



U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-01-105-51321

Office: Vermont Service Center

Date: 10/19/2007

IN RE: Petitioner:
Beneficiary:



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:



Public Copy

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 is a healthcare contractor and placement agency with approximately 60 employees and an approximate gross annual income of \$4 million. It seeks to employ the beneficiary as a clinical instructor 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 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 letter from the petitioner's president 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 documentary evidence that "in your company and industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered."

In response, counsel submitted information from the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) indicating that adult education teachers require a baccalaureate degree. Counsel also submitted a list of the beneficiary's proposed duties.

The director denied the petition, stating that the proffered position was primarily that of a registered nurse, an occupation that does not require a baccalaureate degree.

On appeal, counsel reiterates the arguments that he made in response to the director's request for additional information.

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)

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. 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 perform the duties of a clinical instructor.

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. 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 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.

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.

In a letter dated July 20, 2001, counsel states, in part, as follows:

Because of the complexity of their duties and responsibilities . . . a baccalaureate degree has become the standard educational requirement for adult education teachers, and in some cases, a master's or doctoral degree is now required. In the field of nursing, a B.S.N. is the prerequisite for admission to a teaching or clinical specialization.

Although counsel states that a baccalaureate degree is required for the proffered position, the record contains no evidence in support of such claim. 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 instruction duties. As stated in a previous section, nothing in

the job description for the proffered position indicates that the position of a clinical instructor at Professional Healthcare Associates 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 states on appeal that the petitioner requires a baccalaureate degree in nursing or a medical-related field for the proffered position. The petitioner, however, has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as nursing, for the offered position. As such, there is nothing in the record to demonstrate that Professional Healthcare Associates 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)

As discussed in a previous section, the Service is not persuaded to find that the proffered position at Professional Healthcare Associates is so complex or unique that it can be performed only by an individual with a degree.

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 clinical instructor 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 clinical instructor 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 clinical instructor requires the attainment of a bachelor's degree in a specific specialty.

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.