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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public Copy

MAY - 7 2001

File: SRC 99 116 53464 Office: Texas Service Center Date:

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)

IN BEHALF OF PETITIONER: [Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care facility with 990 employees and \$112,409,815.00 gross annual income. It seeks to employ the beneficiary as a telemetry nurse for a period of three years. The director determined the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel argues that the offered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

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), provides in part for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary holds a Bachelor of Science in Nursing degree from Wesleyan University-Philippines in Cabanatuan City in the Philippines and is licensed in the State of Florida. It is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the offered position.

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

an 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.

The duties of the offered position are described as follows:

Specifically, the Telemetry Nurse is responsible for the direct and indirect total nursing care of the assigned patients, as well as the supervision of assigned personnel. The position requires intimate knowledge of both department and hospital policies and procedures relevant to the delivery of nursing care. Additionally, interpretive skills, frequent interactive and consultive associations, along with management and supervisory skills are inherent in the position. The ability to retrieve, communicate, or otherwise present information, in a written, auditory or visual fashion is essential. The Telemetry Nurse should also have the ability to deal with physical demands such as lifting over 50 pounds.

Additionally, the telemetry nurse will be responsible for:

1. Assessing and prioritizing patient care needs according to acuity;
2. Delegating patient care responsibilities to assigned team members based upon patient needs and competencies;
3. Administering medications and therapies in accordance with physician's orders;
4. Assessing each newly admitted patient;
5. Identifying patient's problems utilizing nursing diagnosis and initiating plan of care according to identified patient needs;
6. Communicating ongoing patient care needs with team members as identified through patient assessment;

7. Solicit feedback from team members as to patient's status;
8. Check patient medical records for changes in physician's orders and report any pertinent changes in patient's condition to physicians;
9. Perform physical assessment with an advanced expertise with an ability to assess a range of conditions identified by physical, monitor and/or equipment readings;
10. Assist physicians with radiological, intubation, caterization, thoracentesis, paracentesis, cardioversion, bronchoscopy and suturing procedures.

The petitioner explains that the telemetry nurse will work in a unit designed to be a "close-monitor" facility of patients with a high index of suspicion of major risk, or suspicion of critical rhythm disturbances (related to the heart). These patients require immediate treatment or change in treatment regarding unstable, progressive or pre-infarction angina, acute myocardial infarction, the onset of complicated rhythm disturbance of the heart, and post-operative heart surgery (including pacemaker implants, pacemaker evaluation and verification).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

Counsel asserts that the Department of Labor has determined that the offered position is a specialty occupation. However, a reference in the Department of Labor's (DOL) Dictionary of Occupational Titles (DOT), Fourth Edition, 1977, standing alone, is not enough to establish an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides

specific and detailed information regarding the educational and other requirements for occupations.

In these proceedings, the duties of the position are dispositive and not the job title. The offered position appears to combine the duties of a registered nurse with those of a nurse supervisor. DOL's Handbook, 2000-2001 edition, at pages 210-212 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse or as a nurse supervisor. The three educational paths to nursing are as follows: Associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. The Handbook further states that:

There have been attempts to raise the educational requirements for an R.N. license to a bachelor's degree and, possibly, create new job titles. These changes, should they occur, will probably be made State by State, through legislation or regulation...In fact, many career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is usually necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

It is further noted that the claim that 27 of the petitioner's 39 telemetry nurses hold bachelor's degrees does not persuasively establish that a baccalaureate degree is normally required by the petitioner for employment in the offered position.

Finally, counsel cites a Service adjudications memorandum, HQ214h-C (November 17, 1995, and argues that the Service specifically recognized that professional registered nurses may be classified in H-1B status. Such memo states in part as follows:

Situations may arise, however, where a petitioner may be able to establish that it, in the past, has hired as registered nurses only those possessing a bachelor's degree or higher. (Emphasis added). In these situations it may be possible for the petitioner to argue that its nursing positions require a registered nurse with a baccalaureate degree. This decision must be made on a case-by-case basis after examining the petitioner's past hiring practices and the hiring practices of similar hospitals.

In the present case, the petitioner's past hiring practices do not persuasively establish that it requires a baccalaureate or higher degree in a specialized area for employment as a telemetry nurse; nor has the petitioner established that the duties of the offered position are so complex that they can be performed only by an individual with a degree. In view of the foregoing, it is concluded

that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of regulations.

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.