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U.S. Department of Justice

Immigration and Naturalization Service

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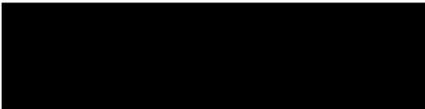
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-99-250-52721 Office: Nebraska Service Center

Date: APR 29 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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a sub-acute rehabilitation and nursing care facility with 150 employees and an approximate gross annual income of \$4.9 million. It seeks to employ the beneficiary as a patient care unit supervisor 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 and additional documentation.

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 denied the petition based on a conclusion that the petitioner had failed to show that a Bachelor of Science degree in Nursing (BSN) is the usual requirement for parallel positions among similar organizations. On appeal, counsel argues that the denial of the petition is arbitrary and capricious and an abuse of discretion. Specifically, counsel argues that the degree requirement is common to the industry in parallel positions among similar organizations. Counsel further argues that the proffered position requires the services of a member of the professions due to the complexity of its duties.

Counsel's arguments on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the proffered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Directs, plans, and organizes activities in nursing services for nursing home patient care units to satisfy patient needs in accordance with physician, hospital, and

administrative procedures. Engages in some direct patient contact and coordination of activities with other patient care units.

In response to a Service request for additional evidence, the petitioner described the duties of the position in pertinent part as follows:

Direction of others - 30 %

- * Participates in hiring, directing and assigning nursing staff, [c]ounsels and evaluates nursing personnel performance using quality assurance standards and established policies and procedures.
- * Assigns resident care responsibilities and supervises nursing subordinates on scheduled shift.
- * Assists with scheduling staff as directed by the Director of Nursing.

Delivery of Care - 35%

- * Plans nursing interventions for each resident, based upon individual needs and monitors implementation of the approaches.
- * Monitors compliance with quality assurance standards, restorative programs and federal, state and local guidelines by auditing records and making frequent rounds.
- * Administers direct resident care, when necessary; [p]rovides treatments, administers medications, provides resident education and training, and oversees daily care routines.
- * Institutes appropriate emergency interventions.
- * Ensures that effective infection control practices are followed and that potential environmental hazards are identified.

Support of Others - 15%

- * Coordinates and implements physician services for each resident.
- * Assists physicians with rounds and examinations.

- * Identifies staff development needs; [a]ssists with implementation of a comprehensive staff development program . . .
- * Coordinates and assists the interdisciplinary team with resident discharge planning.

Reporting of Information - 20%

- * Communicates with families about changes in condition, progress or lack of progress, care plans, incident reports, and discharge plans.
- * Communicates with physician during rounds and as indicated; [n]otifies physician of any changes in condition, reactions/responses to medications, treatments or restorative programs, progress or lack of progress of care programs, and results of incidents/accidents.
- * Supervises and maintains accurate and informative records for each resident.
- * Evaluates all resident charts, including monthly summaries, and monitors physician orders and records for accuracy and consistency.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Service does not agree with counsel's argument that the proffered position of patient care unit supervisor (nurse supervisor) would normally require a BSN degree. A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 268-270 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a nurse supervisor. 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.

Counsel argues that the position of patient care unit supervisor is an administrative position which the Handbook recognizes as an exception to the general classification of registered nurse positions. However, the description of the proffered position's duties demonstrates that such position is not exclusively administrative in nature as it includes elements involving direct patient care, supervision of the nursing staff within a nursing care unit, management of daily activities within the unit, and interaction with other department and unit supervisors employed by the petitioner.

A review of the Handbook finds no support for the argument that the offered position is a specialty occupation based on the beneficiary's supervision of other nurses and performance of associated duties considered to be administrative in nature. The Handbook specifically notes at page 268 that a nurse supervisor's duties include both administrative and management functions such as planning work schedules, assignment of duties, provision of training programs, records maintenance, and ordering of supplies and equipment. As the record does not demonstrate that the proffered position is an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary based on the supervisory duties of the position.

Counsel argues that the DOL has determined in its Dictionary of Occupational Titles (DOT) that the position of nurse supervisor

requires a bachelor's degree. 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 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.

Counsel cites a previous decision by the Administrative Appeals Office (AAO) in which the position in question was found to be similar to that of a health service manager, an occupation which normally requires a master's degree in a specialized and related area. While 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. The decision cited by the director is not a precedent decision.

