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U.S. Department of Justice

Immigration and Naturalization Service

Public Copy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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[redacted]

File: EAC 01 038 50901 Office: VERMONT SERVICE CENTER Date: JAN 29 2002

IN RE: Petitioner: MERCY HEALTH PARTNERS
Beneficiary: RHEA LIBUNAO

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:

[redacted]

identifiers deleted to prevent clearly unwarranted invasion of personal privacy

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 Director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner runs a hospital as well as health care and nursing home centers, and has approximately 1229 employees and a gross annual income in excess of $270,000,000. It seeks to employ the beneficiary as a registered nurse for a period of three years. The director denied the petition finding that the proffered position was not a specialty occupation.

On appeal, counsel submits a brief. Counsel states, in part, that the position of a registered nurse meets the qualifications for classification as a specialty occupation.

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 are 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 for the petitioner emphasized that the offered position was for a "professional nurse," not for an entry-level nurse, as the beneficiary would be working within a particular unit. The director, however, denied the petition on the basis that the petitioner did not establish that it is an industry-wide standard to hire only individuals with a bachelor's degree in a specific specialty for the proffered position.

On appeal, counsel states that the proffered position meets three of the four criteria enumerated in the regulations to classify the position as a specialty occupation.

First, counsel states that the position of a registered nurse is so complex or unique that it can performed only by an individual with a degree, and that the nature of the duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree. Counsel argues that because the individual in the proffered position would be required to work with critical care patients, she or he requires "knowledge and experience far above that of a ward nurse, the entry-level nurse..." Counsel claims that a critically ill patient would be adversely affected by a registered nurse with less knowledge than a nurse who has attained a baccalaureate degree.

Second, counsel claims that the petitioner normally requires a degree or its equivalent for the proffered position. According to counsel, even though the petitioner has hired individuals without baccalaureate degrees for the proffered position, they were given sufficient training and education so that they would have the equivalent of a bachelor's degree.

Third, counsel maintains that a baccalaureate degree for a registered nurse is an industry-wide standard. Counsel calls the Service's attention to a policy that the Department of Veterans

Affairs (DVA) enacted, which requires its registered nurses to hold baccalaureate degrees. According to counsel:

> The Department of Veterans Affairs has determined that registered nurses filling critical care positions in medical facilities, and every other registered nurse filling a position in anything but an entry-level position in the **hospital must have a baccalaureate degree.** This is the government making this determination and the creation of public policy. Behind the public policy is the determination that the knowledge gained in a baccalaureate program is necessary for the safe treatment of patients. . . .

(Emphasis in the original.) Fourth and finally, counsel states that the director recently approved several non-supervisory registered nurse positions for H-1B nonimmigrant visas, and lists the identifying receipt numbers. Although not explicitly stated, counsel suggests that the Service is bound to follow its prior decisions and approve the instant petition.

Counsel does not present a persuasive argument for classifying the offered position as a specialty occupation. In evaluating whether the offered position is a specialty occupation, each of the four criteria listed at 8 CFR 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 U.S. Department of Labor's (DOL), Occupational Outlook Handbook (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 2000-2001 edition of the Handbook at pages 211-212, the DOL states the following about the training and educational requirements for registered 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 petitioner is offering to the beneficiary the position of a registered nurse. The offered position is not an administrative position which, depending upon the duties of the position, may require the attainment of a bachelor's or higher degree for the position. 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.

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*)

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 made a baccalaureate or higher degree a minimum entry requirement.

Counsel's main argument against the denial of the petition concerns the DVA's hiring practices for its registered nurse positions. Counsel states the following about the impact of this hiring practice on whether a registered nurse position can be considered a specialty occupation:

> A significant change in the position of the Government of the United States in how it views the position of "Registered Nurse" has now been recorded. **The Veteran's Administration, part of the Department of Veterans Affairs, has concluded that the position to be filled by a registered nurse is a specialty occupation that can only be filled by a registered nurse with a baccalaureate degree.**

> . . . It is the citation of authority recognized by [the] Immigration & Naturalization Service that this position is true. The failure of the Immigration & Naturalization Service to follow the lead of another area of the Government, where the hospital-petitioner wishes to do so, should be viewed as grounds to reverse the decision of the Center Director.

