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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: WAC-00-112-52071

Office: California Service Center

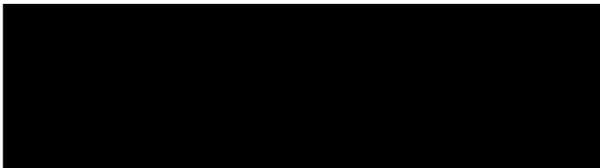
Date: 18 DEC 2007

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 that 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 that 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 that 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 and a subsequent motion to reopen and reconsider were both denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a health care facility with 8 employees and a stated gross annual income of \$400,000. It seeks to employ the beneficiary as a registered nurse 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 concluded that the petitioner had failed to establish that a baccalaureate degree in a specific specialty is a standard minimum requirement for the job offered or that the degree requirement is common to the industry in parallel positions among similar organizations. On appeal, counsel argues that the originally proffered position is an administrative position, and as such requires a bachelor of science degree in nursing. Counsel states that the beneficiary has since been promoted to the position of program director and submits a corresponding I-129 petition, labor condition application, and supporting documents.

The Service does not agree with counsel's argument that the originally proffered position requires a bachelor of science degree in nursing. 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 a letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

1. Conducts initial nursing assessments of all participants; provides ongoing assessments, monitors health problems and develops and implements nursing care plans.
2. Monitors vital signs for each participant, including blood pressure, on a regular basis.
3. Assists participants i[n] maintaining optimum health, coordinating and supervising health screening programs, assists with prescribed medications, and giving first aide, as required.
4. Provides health counseling to participants and their families on an individual and group basis.
5. Develops and provides health related training to staff, volunteers and families.
6. Refers participants and their families to appropriate community health care agencies of [sic] facilities, acts as liaison with such organizations.
7. Responsible for the coordination of personal-care activities of all participants. Supervises the program aides in their personal care duties and oversees the staff participating in personal care giving, while also participating as a personal caregiver.
8. Complete quarterly progress notes, and six-month reassessments on all participants.
9. Acts as nursing consultant for the staff and acts as primary liaison with the participant's physician as Director/Social Worker as a [sic] appropriate.
10. Maintains current, written case management records; prepare a variety of written reports and correspondence.
11. Participates in the daily activities of the center, conducting classes, assisting with meals and clean-up; may accompany patients to and from the center, or to the physician or hospital on a relief or emergency basis.

12. Responsible for activities of daily living training and continence training.
13. Serves as a member of the multi-disciplinary team and participates in the initial assessments, care planning, and on-going re-evaluation of the participants' needs.
14. Coordinates timing of therapist's services for participants as determined by care plans.
15. Makes home visits, and in-home assessments, as needed.
16. Represents the agency in contacts with human service, health and community organizations, groups and individuals, and with the public; may attend community meetings, particularly those related to aging.
17. Assists with marketing, public relations and fund raising efforts of the agency.
18. Maintains data collection, time studies and all reports required by the agency.
19. Responsible for supervision of all activities related to medications; to include destruction of drugs, maintenance of drug supplies and medications, supervision of all drugs stored at the center, and keeping of a record which lists all prescription medications stores overnight.
20. Supervises continence training program.

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 a registered nurse would normally require a bachelor's degree in nursing or a related field. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 Edition, at pages at pages 268-270, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a 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.

Counsel argues that the offered job 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 and other staff, management of daily activities, maintenance of medical records, and interaction with patients, their families, and the community at large.

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 at page 268 specifically notes 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 beneficiary's 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.

The petitioner has failed to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the offered position. The petitioner has not submitted any evidence to demonstrate that the degree requirement is common to the industry in parallel positions among similar organizations. Finally, the petitioner has failed to establish that 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 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 statements put forth by counsel on appeal regarding the fact that the beneficiary was no longer employed in the originally proffered position, but rather was currently employed in the position of program director are acknowledged. The record shows counsel submits a corresponding I-129 petition, labor condition application, and supporting documents listing the new position of program director. Upon initial submission, both the original I-129 petition and corresponding labor condition application specified that the petitioner would employ the beneficiary as a registered nurse. This represents a substantial change in the proffered position as listed on the initial I-129 petition at the time of its filing. In such a case, the regulations require the petitioner to file an amended or new petition, with fee, to the office where the original petition was filed to reflect these changes. In the case of an H-1B petition, this requirement includes obtaining a new labor condition application from the Department of Labor. 8 C.F.R. 214.2(h)(2)(i)(E).

While the record does contain a new certified labor condition application listing the job offered as program director, the petitioner has failed to submit an amended or new petition with the corresponding fee containing an accurate listing of the newly proffered position. In light of the fact that the petitioner currently employs the beneficiary as its program director rather than as a registered nurse, both the original labor condition application and the petitioner's statement of compliance cannot be considered as valid within the meaning of 8 C.F.R. 214.2(h)(4)(iii)(B). In addition, it must be noted that the petitioner

has effectively eliminated any further consideration of the original petition by acknowledging that the proffered position listed in such petition was no longer being offered to the beneficiary.

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.