Counsel states that the AAO has previously held in Matter of Sun, 12 I&N Dec. 535 (Reg. Comm. 1967), that the position of hotel manager is a profession based on the complexity of the duties involved. Counsel contends that the petition should be approved since the duties of the proffered position of nursing care unit supervisor are essentially the same as those of a hotel manager, including the following: personnel administration; establishing performance standards; allocating funds; planning budgets; authorizing expenditures; delegating authority; controlling and supervising performance of personnel; and insuring efficient and profitable operation of the hotel. While the supervisory duties of the proffered position bear some resemblance to those of a hotel manager, or indeed to those of any other supervisory position, the overall duties of a hotel manager are obviously very different from that of a nurse supervisor. Therefore, counsel's contention that the petition should be approved based on the finding in Matter of Sun is not persuasive.

Counsel makes reference to the text of an interview with [REDACTED] a nursing supervisor for the NBC television network, which was previously submitted by the petitioner. Counsel asserts that [REDACTED] states in the interview that the minimum entry requirement

for the position of a nursing supervisor is a bachelor's degree. A review of the text of the interview reveals that [REDACTED] does not state that a position as a nurse supervisor requires a BSN degree. Rather, she describes her own professional credentials as follows:

I'm an RN and I have a bachelor's in healthcare management. I'm certified through the American Association of Occupational Health Nurses as an occupational health nurse-specialist.

As such, the interview does not support a finding that a BSN degree is a minimum requirement for entry into the field.

It is concluded that the petitioner has failed to show that a BSN degree is the normal minimum requirement for employment as a nurse supervisor.

Although the petitioner states that it normally requires a baccalaureate degree in nursing for the proffered position, the petitioner has not submitted any documentary evidence to demonstrate that it requires a BSN degree as part of the hiring process, such as copies of previous job announcements or public advertising for open positions.

Counsel asserts, on appeal, that the degree requirement is common to the industry in parallel positions. Counsel points out that the petitioner has previously submitted letters addressing this question from [REDACTED]

[REDACTED] of Advanced Home Health Care. Counsel argues that these letters represent "expert testimony" and should be accepted as such by the Service. In support of this argument, counsel cites *Moore's Federal Practice 702.3 Advisory Committee's Note*; *Moore's Federal Practice and Procedure*, 1992, p. 320; *Habacker v. Copperloy Corp*, 893 F.2d 49 (3rd Cir. 1990); and *Rocky Mountain v. Bell Helicopters*, 805 F.2d 907,919 (10th Cir. 1986). (These cites have to do with the acceptance of expert testimony by the Service and by federal courts.)

In their advisory opinion letters, [REDACTED] both state:

I work with and supervise a wide variety of nurses in supervisory positions and am quite familiar with the nature of a [n]urse, [p]atient [c]are [u]nit [s]upervisor position. I wish to confirm that a [b]achelors [d]egree is very common for this type of position in this field and that this position is so complex and specialized that it requires a [b]achelors [d]egree to perform the functions of the position.

Two letters do not exemplify the industry standard. Additionally, the attention of the Service is drawn to the fact that the same paragraph is incorporated into both letters. It appears that this portion of both letters may have been drafted by the same individual. Therefore, the Service must question whether these "advisory opinion letters" represent the true testimony of the avowed authors. The Service may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm., 1988). In this case, the Service is not persuaded to accept the letters from Ms. Vista and Ms. Galang as "expert testimony" for the reason cited above.

The petitioner has also submitted numerous job ads for nursing positions and general managerial positions collected from newspapers and internet employment websites. The majority of the advertised jobs are not parallel to the proffered position. Twenty jobs are for positions in hospitals, not in a nursing home. Ten jobs do not involve managerial or supervisory duties. Six jobs do not specify that a BSN degree is required for the position. Twenty jobs are general managerial positions with a variety of employers and as such cannot be compared to the position of nurse supervisor. Four of the advertisements do not contain enough information to determine whether a BSN degree is required. The remaining jobs appear to be administrative in nature and a master's degree is required or strongly preferred. As such, these job advertisements do not support a finding that the degree requirement is common to the industry in parallel positions among similar organizations.

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 petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the 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.

ORDER: The appeal is dismissed.