functions of a nurse administrator, which qualifies as a specialty occupation.

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.

As provided in 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the petitioner's response to the service center's request for additional evidence (RFE); (3) the service center decision denying the petition; and (4) the petitioner's notice of appeal (Form I-290B), appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its H-1B petition (Form I-129) the petitioner stated that it wished to hire the beneficiary as an advanced practice nurse to "assist[] the doctor in making patient treatment plans, plan[], make[] and contribute to nursing home policy and procedure, operate[] and delegate[] the operation of equipment for resident life support and other medical therapies, [and to] implement[] teaching protocols." In response to the director's RFE and follow-up note to the beneficiary the petitioner responded with a letter stating that the advanced practice nurse would supervise its licensed practical nurses (LPNs) and certified nursing assistants (CNAs). The specific daily duties of the advanced practice nurse were listed as follows:

- Receive report from the previous shift, determine priorities, resident issues and problems to be addressed.
- Develop educational programs for LPNs and CNAs in assessing wounds and determining treatment effectiveness.
- Inspect physical environment and report problems to housekeeping or maintenance.
- Assure that LPN medication pass is done appropriately and timely. Assure that treatments are done correctly.

- Monitor care given by CNAs and develop policies when indicated.
- Review arrangements for resident appointments outside the facility.
- Document as needed in the medical record and review record for completeness.
- Collaborate with physicians, hospice nurses, dietician, and therapists, communicating resident issues and developing solutions and policies.
- Observe resident meals for proper feeding, supervising employees and monitoring resident food consumption.

In apportioning the percentage of the beneficiary's time to be spent on these duties, the petitioner indicated that 60% of her time would be spent assessing residents, collaborating, planning and evaluating care, developing education programs and policies and communicating with residents and families, 25% of her time would be spent supervising a staff of 19 nurses (three LPNs and sixteen CNAs), and 15% of her time would be spent on documentation. The beneficiary earned a bachelor of science degree in nursing from ██████████ City Medical Center and Colleges in the Philippines on April 8, 1991. According to Morningside Evaluations and Consulting in New York City, in a letter dated September 18, 2002, the beneficiary's degree and course content in the Philippines is "the equivalent to a Bachelor of Science Degree in Nursing [B.S.N.] from an accredited institution of higher education in the United States."

The service center determined that the proffered position was not a specialty occupation. In the director's judgment, the nature of the position is not so specialized, complex, or unique that only an individual with a degree can perform the job, that a baccalaureate or higher degree is usually associated with the duties of the position, or that the proffered position is particularly specialized, complex, or unique within the nursing industry. No evidence was submitted that the nursing industry distinguishes "non-specialized" from "specialized" registered nurses, the director indicated, and the Department of Labor's *Occupational Outlook Handbook (Handbook)* makes no such distinction. Rather, the *Handbook* distinguishes more broadly between "registered nurses" and "advanced practice nurses," indicating that the latter must meet educational and clinical practice requirements beyond those of registered nurses. In the director's view, the petitioner failed to show how the B.S.N. curriculum completed by the beneficiary differed qualitatively from an associate degree in nursing curriculum, or why a licensed nurse who graduated from an associate or diploma program would be incapable of performing the duties of the "advanced practice nurse" the petitioner is seeking. The director found that the record failed to show a B.S.N. degree is common to the nursing industry in parallel positions among similar organizations. Indeed, the duties of the proffered position, in the director's judgment, parallel those carried out by registered nurses and nurse supervisors, as described in the *Handbook*, for which a B.S.N. is often not required. The *Handbook* does recognize that a B.S.N. is often necessary for administrative positions, the director pointed out, but the record in this case did not demonstrate that the proffered position fit the *Handbook's* description of a nurse administrator or advanced practice nurse, which would require a bachelor's degree. The director also found that the petitioner does not have an established policy of hiring only individuals with B.S.N. degrees for the proffered position. Finally, the director noted the lack of evidence that the beneficiary was a licensed registered nurse in Pennsylvania and immediately eligible to practice nursing in the state. Accordingly, the record failed to establish that the beneficiary was qualified to perform the services of a registered nurse.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered by CIS are whether the

Handbook indicates a degree is required by the industry; 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. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel asserts that the service center made certain findings in its decision without having requested information on those points in the RFE, and thereby violated the petitioner's due process rights. For example, counsel cites the director's finding that "there is no evidence in the record demonstrating that the licensing authority in the state of employment requires a bachelor's degree in nursing for a registered nursing license," without having asked the petitioner to furnish this information. Counsel cites the director's finding that "the petitioner fails to explain and document the qualitative differences between a B.S.N. curriculum and associate's degree in nursing curriculum," and argues that this issue was not raised in the RFE, which requested instead that the petitioner "submit an explanation why a licensed registered nurse, without a bachelor's degree, could not perform these duties [of the proffered position]." Counsel also cites the director's finding that "the record lacks supporting documentation establishing a bachelor's degree is common to the industry in parallel positions among similar organizations," and complains that the director failed to raise this concern in the RFE. Lastly, counsel cites the director's finding that "the petitioner fails to cite or produce sufficient primary documentation to support that the nursing industry distinguishes 'non-specialized' registered nurses from 'specialized' registered nurses," and asserts that this concern likewise was not raised in the RFE.

