

2005-06-01 10:00:00 AM
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PETITION COPY



DDQ

JUN 01 2005

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date:

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 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 hospital that seeks to employ the beneficiary as a registered nurse. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and previously submitted documents.

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.

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 (B.S.N), in a cardiac care unit. Evidence of the beneficiary's duties includes: the Form I-129; the March 14, 2003 letter of support; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: utilizing the nursing process to diagnose and treat human responses to actual or potential problems of individuals or groups; documenting data about patients; developing a written plan of care; implementing safe, cost effective, therapeutic care for patients; evaluating patients emotional and physical response to continuously improve the effectiveness of the plan of care; exercising a leadership role that fosters collaboration and achieves consensus and cooperation; incorporating principles of adult learning into formal and informal unit based staff development activities directed at fellow care providers; coordinating the development, implementation and documentation of educational programs and learning aids for the units; providing leadership and support of Quality Improvement Programs; completing unit based projects; continuously updating knowledge of nursing theory, clinical practice and current trends in healthcare, and demonstrating knowledge, skills and abilities necessary to provide care to the age groups served. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN) or its equivalent.

The director requested additional evidence. The director requested the detailed description of the proffered position that is on file with the petitioner's office of human resources or its personnel office. The director noted that the description should show the date it was drafted and the minimum education requirements for the position. Additionally, the director requested, if available, the actual job announcement used to solicit applications for the position. The director requested a weekly breakdown of the number of hours devoted to each of the beneficiary's proposed duties. The director wanted an explanation of how many registered nurses, licensed practical nurses, nursing aides and other employees the beneficiary will be expected to supervise, if applicable. The director also requested an organizational chart for the health care facility and the department where the beneficiary will be assigned. The director requested a list of individuals that are currently employed in the same capacity as the proffered position and noted that the list should indicate their degrees, fields of study, date hired by the organization in each individual's current capacity, the date the individual received his or her respective degree(s) and the individual's immigrant or nonimmigrant status. Finally, the director asked for an explanation of whether the registered nurses with associate degrees are capable of performing the same duties as the registered nurses with bachelor's degrees.

The petitioner provided a detailed job description that is on file with its human resources offices. The petitioner indicated that the description was last revised in July 2002 and required (1) graduation from an accredited school of nursing (2) current registration as a Licensed Professional Nurse in New York State and (3) a Bachelor of Science degree in Nursing. The petitioner indicated that a job announcement used to solicit applications was not available. The petitioner noted that the beneficiary would not be supervising other employees. The petitioner submitted an organizational chart entitled department of patient care services. Additionally, the petitioner provided a copy of the department's plan for providing patient care in the department where the beneficiary will be assigned.

The petitioner provided the same list of individuals currently employed in the same capacity as the proffered position that was provided with the instant petition filed in March 2003. Additionally, the petitioner provided five letters from experts in the nursing field. The petitioner contended that these letters explain why

registered nurses with only an associate degree in nursing are incapable of performing all the complex and specialized duties of the job description. Furthermore, the petitioner confirmed that a bachelor's degree in nursing is not the standard requirement for an entry-level position in their industry. The petitioner asserted that these experts demonstrate that the proffered position is not any entry-level position. The petitioner provided a copy of the license requirement for entry level RN's published by the Office of the Professions of the New York State Education Department.

The director found that the record does not establish that the job offered qualifies as a "specialty occupation" as defined in section 214(i)(1) of the Act. The director found the petitioner's creation of a position with a perfunctory bachelor's degree requirement does not disguise the fact that the position is not a specialty occupation. The director found that the petitioner does not normally require a bachelor's degree in a specific specialty for the position. Additionally, the director found that the petitioner does not explain and document sufficiently the qualitative difference between a B.S.N. curriculum and an associate's degree in nursing curriculum. The director concluded that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the duties of the position were routine to any nursing position and, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, counsel states that the same specialized occupation for the same beneficiary involving the same duties and requirements was approved by the center director in 2002. Counsel contends that because there are no differences between the two petitions the current petition should be approved.

Counsel explains that the petitioner has not claimed that a B.S.N. is an industry standard for performance of an entry level nursing position. The petitioner states that the beneficiary's position is an advanced position in accordance with its Differentiated Nursing Practice and its Professional Nursing Practice Plan ("PNP Plan") which has been in operation since 1998 and which requires a B.S.N. to perform specialized duties, and is corroborated by the professional opinions of five experts in the field of nursing education. The petitioner claims that it currently employs 201 B.S.N. nurses in the specialized position. Counsel refers to the Service Contract Act's description of nursing levels to support the petitioner's contention that the proffered position's complex duties are specialized and advanced. Counsel cites each author of the five submitted letters to distinguish between an associate degreed nurse and a baccalaureate prepared nurse. A professor and Chair, Division of Nursing, The Sage Colleges, in Troy, New York stated:

In reviewing the St. Peter's Hospital baccalaureate nursing job description, there are expectations which are complex and specialized for which preparation at the baccalaureate level is needed. Adaptation and modification of nursing care plans is frequently necessary for complex patients with rapidly changing physical and emotional status. Being able to make clinical decisions to modify planned approaches is essential for quality care as well as adjusting when there are life-threatening situations. The leadership role of the baccalaureate nurse as described in the job description is an essential part of the role of the baccalaureate prepared nurse and the educational experience. This role includes formal and informal unit based staff-development, documentation of educational programs, participation in and

managing Quality Improvement programs and other projects on the nursing care unit. The professional role socialization of the baccalaureate nursing student emphasizes the responsibility for continued learning of nursing theory and practice since nursing practice exists in a rapidly changing health care environment.

The second letter written by the Dean of Nursing at Regents College analyzed four aspects of the proffered position and related them to specific bachelor degree courses required to perform them. Additionally, this author stated that one of the major areas that the faculty differentiates between the associate and baccalaureate nursing practice is the area of leadership. The third letter is written by an assistant professor of Nursing at the State University of New York at Utica/Rome. This professor stated:

Patients are hospitalized for shorter periods of time and usually require a higher level of skill assessment, clinical decision making/clinical judgment, planning for discharge, health teaching and coordination of care after the patient is discharged. These skills are not taught in associate degree programs. In an associate degree program students focus on basic clinical assessments and learn to coordinate the care of a group of patients.

Additionally, the petitioner submitted two letters from personnel at St. Peter's Hospital asserting that only a baccalaureate prepared nurse can perform the duties of the proffered position.

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 turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the director noted, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a registered nursing job.

The proffered position does not normally require a bachelor's degree in nursing or a related field. The proffered position is that of a registered nurse. In its *Handbook*, 2004-2005 edition, the DOL states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (A.D.N.), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs 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. In this case, the petitioner has not demonstrated that the proffered position is an administrative position, which would require a registered nurse with a master's degree in nursing or health administration. Additionally, the position description does not indicate that the position is in a clinical specialty. Rather, the proposed duties are similar to those of a registered nurse albeit beyond an entry-level position, as described herein. As such, the petitioner has not demonstrated that a bachelor's degree or its equivalent is required as a minimum for entry into the occupation. Thus, the petitioner failed to establish the first criterion.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner states that under its PNP plan it only places baccalaureate prepared nurses in certain positions which require more complex and advanced patient care in a variable health care environment. However, in response to the request for evidence, the petitioner submitted a list of nurses holding bachelor's degrees and indicated that all of these nurse are placed in the specialized position, registered nurse – baccalaureate prepared. The list indicates the date of hire of the B.S.N. nurses, but the petitioner did not submit additional evidence that the nurses on this list are in fact placed in the same position as the proffered position. The petitioner did not submit employment records, contracts or any indication as to which department the listed nurses work in, and what their duties are. There is no evidence of any pay differential, or any differentiation in the actual day-to-day duties performed by the B.S.N. nurses compared to A.D.N. nurses. Therefore, the petitioner has not has met its burden of proof in this regard.

The petitioner has not established any meaningful difference between the B.S.N. and A.D.N. nurses in the discharge of their day-to-day duties at the hospital. Thus it cannot be determined that the PNP program under which the beneficiary was hired requires the theoretical and practical application of a body of highly specialized knowledge. To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree

in the specific specialty as the minimum for entry into the occupation, as required by the Act. Thus, the petitioner has not established the third criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

While a registered nurse in the proffered position may possess greater skills and experience than an entry-level nurse, it is not clear that those skills and experience could only be acquired by earning a bachelor's degree. Counsel asserts repeatedly that the duties of the proffered position are too complex to be performed by an entry-level nurse, but the petitioner has not established that the duties could not be performed by an experienced nurse with less than a bachelor's degree. Counsel refers to five letters and states that these letters provide detailed reasons and references to specific bachelors' degree courses needed to perform the duties of the position. The *Handbook* is clear that most nursing positions can be performed by nurses with an associate level nursing degree. The duties of the proffered position are in line with those of other registered nurses. Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Although the petitioner has provided a detailed professional nursing practice plan, it does not provide sufficient explanation differentiating between the duties of a registered nurse with a baccalaureate degree and an associate degreed nurse. Within its differentiated practice conceptual framework, the petitioner describes how an associate degreed nurse and a registered nurse with increasing levels of skill should react in certain situations. However, the petitioner has not established that its experienced associate degreed nurse is not able to perform the same duties as a registered nurse or that the duties to be performed by the beneficiary are more complex than those performed by its associate degreed nurses. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that

was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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.

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.