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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



File: SRC-99-122-52417 Office: Texas Service Center

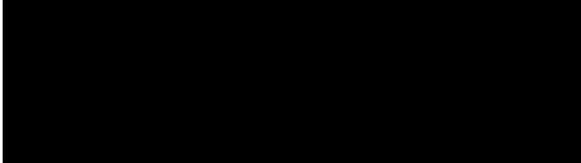
Date: MAY 30 2001

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)

Public Copy

IN BEHALF OF PETITIONER:



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 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 a gross annual income of \$112,409,815. It seeks to employ the beneficiary as a medical-surgical nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

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.

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 proffered position are described in pertinent part as follows:

...[T]he specific duties of the Medical/Surgical Nurse are specialized and complex. Further, the duties of this position are substantial because it requires the nurse to use advanced specialized care nursing procedures and technology within the facility's specialized Medical/Surgical Unit. This unit is responsible for providing comprehensive quality care in a specialized setting of the Operating and Recovery Room. The Medical/Surgical Nurse is responsible for the direct and indirect total nursing care of all assigned patients, as well as the supervision of assigned personnel. The position requires interpretive skills, consultative associations, as well as management and supervisory skills. A Medical/Surgical Nurse must have the ability to use critical judgement and analytical skills, as well as in-depth knowledge of the technology.

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 proffered 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 proffered position is a specialty occupation. However, a reference in the Department of Labor's 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 proffered position appears to combine the duties of a registered nurse with those of a respiratory therapist and a licensed practical nurse. The 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. 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.

The Handbook at pages 213-214 also finds no requirement of a baccalaureate degree in a specialized area for employment as a respiratory therapist. Training is offered at the postsecondary level by medical schools, hospitals, colleges and universities, trade schools, vocational-technical institutes, and the Armed Forces.

The Handbook at page 227 also finds no requirement of a baccalaureate degree in a specialized area for employment as a licensed practical nurse. All States require the LPN to pass a licensing examination after completing a State-approved practical nursing program. A high school diploma is the usual requirement for entry, but some programs accept people without a diploma.

The record includes a list that is described as "some of the more important functions of the Medical/Surgical Nurse." Two such functions "Perform insertion of urinary catheters" and "Collecting and labeling specimens for diagnostic lab analysis" are included in the list of the licensed practical nurse's basic bedside care duties. Another such function "Initiating intravenous (I.V.) therapy" may be performed by the licensed practical nurse in States where the law allows. The category of registered nurse called

"nursing home nurse" is described as being able to "perform difficult procedures such as starting intravenous fluids." In addition, the category of registered nurse called "hospital nurse" is described in part as being assigned to such areas as surgery. Another duty of the proffered position "Administers oxygen therapy per physician's order" is included in the list of the respiratory therapist's duties. As such, it has not been persuasively established that the duties of the proffered position are so complex that they can be performed only by a person with a degree. It is further noted that the petitioner's claim that 56% of its medical surgical nurses hold bachelor's degrees does not persuasively establish that a baccalaureate degree is normally required by the petitioner for employment in the proffered 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 registered nurse. Nor has the petitioner established that the duties of the proffered 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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.