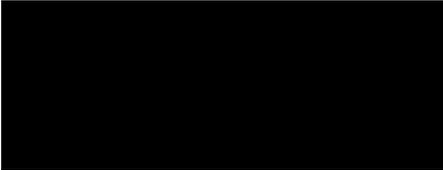


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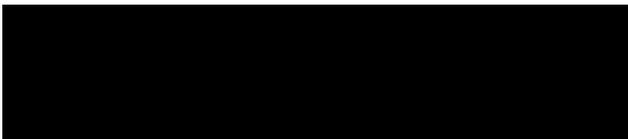
**JAN 04 2005**

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:



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 an adult day-care healthcare center currently with six employees that offers non-medical care and supervision to the elderly and the developmentally disabled, all of who continue residing in their own homes. It seeks to employ the beneficiary for 20 hours a week as a rehabilitative services coordinator, and 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 the proffered position is not a specialty occupation. On appeal, counsel submits a brief and reasserts that the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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 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 proceedings 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

At the outset, it should be noted that the petition was filed prematurely. Pursuant to 8 C.F.R. § 214.2(h)(i)(B)(1), before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed. This alone is adequate grounds for denying the petition herein.

The petitioner is seeking the beneficiary's services as its first rehabilitative services coordinator. Evidence of the beneficiary's duties was included with the I-129 petition and in response to the director's request for evidence. According to the record, the beneficiary: plans, administers and directs the operation of health rehabilitation programs, including physical, occupational, recreational and speech therapies; consults with medical and professional staff in planning and coordinating joint resident and management objectives; plans and implements programs that restore functions, prevent loss of physical capacities, and maintain optimum performance; conducts training programs to maintain staff proficiency in therapy techniques and use of new methods and equipment to meet resident needs; participates in the planning and development of medically oriented rehabilitative programs, including educational, occupational and recreational activities; coordinates with other professional staff in selecting activity program consistent with needs and capabilities of individuals; recommends resident fees for therapy based on use of equipment and staff involvement; and requisitions supplies and equipment.

The petitioner states that the position requires a bachelor's or master's degree or its equivalent "in the fields of nursing, social work, psychology or recreational, occupational, physical therapy, speech therapy, dietetics or gerontology." The beneficiary has a bachelor of science degree in nursing from a university in the Philippines, where she also is licensed as a registered nurse.

The petitioner has failed to establish any of the criteria for a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often

considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether an industry 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/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those provided by a registered nurse, head nurse or nurse supervisor on the business side of healthcare (quality assurance). The beneficiary's proposed duties do not include these responsibilities. In the *Occupational Outlook Handbook, (Handbook)*, the Department of Labor describes in part, the duties of a registered nurse, and head nurse or nurse supervisor:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.... Home health nurses provide nursing services to patients at home. RN's assess patients' home environments and instruct patients and their families. Home health nurses care for a broad range of patients, such as those recovering from illnesses and accidents, cancer, and childbirth.

They must be able to work independently and may supervise home health aides. Nursing home nurses manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they spend much of their time on administrative and supervisory tasks, RNs also assess resident's health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids.... Head nurses and 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 proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered. ...Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home health, and chronic care services.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment in the proffered position.

There are three major educational paths to registered nursing: bachelor of science degree in nursing (B.S.N.), an associate degree in nursing (A.D.N.), and a diploma. B.S.N. programs, offered by colleges and universities, take about 4 years to complete. In 2002, 678 nursing programs offered degrees at the bachelor's level. A.D.N. programs, offered by community

and junior colleges, take about 2 to 3 years to complete. About 700 RN programs in 2002 were at the A.D.N. level. Diploma programs, administered in hospitals, last about 3 years. Only a small and declining number of programs offer diplomas. Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. Experience and good performance can lead to promotion for a registered nurse to more responsible positions, such as assistant head nurse or head nurse/nurse supervisor. Likewise, good performance and experience can equip a nurse to perform the duties of an associate administrator in the healthcare field. There is no requirement, however, that a nurse, or any other healthcare professional performing the duties of an associate administrator, have a baccalaureate or higher degree in a specific specialty or its equivalent as a minimum requirement for entry into that position.

In the 2002-2003 edition of the *Handbook* at page 269, the *Handbook* states that a baccalaureate degree or its equivalent in a specific specialty is not a minimum requirement for a registered nurse position. 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 - head nurses or nurse supervisors. 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 *Handbook* at 75.)"<sup>1</sup> 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.

While the petitioner states that the position is similar to that of a program director, as set forth in the *California Occupational Guide*, that position differs from the one described for medical health services manager in the *Handbook*. The petitioner does not require a background in health administration, and the duties described are not similar to the health services manager position. On appeal, counsel states that the position is similar to the *California Occupational Guide's* occupation for managers and administrators. Counsel, however, supplies no documentation from the guide and no job description for managers and administrators occupation from the guide. The statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of*

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<sup>1</sup> 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).

*California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this criterion counsel cited the state of California Occupational Guide for managers and administrators, which state the entry requirements are a bachelor's or master's degree in fields of nursing, social work, psychology or recreational, occupational, physical therapy, speech therapy, dietetics or gerontology. As indicated in the preceding paragraph, the assertions of counsel do not constitute evidence. *See INS v. Phinpathya; Matter of Ramirez-Sanchez*.

The petitioner does not assert that it normally requires a degree or its equivalent for entry into the proffered position, and offers no evidence in this regard. The position is new for the petitioner's business. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has not established that the duties of the proffered position are so complex or unique that an individual can only perform them with a degree in a specific specialty. Nor has it been established that the duties of the offered position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4). The duties described are general and routine for associate administrators with administrative functions. A baccalaureate level education is not required for entry into the position.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. 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 and the appeal shall accordingly be dismissed.

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