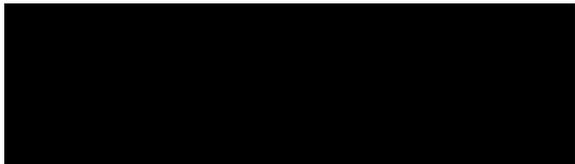


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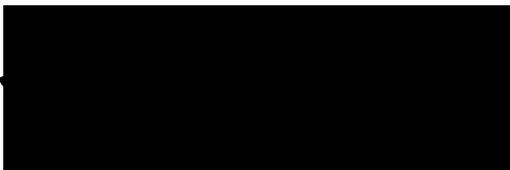
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FILE: WAC 03 133 51807 Office: CALIFORNIA SERVICE CENTER Date: AUG 18 2005

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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a medical supplies distribution and nursing registry. It seeks to employ the beneficiary as an administrative nursing supervisor and 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 on the ground that the record failed establish to that the proffered position is 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.

As provided in 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 (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a medical supplies distribution and nursing registry, established in 1999, with nine employees and a gross annual income of \$1 million. The petitioner indicated that it wanted to hire the beneficiary as an administrative nursing supervisor to perform the following duties:

- Screen and interview qualified nursing applicants and determine their abilities and qualifications based on education and experience.
- Maintain a pool of nurses available for scheduling and placement to hospitals and facilities.
- Maintain and update records.
- Communicate with clients (hospitals and facilities) on a daily basis to resolve questions.
- Use tact, diplomacy, flexibility, and communication skills motivating personnel and clients to implement her decisions.
- Supervise office personnel.

The minimum educational requirement for the proffered position, the petitioner indicated, was a bachelor's degree in nursing (B.S.N.). The beneficiary received a bachelor of science in nursing from Far Eastern University, in the Philippines, on April 20, 1985.

In a letter responding to the RFE the petitioner indicated that, in addition to the previously listed job duties, the administrative nursing supervisor would be responsible for:

- Planning and organizing orientation and training of registered nurses, licensed practical nurses, and certified nurse assistants.
- Performing evaluation of nurses' activities to ensure patient care, staff relations and efficiency of service.

The petitioner emphasized that the administrative nursing supervisor will directly supervise all registered nurses, licensed practical nurses and certified nurse assistants. Also submitted was the petitioner's organizational chart and a photocopy of the beneficiary's six-month interim permit from the State of California to practice nursing under the supervision of a registered nurse pending issuance of a license.

The service center determined that the proffered position was not a specialty occupation. The director found that the duties of the proffered position paralleled those of a nurse supervisor as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*,¹ and noted the *Handbook's* indication that such a position could be performed by a nurse with an associate degree in nursing. In the director's view, the duties of the proffered position and its level of responsibility did not indicate complexity or authority beyond that normally encountered in the occupational field. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹ "Head nurses or nurse supervisors direct nursing activities, particularly in hospitals. 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. They also may ensure that records are maintained and equipment and supplies are ordered." *Handbook*, 2004-05 edition, at 302.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

On appeal counsel asserts that the proffered position is a high-level administrative and supervisory nursing position requiring a B.S.N. degree, as discussed in an Immigration and Naturalization Service policy memorandum in November 2002 providing guidance for CIS on the adjudication of H-1B petitions for registered nurses (*H-1B Memorandum*), and therefore qualifies as a specialty occupation. Counsel contends that the proffered position accords with the DOL *Handbook's* description of a health services manager, an occupation which qualifies as a specialty occupation because it requires a baccalaureate or higher degree in one of several specific fields. Counsel refers to one case in which the AAO found a supervisory nursing position to be that of a health service manager requiring at least a bachelor's degree. Lastly, counsel asserts that no license is required for the proffered position.

The *H-1B Memorandum* referenced above provides guidance for CIS on the adjudication of H-1B petitions for nurses. In surveying the educational requirements for the nursing occupation, it notes that the minimum requirement for entry into the field as a registered nurse is a two-year associate degree in nursing (A.D.N.). Though a four-year B.S.N. can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The *H-1B Memorandum* indicates that certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – require a B.S.N. or equivalent knowledge, making them specialty occupations as well. In addition, some nurses in high-level management positions – "such as an upper-level 'nurse manager' in a hospital administration," according to the *H-1B Memorandum* – require a B.S.N. or higher degree, making them specialty occupations.

The position at issue in this case, however, is not an "upper-level nurse manager" within the contemplation of the *H-1B Memorandum*. The petitioner's organization and scale of operations bear no resemblance to the type of institution – a hospital administration – cited in the *H-1B Memorandum*. The petitioner's organizational chart places the "nursing administrator" position subordinate to the president, at the same level in the hierarchy as six other employees (secretary, treasurer, marketing, advertising & promotions, bookkeeper, accounts receivable, and medical biller) and above a second tier of employees. (The organizational chart lists more employees than the nine that were indicated in the original petition.) Directly subordinate to the "nursing supervisor" on the organizational chart are an unspecified number of nurses, LVNs (licensed vocational nurses) and CNAs (certified nursing assistants). While the proffered position may involve some first-line supervision of nurses, such duties do not enhance the position to that of an H-1B level nurse manager as referenced in the *H-1B Memorandum*.

Counsel's contention that the proffered position is that of a health services manager, as described in the DOL *Handbook*, is without merit. The *Handbook* describes the occupational category of medical and health services managers, in pertinent part, as follows:

The occupation, 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.

. . . . 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 at work, and an increased focus on preventive care. They will be called upon to improve efficiency in healthcare facilities and the quality of the healthcare provided

Large facilities usually have several assistant administrators to aid the top administrator and to handle daily decisions

In smaller facilities, top administrators handle more of the details of daily operations

Handbook, 2004-05 edition, at 55-56. The foregoing duties far exceed those of the administrative nursing supervisor at issue in this petition with respect to their scope of responsibility as well as the knowledge required to perform them. The proffered position is not that of a health services manager. Though counsel refers to one case in which he states the AAO ruled that a supervisory nursing position was akin to a health services manager requiring a bachelor's degree, counsel has provided no documentation or any further information about the case or the basis of the AAO's ruling. Thus, the record does not support counsel's assertion that the proffered position should be considered a health services manager.

There is no indication in the *Handbook* or in the *H-1B Memorandum* that nurse supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. Rather, it would appear that a two- or three-year associate degree in nursing is often sufficient educational background. Accordingly, the AAO determines that a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the minimum requirement for entry into the nursing position proffered by the petitioner, as required to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With respect to the second alternative criterion of a specialty occupation, there is no evidence in the record that a B.S.N. degree is common to the industry in parallel positions among similar organizations, as required for the subject nursing position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that its nursing position is so complex or unique that it can be performed only by an individual with a B.S.N. degree, as required to qualify it as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the record indicates that the proffered position is newly created. Therefore, the petitioner cannot demonstrate that it normally requires a B.S.N.

degree or its equivalent for the position. Accordingly, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the subject position are so specialized and complex that baccalaureate level knowledge – *i.e.*, a B.S.N. – is required to perform them. The *Handbook* indicates that nurse supervisor positions are commonly held by registered nurses without baccalaureate degrees. The duties of the proffered position, to the extent they are described in the record, do not appear so specialized or complex that they require knowledge associated with a B.S.N.

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

Since the record does not establish that the proffered position is a specialty occupation, the issue of the beneficiary's qualifications to perform the services of a specialty occupation is inconsequential to the disposition of this appeal.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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