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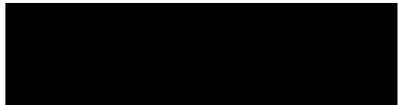


U.S. Citizenship  
and Immigration  
Services

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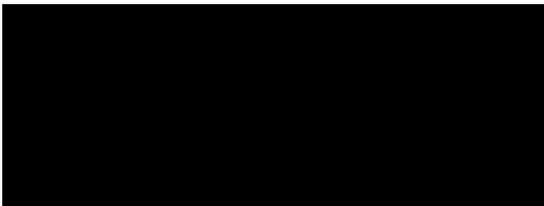


FILE: SRC 01 272 54617 Office: TEXAS SERVICE CENTER Date: **MAR 08 2004**

IN RE: Petitioner:   
Beneficiary: 

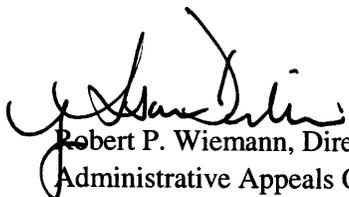
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

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 approved the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). The director's decision will be overturned. The petition will be denied.

The petitioner is a hospital that seeks to employ the beneficiary as a lead registered nurse for the orthopedic unit. 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).

On certification, counsel submits a memorandum and states, in part, that the service center issued an approval notice for the beneficiary's H-1B status and gave no indication that the approval was not final or that the petition would be certified to the AAO. Counsel further states that the beneficiary already had obtained her H-1B visa at the U.S. consulate, entered the United States in H-1B status, and initiated her employment with the petitioner. Counsel additionally states that the beneficiary is now working in a lead nurse capacity.

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 approval letter; (5) the director's notice of certification; and (6) counsel's response to the director's notice of certification. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a lead registered nurse in the orthopedic unit. Evidence of the beneficiary's duties includes: the Form I-129; an undated letter from the petitioner with a description of the proposed duties; 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: organizing, assigning, and delegating to nursing staff; overseeing the administration of prescribed medications and treatments; coordinating medical equipment; and coordinating diagnosis, treatment and RN staffing issues with hospital physicians. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

On certification, counsel states, in part, that the record contains sufficient evidence to demonstrate that a baccalaureate degree in nursing is required to perform the duties of a lead registered nurse, such as opinion letters, excerpts from nursing publications, and BSN curriculum materials.

The record contains the following:

- Letter from Dean and Professor [REDACTED] from the Kramer School of Nursing, Oklahoma City University, who states, in part, that he/she supports the petitioner's efforts to require a BSN degree for its lead RN position;
- Letter from the manager of Nurse Recruitment and Retention at OU Medical Center [REDACTED] who states, in part, that it is common in the nursing industry to require a BSN degree for positions similar to the proffered position;
- Letter from [REDACTED] Ph.D., RN, Research Advisor, OU Medical Center, who states, in part, that she does not support the appointment of registered nurses without a BSN degree to perform duties such as the proposed duties of the proffered position;
- Letter from [REDACTED] Ed.D., R.N., College of Nursing, Health Sciences Center, The University of Oklahoma, who states, in part, that positions such as the proffered position, requires a baccalaureate degree in nursing;
- Copy of an H-1B nurse petition sustained by the AAO;
- Article concerning the BSN curriculum offered by Kaiser Permanente and Holy Names College in Oakland, California;
- Article entitled "Mission Possible: Getting a BSN" concerning five nurses who obtained a BSN degree;
- Various nurse BSN curriculums; and
- Various nursing articles.

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 Department of Labor's (DOL) *Occupational Outlook Handbook (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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In its *Handbook*, 2002-2003 edition, at page 269, the DOL states the following about the training and educational requirements for registered nurse 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 within the classification of registered nurse that appear analogous to the proffered position. 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 proffered position appears to resemble a nursing position beyond the entry-level registered nurse, but it does not appear to be analogous to an administrative nursing position. A recent CIS policy memo 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.)" The *Handbook* reference is to the classification of medical and health services managers. On page 75, 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 structure and financing of healthcare is changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. . . . Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of interrelated services, for example, those ranging from inpatient care to outpatient follow-up care.

....

In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

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. Rather, the proposed duties are similar to those of a head nurse or nurse supervisor, as described herein. It is noted that the beneficiary holds a baccalaureate degree in nursing. Thus, the petitioner has not shown that a bachelor’s degree or its equivalent is required as a minimum for entry into the position being offered to the beneficiary.

The record does not include any evidence from parallel positions in the petitioner’s industry or from professional associations regarding an industry standard. Nor does the record include documentation to support the complexity or uniqueness of the proffered position. The record contains a position statement by the American Association of Colleges of Nursing (AACN), recognizing the Bachelor of Science degree in nursing as the minimum educational requirement for professional nursing practice. The AACN notes that presently only about 40 percent of the basic registered workforce hold baccalaureate or higher degrees in nursing. As such, despite its position statement recognizing the Bachelor of Science degree in nursing as the minimal educational requirement for professional nursing practice, less than half of currently employed registered nurses hold bachelor’s degrees as their highest academic credential. The record also contains a statement from the American Nurses Association (ANA), affirming that, while baccalaureate education should be the standard entry into professional nursing practice, three paths for basic educational preparation for nursing practice remain in place: a two-year associate degree; a three-year diploma; or a four-year baccalaureate degree. The position statements by the AACN and the ANA are noted; they do not, however, constitute an industry wide standard requiring such higher degrees.

The various opinion letters listed above are noted. None of the writers, however, provide evidence that a baccalaureate degree in nursing is an industry requirement. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, with respect to the petitioner's objection to denial of this petition in view of the approval of a similar petition in the past, this record of proceeding does not contain all of the supporting evidence submitted to the AAO 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 other H-1B petition was parallel to the proffered position. Furthermore, in the previous decision, the AAO found that the position was similar to that of a health services manager. In the instant case, however, the petitioner has not demonstrated that the proffered position is a health services manager position, which would require a registered nurse with a master's degree in nursing or health administration. 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. In a letter dated October 26, 2001, counsel states that the proffered position is a new position and, therefore, it is impossible to show that the petitioner has, in the past, required a BSN degree.

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or 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.<sup>1</sup> In this regard, the petitioner fails to establish that the lead registered nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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.

The petitioner submits various curriculums for a baccalaureate program in nursing. The AAO cannot assume, however, that the additional training that the baccalaureate program provides is solely related to the alleged complexity of the proffered position. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California, supra*. 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).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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<sup>1</sup> The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

SRC 01 272 54617

Page 7

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 director's January 18, 2002 decision is overturned. The petition is denied.