(Emphasis in the original.) Counsel contends that the DVA's enactment of a policy that mandates its registered nurses to have baccalaureate degrees indicates that a degree requirement is common to the industry in parallel positions. The Service, however, does not find counsel's statement persuasive.

Although the DVA is the largest employer of registered nurses, it is just one example of an organization that employs registered nurses. The petitioner has not presented any other evidence, such as letters or affidavits from hospitals or other employers of registered nurses, that such organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. See Shanti, Inc. v. Reno, supra at 1165. One employer's hiring practices does not exemplify the industry standard.

The Service strongly disagrees with counsel that the policy enacted by the DVA is the "position of the government." The DVA is merely one government agency among many, and its policies are not binding on the Service. As previously stated, the DVA's stipulated educational requirements for its registered nurses do not represent the nursing industry or all employers of registered nurses. Therefore, the Service is not bound to find that the position of a registered nurse is a specialty occupation simply because the DVA has determined that it, alone, shall require its registered nurses to hold a baccalaureate degree.

The Service further contends that the DVA may not be considered a "similar organization," as it employs approximately 36,000 registered nurses, whereas the petitioner employs far less than this number of registered nurses. Instead of relying solely on the DVA's educational requirements, the petitioner should have presented information regarding the educational requirements for registered nurses in facilities that are similar to the size and scope of its operations, in order to establish that a degree in a specific field of study is common to the industry in parallel positions within similar organizations.

Additionally, counsel has not presented any evidence that the offered position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree.

It is noted that while counsel has consistently stated that the proffered position requires an individual to deal with critically ill patients, the petitioner has never presented a comprehensive

job description for the beneficiary. Counsel's statements, by themselves, are insufficient proof that the position at the petitioning organization is either complex or unique. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. 214.2(h)(4)(iii)(A)(3)

The petitioner has not presented evidence that it normally requires a degree or its equivalent for the proffered position of a registered nurse. On appeal, counsel states that even though the petitioner has hired individuals without baccalaureate degrees for the proffered position, they were given sufficient training and education so that they would have the equivalent of a bachelor's degree. However, neither counsel nor the petitioner has presented any evidence to support this assertion.

The record does not contain any information regarding the number of registered nurses who are employed by the petitioner and their educational backgrounds. Therefore, the Service cannot determine, with any degree of certainty, that the petitioner normally requires a degree or its equivalent for the proffered position.

While it is understandable that the petitioner would prefer to hire individuals with at least a bachelor's degree, the petitioner has not shown that a degree has been, and continues to be, a requirement in its hiring practices.

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)

Counsel contends that the proffered position is a "professional level" nursing position and, therefore, encompasses specialized and complex duties that can only be performed by an individual who has attained a baccalaureate or higher degree. Counsel maintains that the main difference between a professional nurse and an entry-level nurse is the requirement that the professional nurse is expected to, and must actually perform, functions beyond the skill and knowledge of the entry-level nurse.

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 a registered nurse requires the attainment of a baccalaureate or higher degree due to the complex and sophisticated nature of the position's specific duties, counsel does not present any evidence in support of his

assertions. Furthermore, although counsel refers to a registered nurse position 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. 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.[1] In this case, the petitioner has not shown that the practice of the proffered registered nurse position requires the attainment of a bachelor's degree in a specific specialty.

Finally, counsel notes on appeal that the director had approved other H-1B petitions for registered nurses in rural areas of New York and Pennsylvania. Counsel suggests that the director's prior approvals are binding on the Service to approve the instant petition.

The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (U.S. 2001). If the nonimmigrant petitions cited by counsel were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of the director. The Administrative Appeals Office is not bound to follow such errors.

Beyond the decision of the director, evidence in the record does not indicate that the beneficiary possesses the proper credentials to practice the proffered position. 8 C.F.R. 214.2(h)(4)(v) states that:

(A) *General*. If an occupation requires a state or local license for an individual to fully perform the duties

[1] The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure*. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The petitioner has not presented any evidence that the beneficiary possesses the proper licensure from the State of Pennsylvania in order to practice the occupation. Inasmuch as the appeal will be dismissed on other grounds, this issue need not be examined further.

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.