Requests for evidence in regard to petitions and applications are governed by the regulation at 8 C.F.R. § 103.2(b)(8), which provides that:

[w]here there is no evidence of ineligibility [in the record], and initial evidence or eligibility information is missing or the Service [CIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [CIS] shall request the missing initial evidence, and may request additional evidence

(Emphases added.) Initial evidence, as explained in 8 C.F.R. § 103.2(b)(1), is information requested in the petition or application form as well as evidence required by the accompanying instructions or by regulation. Thus, 8 C.F.R. § 103.2(b)(8) requires the director to request evidence from the petitioner only when initial evidence is missing from the record. If the record is complete with respect to the initial evidence the director is not required to request any additional evidence from the petitioner before issuing a decision, but may do so in his or her discretion. See Memorandum from ██████████ Associate Director, Operations, U.S. Citizenship and Immigration Services, Requests for Evidence (May 4, 2004). By extension, even if the director exercises the discretion of issuing an RFE, he or she is not required in that RFE to request every conceivable piece of evidence or information that may help the petitioner establish eligibility for an immigration benefit. The items of evidence counsel claims should have been addressed in the RFE prior to the director's decision are not required initial evidence. Therefore, the director did not err in exercising his discretion not to request that additional evidence. Furthermore, the

petitioner had the right on appeal to submit additional evidence to rebut the director's findings, in accordance with 8 C.F.R. § 103.3(a)(2).

Accordingly, the Vermont Service Center did not violate the petitioner's due process rights in its adjudication of the instant petition.

In determining whether the proffered position meets any of the criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation, the nature of the position must first be examined. As previously mentioned, the petitioner states that the beneficiary, as an advanced practice nurse or nurse administrator, would supervise nineteen LPNs and CNAs. The record includes the petitioner's organizational chart, which indicates that [REDACTED] (registered nurse), MSN, NHA, occupies the position of overall administrator and that another registered nurse occupies a subordinate position as director of nursing. Below the director of nursing is a position identified simply as RN, which evidently stands for registered nurse, and below the RN position are two boxes identified as LPN and CNA, respectively. Absent any further explanation from the petitioner, the AAO concludes that the RN position is the one proffered to the beneficiary, while the LPN and CNA positions listed thereunder represent the nineteen nurses and nursing assistants she would supervise. Thus, in the petitioner's organizational hierarchy the proffered position is two levels of management below the nursing facility's administrator and one level below the director of nursing.

Counsel argues that the director erred in using the *Handbook* entry on registered nurses as the frame of reference in his decision and "ignoring the job description submitted by the petitioner." In particular, counsel asserts that the administrative functions of the position were ignored, as was the apportionment of the beneficiary's time among planning, evaluating, developing policies and educational programs (60%), supervising the staff of LPNs and CNAs (25%), and monitoring documentation (15%). According to counsel, "[t]he record overwhelmingly demonstrates that this is a nurse administrator . . . consistent with the [H-1B] *Memorandum* indicating what positions would qualify for an H-1B."

The AAO is not persuaded by counsel's argument. The duties of the proffered position, as described by the petitioner, do not include any particularly demanding responsibilities that require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a B.S.N. degree. Rather, the duties appear to focus primarily on routine administrative matters in the daily operation of the nursing facility. The proffered position, despite its title, does not fit any of the examples of an advanced practice nurse in the *H-1B Memorandum*. Though the proffered position entails first-line supervision of the LPNs and CNAs, that responsibility does not enhance the position to that of a nurse administrator. As indicated in the *H-1B Memorandum*, nurses in administrative positions who may be H-1B equivalent would be those occupying positions "such as an upper-level 'nurse manager' in a hospital administration." The position at issue in this case is well below that level. Nor does the proffered position involve any nursing specialty as discussed in the *H-1B Memorandum*.

In deciding whether a particular job is a specialty occupation, the duties of the position are determinative, not its title. Based on the foregoing analysis and the specific duties of the position, the AAO concludes that the proffered position most closely resembles that of a head nurse or nurse supervisor, as described in the *Handbook*, 2004-05 edition, at page 302:

Head nurses or nurse supervisors direct nursing activities, particularly in hospitals. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure that the patients receive proper care. They also may ensure that records are maintained and equipment and supplies are ordered.

There is no indication in the *Handbook* or in the *H-1B Memorandum* that head nurses or nurse supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. Rather, it would appear that a two-year associate degree in nursing is often sufficient educational background. Accordingly, the AAO determines that a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the minimum requirement for entry into the nursing position proffered by the petitioner, as required to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With respect to the second alternative criterion of a specialty occupation, the petitioner has submitted no evidence that a B.S.N. degree is common to the industry in parallel positions among similar organizations, as required for the subject nursing position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor, for the reasons previously discussed, has the petitioner shown that its nursing position is so complex or unique that it can be performed only by an individual with a B.S.N. degree, as required to qualify it as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record does not indicate who, if anyone, was previously employed in the subject nursing position. Thus, there is no evidence that the petitioner has normally required a B.S.N. degree for the position, as required for it to meet the third alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the record does not establish that the duties of the subject position are so specialized and complex that knowledge associated with a B.S.N. is required for an individual to perform the services of the job, as required for it to meet the fourth alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Thus, the proffered position does not meet any of the regulatory criteria to qualify as a specialty occupation. The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has not established that the beneficiary will be performing services in a specialty occupation.

Counsel offered no argument in his appeal brief with respect to the director's separate ground of denial – *i.e.*, that lacking any evidence of the beneficiary's licensure as a registered nurse in Pennsylvania and immediate eligibility to practice registered nursing in that state, the record failed to establish that the beneficiary was qualified to perform the services of a specialty occupation. The record does not establish that the beneficiary is licensed to provide nursing services in the State of Pennsylvania, as required by section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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