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FILE: WAC 04 093 50942 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 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:

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, Director
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 skilled nursing and rehabilitation facility that seeks to employ the beneficiary as a registered nurse supervisor (night shift). 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 grounds that the proffered position is not a specialty occupation. On appeal, the petitioner submits a brief.

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; 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 supervisor (night shift). 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 this evidence, the proposed position entails planning, organizing, and directing activities for the night shift of the department; establishing policies and procedures for the nursing department and directions from the hospital administrator; observing techniques of and services rendered by nursing staff to ensure adherence to hospital guidelines; identifying problem areas in the nursing department such as understaffing, absenteeism, and wastefulness and taking corrective action; responding to various departments requesting emergency assistance and assigning staff during emergencies; and preparing schedules and assigning duties to nursing staff in the department. For the proposed position the petitioner requires a baccalaureate degree in nursing (B.S.N.) and one to two years of experience.

Based on the evidence in the record, the director concluded that the proposed position resembles a registered nurse (RN) or a head nurse or a nurse supervisor as those occupations are described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reflects that these occupations do not require a B.S.N. The director further found that it is not common in the industry to require an RN to possess a baccalaureate or higher degree and that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field.

On appeal, the petitioner asserts that the *Handbook* indicates that the proposed position resembles a nurse supervisor and that this occupation requires a B.S.N. The petitioner references the following passages in the *Handbook* to support this assertion:

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.

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 bachelor's or advanced degrees. A bachelor's degree often is necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The petitioner asserts that the director failed to properly consider the submitted job postings and the petitioner's statement that its three RN supervisors hold bachelor's degrees.

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 first 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)).

CIS often looks to the Department of Labor's *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2004-2005 edition of the *Handbook*, the *Handbook* states the following about the training and educational requirements for RN positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

. . . .

. . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The *Handbook* does not elaborate on administrative nursing positions within this classification, although reference is made to two nursing positions, head nurses or nurse supervisors, within the classification of RN. The *Handbook* states the following about head nurses or nurse supervisors:

Head nurses or nurse supervisors direct nursing activities. 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 the proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered.

The *Handbook* further states that "[i]n all States and the District of Columbia, students must graduate from an approved nursing program and pass a national licensing examination in order to obtain a nursing license."

An RN position requires licensure according to the *Handbook*, and the *Handbook* reveals that head nurses or nurse supervisors do not require a B.S.N; thus, those occupations do not qualify as specialty occupations. The AAO finds that the proposed position differs from a head nurse or nurse supervisor because the petitioner does not require a nursing license. Furthermore, the proposed position differs from an administrative nursing position. A policy memo dated 2002 provides the following commentary on administrative nursing positions: “Nursing Services Administrators 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.)”¹ The *Handbook* reference is to the classification of medical and health services managers. On page 75, the 2002-2003 edition of the *Handbook* states:

The term “medical and health services manager” encompasses all individuals who plan, direct, coordinate and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

The policy memo conveys that a nursing services administrator is generally a supervisory level nurse who holds an RN and a graduate degree in nursing or health administration. The proposed position does not require a nursing license and a graduate degree in nursing or health administration. Thus, the proposed position is distinguishable from a nursing administrative position.²

The AAO’s conclusion, from the evidence to which it has referred, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

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 petitioner asserts that the director failed to consider the submitted job postings. The record does not contain job postings, however. The petitioner therefore fails to show that a degree requirement is common to the industry in parallel positions among similar organizations.

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).

² The AAO notes that the record contains an interim permit issued by the Board of Registered Nursing (Sacramento, California) to the beneficiary. This document states that the beneficiary is allowed to practice professional nursing under the direct supervision of an RN, pending issuance of a license following examination. This evidence suggests that the proposed position, registered nurse supervisor (night shift), differs from a nursing services administrator and from a head nurse or nurse supervisor.

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. The proposed position differs from a nursing services administrator. The 2002 policy memo describes a nursing services administrator as generally being a supervisory level nurse who holds an RN and a graduate degree in nursing or health administration. The petitioner does not require a graduate degree in nursing or health administration and does not require a nursing license. The proposed position is therefore distinguishable from a nursing administrative position. Moreover, the proposed position does not resemble that of a head nurse or a nurse supervisor, which are occupations that the *Handbook* relays do not require a B.S.N. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. Although the petitioner asserts that three of its RN supervisors hold bachelor's degrees, the petitioner submitted no corroborating evidence of this. 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)). The petitioner fails to establish this criterion, therefore.

The evidence in the record fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): 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. As already discussed, the proposed position is distinguishable from a nursing services administrator. The 2002 policy memo describes a nursing services administrator as generally being a supervisory level nurse who holds an RN and a graduate degree in nursing or health administration. The petitioner does not require a graduate degree in nursing or health administration and does not require a nursing license; as such, the proposed position differs from a nursing administrative position. Moreover, the proposed position does not resemble that of a head nurse or a nurse supervisor, which are occupations that the *Handbook* relays do not require a B.S.N. The petitioner, therefore, fails to establish this last criterion.

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.

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