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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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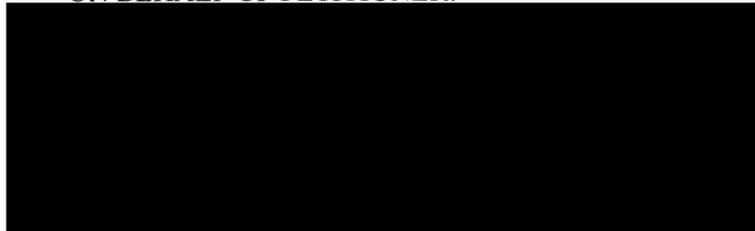


FILE: SRC 03 255 54588 Office: TEXAS SERVICE CENTER Date: JUN 23 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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, 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 on the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

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.

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 proposed position.

The record of proceeding before the AAO contains (1) the 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.

The petitioner, a hospital with 307 employees, was established in 1963. It proposes to hire the beneficiary as a registered nurse. The petitioner's September 22, 2003 letter of support stated that the exact title of its proposed position would be "Registered Nurse II – ICU/Telemetry." The petitioner stated that the beneficiary would be "independently responsible and accountable for the delivery of skilled, high quality patient care through use of the nursing process and in accordance with established policies and procedures of the Patient Care Services Department and the hospital." The petitioner broke the duties of the position down into several categories, including assessment, planning, intervention/performance, evaluation, leadership, performance improvement, professionalism, and safety.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel contends that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed 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 routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) and therefore has not demonstrated that the proposed position qualifies for classification as a specialty occupation.

The AAO first 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)).

The petitioner noted that CIS's November 27, 2002 memorandum¹ (the nurse memo) stated that critical care nurses and other specialty care nurses qualify for H-1B classification. The petitioner noted that the proposed position requires specialized experience in intensive care, and that the terms "intensive care" and "critical care" are used interchangeably.

Such assertions do not prevail in establishing that the proposed position qualifies as a specialty occupation. The nurse memo acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position. Nevertheless, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies for classification as a specialty occupation.²

As noted previously, CIS looks beyond the title of a proposed 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. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. After a careful review of the *Handbook*, the AAO finds that the beneficiary's proposed duties closely resemble those performed by registered nurses who provide direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regimens. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. As such, the duties of the proposed position would be performed by a registered nurse as illustrated in the *Handbook*.

The *Handbook* states the following regarding 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,

¹ 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).

² The nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses. Counsel emphasizes on appeal that the proposed position does not require such certification.

licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

The *Handbook* continues:

[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.

Thus, according to the *Handbook*, candidates for the proposed position would not require a bachelor's degree for entry into the occupation.

The evidence contained in the record fails to persuade the AAO that a baccalaureate degree in a specific specialty is the minimum standard for entry into this occupation. Furthermore, the *Handbook* reveals that employers accept candidates with associate degrees in nursing.

Thus, based upon the evidence in the record, the petitioner has failed to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

There is no evidence in the record to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. Neither does the record contain evidence to establish that the particular position is so complex or unique that only a person with a bachelor's degree can perform it.³

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

In its December 15, 2003 response to the director's request for evidence, the petitioner provided the initials of eight of its nurses who specialize in telemetry. One of these individuals possesses a bachelor's degree and the other seven possess associate degrees; the director denied classification under the third criterion on this basis. Noting that all seven individuals who lack a bachelor's degree possess at least six years of experience, counsel contends that the director should have approved the petition under this criterion:

In the context of H-1B petitions, in determining the equivalent of a Baccalaureate degree, USCIS has determined that three years of qualifying experience compensate for each missing year of baccalaureate education . . . In accordance with these standards, with a minimum of a two-year Associate's degree plus six years of experience, each nurse working in the RN II position in Telemetry is shown to have AT LEAST the equivalent if a baccalaureate degree in nursing – with most having a significantly higher degree of combined education and experience.”

³ In fact, the evidence of record points to the opposite conclusion, as the petitioner employs several individuals in similar positions who do not possess bachelor's degrees.

However, counsel has not demonstrated that the proposed position qualifies under this criterion. First, the petitioner has submitted no documentary evidence, such as payroll records, copies of diplomas, affidavits, etc., to support these contentions. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

While counsel is correct that, as a general rule, three years of qualifying work experience will substitute for each year of college-level training that an alien lacks, see 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), not all experience will suffice. Pursuant to 8 C.F.R. § 214.2(h)(iv)(D)(5), the petitioner must demonstrate that the experience included the theoretical and practical application of highly specialized knowledge, that such experience was gained while working with degreed individuals, and that the alien has recognition of expertise.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation⁴;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Counsel has not demonstrated that the work experience attained by these nurses included the theoretical and practical application of specialty knowledge required for bachelor's degree-level nursing, that it was gained while working with peers, supervisors, or subordinates who held bachelor's degrees, or that the

⁴ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

beneficiary achieved recognition of expertise in the field as evidenced by at least one type of documentation as described in sections (i) through (v) of 8 C.F.R. § 214.2(h)(iv)(D)(5).

Therefore, counsel has not demonstrated that the proposed position qualifies as a specialty occupation under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Moreover, the AAO notes that the petitioner's letter of support stated only that a bachelor's degree was "preferred." Employer preferences are not synonymous with employer requirements, and do not rise to the "normally required" standard imposed by the criterion.

The evidence in the record is inadequate to 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. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel refers to the nurse memo to state that specialty positions, such as the proposed position, require a bachelor's degree. Again, the title of a nursing position such as "critical care" does not establish that the position qualifies as a specialty occupation. Rather, the actual duties of the proffered position are controlling.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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.⁵ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The AAO notes that the record contains two advisory opinions: one from [REDACTED] ARNF, dated December 4, 2003, and an undated letter from [REDACTED]. However, these letters do not establish that the proposed position qualifies as a specialty occupation under the second or fourth criteria.

[REDACTED] lists some of the duties of the proposed position and notes that the petitioner's preference for a bachelor's degree is appropriate. As the AAO noted previously, employer preferences are not synonymous with employer requirements. She concludes that the requirements for this position are either (1) a bachelor's degree, (2) an associate's degree with six years of experience, or (3) an associate's degree with three years of experience and specialty certification.

[REDACTED] letter, which consists of three paragraphs (the first of which consists of her own qualifications), reaches this conclusion: "The complexity of this high-level nursing position makes it a responsible, professional, specialty occupation." She does not state that these duties require someone with

⁵ 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.

a bachelor's degree to perform them. [REDACTED] does not list the duties that led to her conclusion, other than to state that they are very complex, and that they would involve monitoring patients with cardiac conditions and administering medications.

Neither author indicates whether they reviewed company information about the petitioner, visited its site, or interviewed anyone working for the petitioner. While some nursing positions involve responsibilities that would require a bachelor's degree, neither author provides sufficient detail regarding the complexity of the duties in relation to the petitioner's business to substantiate her conclusions. There is thus an inadequate factual foundation established to support these opinions. Moreover, the AAO notes that neither author asserts that a bachelor's degree is the minimum entry requirement for this position.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, 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). The AAO is not persuaded that the nature of the duties of the proposed position is more specialized and complex than that of registered nurses who, lacking bachelor's degrees, perform similar duties or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree. These letters establish the proposed position as a specialty occupation under neither 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) nor 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the petitioner has failed to establish that the proposed position is a specialty occupation, and the petition was properly denied on this ground. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.