

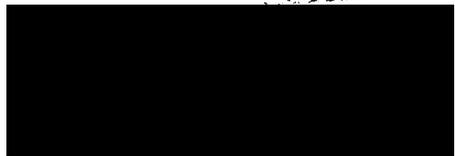


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



File: EAC-01-005-51155 Office: Vermont Service Center

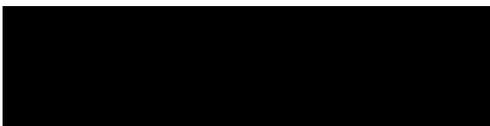
Date:

11 APR 2002

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:



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 skilled rehabilitation and nursing center with 200 employees and a gross annual income of \$12 million. It seeks to employ the beneficiary as a coma unit nurse 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 letter from the petitioner's administrator 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." The director also requested information about the petitioner's past employment practices for similar positions, such as the number of other individuals employed in similar positions and their educational backgrounds.

In response, counsel submitted various articles regarding a nursing shortage in the United States and a detailed statement indicating why a baccalaureate degree is required for the proffered position. Counsel also stated that the proffered position is an administrative position and therefore, in accordance with the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), qualifies as a specialty occupation.

The director denied the petition, citing that while the beneficiary may have a degree, the position of a registered nurse does not have a degree requirement.

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.

The Handbook notes that a bachelor's degree is often necessary for administrative positions. However, despite counsel's claim to the contrary, there is scant evidence to conclude that the proffered position is primarily an administrative position. According to the beneficiary's job description, the proffered position involves the "total nursing care in the coma unit program." Although the proposed duties may include some administrative tasks, it appears that the proffered position is primarily that of a registered nurse in the coma unit. 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:

. . . total nursing care in the coma unit program, education of nursing and coma unit staff to assure proper implementation of the coma rehab plan of care,

establishing policies and procedures for coma rehab program and its implementation, update of policies and procedures as needed, establishing standards of care for the program and behavioral objectives and contacts with patients as well.

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, 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.

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 position. The petitioner states, in part, that:

The acuities of the patients coming in through these specialty units are very high. In other words the residents are sicker and sicker requiring extensive assessments, treatments and interventions by the sub acute nurses.

For that reason we feel the nurses that come to work in the sub acute unit should be more skilled and credentialed. A baccalaureate degree would hopefully insure that at least a minimum standard of assessment skill is there by nature of their enhanced education in the area of:

- | | |
|-----------------------------------|-----------------------|
| * Neurological Assessment | Oral Assessment |
| * Cardiac Assessment | R e s t o r a t i v e |
| | Potential Assessment |
| * Gastrointestinal Assessment | Visual Assessment |
| * Integumentary System Assessment | Hearing Assessment |
| * GU Assessment | R e s p i r a t o r y |
| | Assessment |
| * Mental Status Assessment | Pain Assessment |

Although the petitioner states that a baccalaureate degree would "hopefully insure that at least a minimum standard of assessment skill is there" because of education in the above listed areas, 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 duties of the subacute care unit. As stated in a previous section, nothing in the job description for the proffered position indicates that the position of a coma unit nurse at [REDACTED] 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)

In his letter dated April 16, 2001, counsel states, in part, that:

To date, we have been unsuccessful in recruiting B.S.N. nurses to provide high level of care required for this type of patients. The opening of the unit is dependent on the facility's ability to secure baccalaureate level nurses.

Counsel states on appeal that the petitioner requires a bachelor of science degree in nursing for the proffered position.

The record contains a September 19, 2000 letter from Esther [REDACTED], the Administrator of [REDACTED]. Ms. [REDACTED] states that "[t]he position of a **coma unit** nurse requires the services of someone in a specialty occupation who holds a bachelor's degree as necessitated by the **theoretical** and **practical** application of a body of specialized knowledge and mandated by the nature of the tasks, demands, duties and actual requirements which are concomitant with the nature of the position being offered." [REDACTED] has not, however, submitted any documentary evidence to support [REDACTED] claim.

Although the director previously requested a listing of [REDACTED] employees in similar positions and evidence of their educational backgrounds, [REDACTED] center refused to provide the requested information. Therefore, there is nothing in the record to demonstrate that [REDACTED] 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 [REDACTED] is so complex or unique that it can be performed only by an individual with a degree. Regarding whether 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, the petitioner maintains that the curriculum for a bachelor of science degree in nursing is evidence that critical care nursing requires individuals with bachelor's degrees.

Counsel had previously submitted a document from the petitioner in which part of the curriculum for a bachelor of science degree in

nursing is listed, indicating that such courses better prepare an individual for a position such as the proffered one and are only offered in a B.S. degree program. Neither counsel nor the petitioner, however, submits any evidence to support such claim. The unproven assertions of counsel are not evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 note (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, 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, supra.

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.