

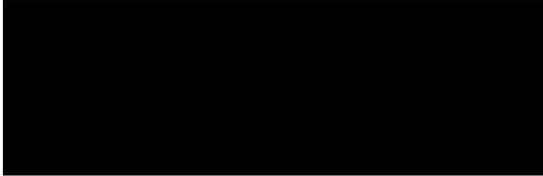


102

U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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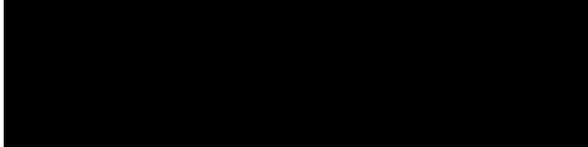
11 APR 2002

File: EAC-01-067-53734 Office: Vermont 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:



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, 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 owns and manages health care facilities. It has 2500 employees and a gross annual income of \$130 million. It seeks to employ the beneficiary as an emergency services coordinator for a period of two 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 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.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" 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.

In the initial petition, counsel submitted a listing of the beneficiary's proposed duties and additional evidence of the beneficiary's qualifications.

The director found the petitioner's initial evidence deficient and requested that the petitioner submit additional evidence to show that the proffered position was a specialty occupation. Specifically, the director requested a detailed statement describing the beneficiary's proposed duties and responsibilities.

In response, counsel stated that the duties of the proffered position are so complex that a baccalaureate degree is required. Counsel further stated that the Department of Labor's (DOL) Dictionary of Occupational Titles (DOT) indicates that the proffered position is a specialty occupation.

The director denied the petition, stating that the nursing profession does not require a baccalaureate degree in nursing for positions such as the proffered one.

On appeal, counsel reiterates the arguments that he made in response to the director's request for additional information. Counsel also submits an opinion from an industry expert.

Counsel does not present persuasive evidence to overcome the director's decision to deny the petition. In evaluating whether the offered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. 214.2(h)(4)(iii)(A) will be considered separately below.

**I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. 214.2(h)(4)(iii)(A)(1)**

Counsel asserts that the DOL has determined that the proffered position is a specialty occupation. However, a reference in the DOL's DOT, Fourth Edition, 1977, standing alone, is not enough to

establish that 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 DOL 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 view of the foregoing, the Service often looks to the DOL's Handbook when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2002-2003 edition of the Handbook, the DOL states the following about the training and educational requirements for registered nurse/supervisory 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, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

. . . some 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.

Upon review of the proposed duties, it appears that the proffered position is primarily that of a registered nurse with supervisory duties. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specialized area is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

In comparing the duties of the proffered position to the duties of a registered nurse or head nurse/supervisor in the Handbook, the

Service contends that the proffered position is no more complex or sophisticated than a general registered nurse position.

The petitioner states that the beneficiary would be responsible for:

- (1) Directs medical emergency service program;
- (2) Coordinates activities of persons involved in transportation & care of patients requiring emergency medical assistance;
- (3) Arranges for emergency medical facilities, maintains records of facilities & personnel, and periodically inspects facilities to ensure capability of meeting patients['] emergency needs;
- (4) Maintains telecommunication contact with mobile and stationary units comprising emergency service network to coordinate activities of personnel, enlist services of other protective agencies;
- (5) Maintains records of emergency medical service activities for coordination with records prepared by cooperating institutions, to provide data for evaluation of program;
- (6) Prepares reports stating progress, problems and plans for future programs.

In the Handbook, the DOL states that job duties for a registered nurse or a head nurse/supervisor include directing nursing activities; planning work schedules and assigning duties to nurses and aides, providing or arranging for training, and visiting patients to ensure the proper delivery of care. They also may see that records are maintained and supplies and equipment are ordered. The beneficiary's job description parallels the job description of any registered nurse. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The proffered position, while in a particular unit of the medical center, does not entail more complex duties than the position of any registered nurse.

- II. 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 - 8 C.F.R. 214.2(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The DOL's conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. Regarding information from professional nursing associations, neither counsel nor the petitioner presents evidence that any nursing association has attested that a baccalaureate or higher degree is a minimum entry requirement for this occupation.

The Service also notes that [REDACTED] Associate Professor of Nursing at Mercy College in New York, states, in part, that: "At most health care institutions in the U.S., the requirements for an Emergency Services Coordinator services usually include a BSN or its equivalent and it has become an industry standard that an Emergency Services Coordinator requires a Bachelor of Science Degree in Nursing." One letter is insufficient evidence of an industry standard. The writer has not provided evidence in support of his assertions. In addition, the writer has not indicated the number or percentage of emergency services coordinators who hold such degrees.

Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The petitioner had previously submitted reasons why a baccalaureate degree in nursing should be the minimum requirement for the proffered positions. Counsel states, in part, that:

Not only must the professional possess knowledge gained through a bachelors's degree in nursing, but the said professional is required to perform "managerial functions" such as coordinating personnel involved in rendering emergency services, maintaining

telecommunications contact with all emergency units, maintenance of records emergency medical services provided by individual cooperating institutions [sic].

Although the petitioner has stipulated that a baccalaureate degree is required for the proffered position, the Service cannot assume that the additional training is solely related to the alleged complexity of the position. Similarly, there is no evidence that someone who does not possess a bachelor's degree would be unable to successfully handle the duties of the emergency services coordinator. As stated in a previous section, nothing in the job description for the proffered position indicates that the position of an emergency services coordinator at Seniors Management is either complex or unique, which would require the holder of the position to have a baccalaureate degree in a specialized field of study.

**III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. 214.2(h)(4)(iii)(A)(3)**

Counsel stated, in part, that due to the number of its facilities and the constant changes in personnel requirements, one position it must provide for is that of an emergency services coordinator, a position which requires a bachelor's degree in nursing.

The record contains no evidence that Senior Management has such degree requirement for individuals employed in similar positions as the required one. As such, there is nothing in the record to demonstrate that Seniors Management requires, rather than prefers, a bachelor's degree as part of the hiring process.

Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

**IV. The nature of the specific duties are so specialized and complex that 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 argues that the position of an emergency services coordinator is a "professional level" position. Counsel maintains that the duties of the emergency services coordinator involve managerial functions in addition to specialist responsibilities which require theory, knowledge, and skills normally gained by the attainment of at least a baccalaureate degree in nursing.

The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Although counsel

contends that the position of an emergency services coordinator requires the attainment of a baccalaureate or higher degree due to the complex nature of the position's specific duties, counsel does not present any evidence in support of his assertions. Furthermore, although counsel refers to an emergency services coordinator as a "professional level" position, counsel does not demonstrate that the nursing industry is comprised of "professional level" and "entry-level" positions.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.

In this case, the petitioner has not shown that the practice of the proffered emergency services coordinator requires the attainment of a bachelor's degree in a specific specialty.

Beyond the decision of the director, the petitioner's labor condition application was certified on January 23, 2001, a date subsequent to December 16, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that 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. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.