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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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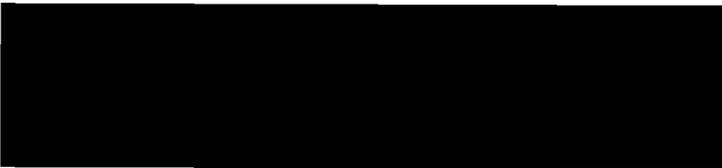


FILE: EAC 08 060 50450 Office: VERMONT SERVICE CENTER Date: APR 30 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


Perry Rhew
Chief, 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 nursing home. To employ the beneficiary in what it designates as a Gerontology Clinical Nurse Specialist position, the petitioner endeavors 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 because he determined that the evidence of record failed to establish the proffered position as a specialty occupation as that term is defined at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), Act and its implementing regulations at 8 C.F.R. § 214.2(h)(4).

As will be discussed below, based upon its review of the entire record of proceeding as supplemented by the Form I-290B and all of the documents submitted on appeal, the AAO finds that the director's decision to deny the petition for its failure to establish the proffered position as a specialty occupation is correct. Accordingly, the appeal will be dismissed, and the petition will be denied.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Further, section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), specifies, "[f]or purposes of section 101(a)(15)(H)(i)(b) of this title," the "requirements of this paragraph, with respect to a specialty occupation" include "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation."

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly

specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (hereinafter referred to as *Defensor*). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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 AAO need not, and therefore will not, address the issue of whether the proffered position requires a Bachelor of Science in Nursing (BSN) and certification in Advanced Cardiac Life Support, as claimed by petitioner. The reason is that the State of Florida requires for the proffered position certification or licensure that the petitioner does not. Therefore, recognition of the proffered position as a specialty occupation is precluded by the prescription at section 214(i)(2)(A) of the Act that the petitioner include as an element of any position proposed for specialty occupation classification whatever licensure or certification requirement that the state of intended employment imposes on the position.

As the basis of its contention that the proffered position qualifies as a specialty occupation, the petitioner asserts that the position requires a BSN and certification in Advanced Cardiac Life Support. However, the Form I-129, the related Labor Condition Application, and the job descriptions submitted initially identify the proffered position as Gerontology Nurse Specialist. Further, the petitioner’s response to the director’s request for additional evidence (RFE) more precisely identifies and discusses the proffered position as “Gerontology Clinical Nurse Specialist”; and the RFE response includes a six-page job description that presents the proffered position as “Clinical Nurse Specialist” and “Gerontology Clinical Nurse Specialist.” As such, and aside from the issue of whether it would otherwise qualify as a specialty occupation position, the proffered position is precluded from qualification as a specialty occupation position because it lacks a material element required by Florida law, namely, inclusion of a requirement for certification as a Clinical Nurse Specialist.

Section 464.003(c)(6) at Chapter 464 of Title XXXII of the 2009 Florida Statutes states:

“Clinical Nurse Specialist” means any person licensed in this state to practice professional nursing and certified in clinical nurse specialist practice.

Also, section 464.015(5) of the same Chapter and Title of the Florida Statutes states:

Only persons who hold valid certificates to practice as clinical nurse specialists in this state may use the title “Clinical Nurse Specialist” and the abbreviations “C.N.S.”

Further, section 2 (Specialty Type) of the Florida Board of Nursing’s Application for Clinical Nurse Specialist (CNS) designates Gerontological Nursing as one of the specialties requiring Clinical Nurse Specialist certification.¹

¹ The application can be accessed on the Internet site <http://www.state.fl.us/mqa/nursing>.

Section 464.0115 of Chapter 464 of Title XXXII of the 2009 Florida Statutes specifies the following requirements for certification as a Clinical Nurse Specialist:

(1) Any nurse seeking certification as a clinical nurse specialist must apply to the department and submit proof that he or she holds a current license to practice professional nursing, a master's degree in a clinical nursing specialty, and either:

(a) Proof of current certification in a specialty area as a clinical nurse specialist from a nationally recognized certifying body as determined by the board; or

(b) Proof that he or she holds a master's degree in a specialty area for which there is no certification within the clinical nurse specialist role and specialty and proof of having completed 1,000 hours of clinical experience in the clinical specialty for which he or she is academically prepared, with a minimum of 500 hours of clinical practice after graduation. The applicant for certification as a clinical nurse specialist must submit an affidavit to the Board of Nursing affirming the required hours of clinical experience. Falsification of the affidavit constitutes grounds for discipline in accordance with s. 464.018(1)(f).

(2) The board shall certify, and the department shall issue a certificate to, any nurse who fulfills the qualifications of this section. . . .

In addition, the AAO notes that Florida law appears to criminalize the assignment of the proffered position's title to a person without the requisite certification, as sections 464.015(9) and (10) of Chapter 464 of Title XXXII of the 2009 Florida Statutes state:

(9) A person may not practice or advertise as, or assume the title of, . . . clinical nurse specialist, . . . or use the abbreviation . . . "C.N.S.," . . . or take any other action that would lead the public to believe that person was certified as such or is performing nursing services pursuant to the exception set forth in s[ection] 464.022(8), unless that person is licensed or certified to practice as such.²

² There is no evidence that the proffered position meets the exception at section 464.022(8), which states that the prohibitions at section 464.015(9) do not extend to:

Any nurse currently licensed in another state or territory of the United States from performing nursing services in this state for a period of 60 days after furnishing to the employer satisfactory evidence of current licensure in another state or territory and having submitted proper application and fees to the board for licensure prior to employment. If the nurse licensed in another state or territory is relocating to this state pursuant to his or her military-connected spouse's official military orders, this period shall be 120 days after furnishing to the employer satisfactory evidence of current licensure in another state or territory and having

(10) A violation of this section is a misdemeanor of the first degree

In other words, based on the State of Florida's requirements for the proffered position as compared to the petitioner's requirements, the petitioner is either attempting to employ someone in the claimed proffered position in violation of that State's laws or the proffered position is not what the petitioner claims it to be. As such, it would appear that the actual position being offered by the petitioner is nothing more than a standards nursing position, a position that is not considered to be a specialty occupation. *See Defensor*, 201 F.3d at 387 (finding that nursing in general is not a specialty occupation). The director, therefore, did not err in finding that the position being offered by the petitioner is not a specialty occupation.

Beyond the decision of the director, even if the AAO were to find that the proffered position is in fact a Gerontology Clinical Nurse Specialist as claimed by the petitioner and that this position is a specialty occupation, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of said position. Specifically, the beneficiary possesses neither the State certification nor the education and/or training that the State of Florida requires for certification to perform the duties of a Gerontology Clinical Nurse Specialist. Consequently, the beneficiary would not be qualified to serve in the position of Gerontology Clinical Nurse Specialist. *See* 8 C.F.R. § 214.2(h)(4)(v)(A). For this reason also, the petition must be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

submitted proper application and fees to the board for licensure prior to employment. . . .