

Identifying information deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



DI

FILE: WAC 04 024 50805 Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2005

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 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 engaged in providing hospice nursing services that seeks to employ the beneficiary as a health services manager. 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 because the proffered position is not a specialty occupation. On appeal, counsel 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 evidence; (3) counsel's response to the director's request for evidence; (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 health services manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail managing the day-to-day activities of the hospice, no portion of which shall relate to direct patient care; setting-up medical records for each client of the hospice directing particular attention to the nature of the terminal illness or condition of the client; managing legal issues related to impending client death such as advance directives, certifications of death, labeling of the deceased autopsy or post-mortem issues, organ donation issues, any inquest that may become necessary, do-not resuscitate orders and other death related issues; ensuring that the hospice is equipped with adequate supplies and equipment that would enable the same to fully operate and attend to the clients on a daily basis; managing the daily intake and discharge of clients; managing and monitoring the submission of requests and orders for medical services that are outsourced to other medical facilities as the circumstances may warrant; managing the requests for information that may be submitted by outside professionals, governmental agencies, and other offices such as insurance companies and law offices; providing oversight review of client files before they are filed or archived to make sure nothing important or relevant is omitted. The petitioner indicated that it required a candidate to have at least a bachelor's degree in nursing or a related field.

The director issued a request for evidence, specifically requesting a detailed description of the work done and the percentage of time to be spent on each duty. The director also requested information regarding the petition such as federal income tax returns, quarterly wage reports and a facility license.

The petitioner stated that in addition to the above listed duties, the beneficiary would supervise five assistant managers: Social Worker, Intake Coordinator, Case Manager, Bereavement Coordinator and Pastor or Clergy. In support of this statement, the petitioner submitted an organizational chart.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director noted that the key duties of the position of a health services manager are ". . . Analyzes operating costs and prepare department budget. Recommend patient fees for therapy based on use of equipment and therapy staff . . ." The director indicated that the duties described resemble the role of a general manager, which is not considered a specialty occupation. The director determined that the petitioner did not meet any of the four criteria under 8 C.F.R. § 214(h)(iii)(A).

On appeal, counsel states that the duties of the proffered position, health services manager, are those of a position requiring professional skills. Counsel asserts that the proffered duties are sufficiently complex such that the individual who shall perform them should have a baccalaureate-level degree in the occupational field. Counsel contends that because the proffered position does not list every duty that the *Handbook* ascribes to a medical and health services manager does not mean the proffered position is less than a health services manager. Counsel explains that the petitioner employs a financial person who does the analysis of operating costs and department budget. Counsel further explains that the determination of patient fees for therapy is done by the management itself at the highest level within the petitioner's organization. Additionally, counsel asserts that it is clear that a baccalaureate level degree is the normal minimum requirement for entry into the position of health services manager in a smaller facility.

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 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. A thorough review of the *Handbook* discloses that the duties of the proffered position most closely resemble those of nurse supervisor. As discussed in the *Handbook*, head nurses or nurse supervisors direct nursing activities, primarily in hospitals. The *Handbook* indicates that 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. Nurse supervisors also may ensure that records are maintained and equipment and supplies are ordered.

The proffered position's duties of setting-up medical records for each client of the hospice while directing particular attention to the nature of the terminal illness or condition of the client, ensuring that the hospice is equipped with adequate supplies and equipment that would enable the same to fully operate and attend to the clients on a daily basis; and managing the daily intake and discharge of clients, and other duties as described would be performed by a nurse supervisor as illustrated in the *Handbook*. The record is not clear exactly what position the beneficiary will occupy in the hierarchy of the organization. The organizational chart does indicate a position titled health services manager. It is not clear if this position is for the current health services manager that has been referenced by the petitioner. While the petitioner indicated that the beneficiary will supervise "5 assistant managers as follows: Social Worker, Intake Coordinator, Case Manager, Bereavement Coordinator, and Pastor or Clergy," it is not clear that these assistant managers will themselves be managing people. The record does not establish that the beneficiary will be performing the duties of a health services manager as defined in the *Handbook*.

The *Handbook* 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.

The *Handbook* continued:

. . . [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.

According to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation. Thus, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on the *Handbook* to support his assertion that a medical health services manager is needed by all types of facilities in the healthcare industry, whether large or small. Counsel contends that the petitioner is entitled to employ the services of a full-time health services manager to manage part of its operations. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations.

The petitioner has submitted no evidence that would establish that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The petitioner submitted an approval notice for an H-1B petition stating that that approval notice was for a health services manager employed by the petitioner. The petitioner noted that CIS approved another petition that had been previously filed by the petitioner. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel indicated that this copy of an approval notice was for a previous health services manager submitted by the petitioner. However, the petitioner has not provided evidence of such employment such as an employment contract, payroll receipts or Form W-2s. Counsel indicated that the petitioner needs to employ another health services manager because of its expanding business. There is no evidence of the petitioner's expanding business in the record. Without documentary evidence to support the claim, the assertions of

counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. However, as discussed above, the listed duties are those of a nurse supervisor. To the extent they are described in the record, the duties do not appear so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In support of his assertions, counsel refers to *Matter of Sun*, 12 I&N Dec. 535 (Reg. Comm. 1967) which concluded that the vocation of hotel manager in its more complex form involving the duties described in the decision may be considered a profession. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the published decision. The *Handbook* reveals that the proffered position is performed by a nurse, an occupation that does not require a bachelor's degree in a specific specialty. There is no evidence in the record that would show that the duties of the proffered position rise beyond this level. 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).

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.

07/05/05/I/AAODAT01/WAC0402450805.H1B