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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-01-105-51332 Office: Vermont Service Center

Date: 24 APR 2002

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care contractor/placement agency with more than 60 employees and an approximate gross annual income of \$4 to \$5 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.

8 C.F.R. 214.2(h)(4)(ii) 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.

The director determined that the proffered position does not require the services of an individual with a Bachelor of Science degree in Nursing (BSN).

On appeal, counsel states that the petitioner is a health care supplementary staffing agency providing RN, PT's, and other health professional services on a long term contract basis with hospitals, nursing homes, and clinics. Counsel states that the petitioner currently employs in excess of 150 RN's and expects to gross between \$8 and \$9 million in 2001. Counsel asserts that the petitioner's service agreements with its health care clientele require that it continually provide in-service education to its health care professional employees. Counsel states that the petitioner must employ clinical nurse instructors in-house who will provide this instruction both at the petitioner's location and also at the actual sites where the RN employees are deployed. Counsel asserts that the petitioner "could have" as many as 20 to 30 staff employees working as staff nurses at some medical facilities.

Counsel contends that the skills involved in such instruction are specialized and complex in nature and, therefore, require the

incumbents to hold at least a BSN degree in nursing or another medical-related field.

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:

- * Responsible directly to the company's V.P. Nursing for teaching, orienting and updating professional nursing skills of over 100 registered nursing employees assigned to various healthcare facilities under long term contracts with the petitioner.
- * Provide fundamental and advance[d] education in anatomy, physiology, medical, surgical, psychiatric, pediatric, orthopedic and community health nursing subjects as practiced in the U.S.;
- * Demonstrate fundamental and advance[d] nursing procedures and function as class coordinator;
- * Conduct bedside teaching and ongoing inservice instruction on various health topics;
- * Assist in development of nursing care plans, evaluate RN employees' performance by conducting regular test[s], reviews and monitoring/feedback sessions;

- * Conduct preparatory examinations and reviews for preparing for NCLEX examinations; and
- * Participate in identifying, developing and monitoring quality assurance indicators, code compliance procedures and special projects.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding.

The petitioner asserts that the proffered position most closely resembles that of an adult and vocational education teacher. In support of this assertion, the petitioner submits the section of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2000-2001 edition, describing the duties and training required for a position as an adult and vocational education teacher. The petitioner also submits the section of the Handbook describing the duties and training required for a position as a registered nurse.

The DOL's Occupational Outlook Handbook, 2002-2003, defines teaching positions differently from previous editions of the Handbook. *Adult vocational-educational teachers* are now redefined as *postsecondary vocational-technical education teachers* and are grouped under the category, "Teachers - Postsecondary." According to the Handbook at page 197, adult vocational-technical education teachers provide instruction for occupations that do not require a college degree, such as welder, dental hygienist, x-ray technician, auto mechanic, and cosmetologist. Regardless of the title, the Service is not persuaded to classify the proffered position as that of an adult or postsecondary vocational-technical education teacher. This is because the duties of the proffered position do not appear to conform to those of adult education teachers. As is clearly stated in the Handbook, adult or postsecondary vocational-technical education teachers provide instruction for technical occupations such as welder, dental hygienist, x-ray technician, auto mechanic, and cosmetologist. The proffered position appears to be that of a registered nurse who provides in-service training to staff nurses placed by the petitioner at various hospitals, nursing homes, and clinics in the United States.

A review of the Handbook at pages 268-270 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.

It is noted that the petitioner is seeking to retain the services of a registered nurse whose nursing education and professional work experience have all taken place in the Philippines. The petitioner has not provided any explanation as to why it wishes to employ a registered nurse with only foreign education and work experience to provide "fundamental and advanced education in anatomy, physiology, medical, surgical, psychiatric, pediatric, orthopedic and community health nursing subjects as practiced in the U.S." (Emphasis added.)

In view of the foregoing, it is concluded that the petitioner has not shown that a baccalaureate degree in a specialized area is normally the minimum requirement for entry into the position.

Although the petitioner states that its nursing instructors are required to have a BSN degree, the petitioner has not submitted any evidence such as a job advertisements in support of its statement. Thus, 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.

The petitioner also asserts that the degree requirement is common to the industry for parallel positions in similar organizations. In support of this assertion, the petitioner submits a photocopy of a job advertisement clipped from a newspaper. Pascack Valley Hospital in Westwood, New Jersey, is seeking to employ an "instructor" with a BSN degree, MSN preferred, and medical/surgical and educational experience. The job advertisement gives no indication as to the duties of the position or what type of instruction is involved. Nor does the ad give any information regarding the size and scope of the operations of Pascack Hospital. Additionally, one job advertisement does not exemplify an industry standard. As such, this advertisement is not sufficient to show that similar firms require the services of such individuals in parallel positions.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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.