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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 01 065 51422

Office: Vermont Service Center

Date: JUN 05 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 and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a skilled nursing and rehabilitation center with 120 employees and a gross annual income of \$22 million. It seeks to employ the beneficiary as a subacute nurse for a period of three years. The director determined the petitioner had not established that the offered 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 specialized area is a standard minimum requirement for the job offered or that the duties of the offered position are so specialized or complex that the knowledge required to perform services in the occupation is usually associated with the attainment of a baccalaureate degree. On appeal, counsel argues that the offered position is a clinically complex, ultra high rehab position involving extremely complex medical functions usually associated with the attainment of a baccalaureate or higher degree.

The Service does not agree with counsel's argument that the offered position requires a BSN degree. 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 offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. The petitioner described the duties of the offered position as follows:

- Actively help the Subacute Unit Manager plan, develop, organize, implement, evaluate and direct the Sub-acute Unit, as well as its programs and activities, in accordance with current rules, regulations and guidelines that govern the long-term care facility.

- Assist in developing, maintaining, and periodically updating written policies and procedures that govern the day-to-day functions of the Sub-acute Unit.
- Develop methods of coordination of nursing services with other resident services to ensure the continuity of the residents' total regimen of care.
- Perform administrative duties such as completing medical forms, reports, evaluations, studies, charting and other related functions, as necessary.
- Maintain a reference compilation of written nursing materials, e.g., PDR's, federal and state regulations, that will assist the nursing unit in meeting day-to-day needs of the resident.
- Assist with development, implementation and maintenance of an ongoing quality assurance program for the unit.
- Assist the Subacute Unit Manager, the Nurse Supervisor and Social Services Department in developing, implementing and periodically updating the procedures for the discharge planning program.
- Assist the department of social services in planning the nursing services portion of the residents' discharge plan.
- Participate in survey (inspections) made by authorized government agencies.
- Make written and oral recommendations to Subacute Unit manager and the Nurse Supervisor as necessary as required concerning the operation of the unit.
- Serve on, participate in, and attend various committees of the facility (i.e., infection control committee, pharmaceutical, quality assurance, etc.) as required and as appointed by the Subacute Unit Manager and the Nurse Supervisor.
- Provide written and/or oral reports of nursing service programs and activities as required, or as may be directed by such committees.
- Assist the pharmaceutical services committee in developing, maintaining, implementing and periodically updating written policies and procedures for the administration, storage and control of medication and supplies.

- Schedule, attend and participate in developing the agenda for care plan committee meetings as necessary.
- Participate in regularly scheduled reviews for the discharge plans as required.
- Evaluate and implement recommendations from established committees as they may pertain to nursing services.
- Determine the staffing needs of the unit necessary to meet total nursing needs of the residents.
- Recommend the number and level of nursing personnel to be employed.
- Assign a sufficient number of registered nurses for each tour of duty to ensure that quality care is maintained.
- Develop work assignments and schedule duty hours and/or assist nursing staff in completing and performing such tasks.
- Develop, maintain and periodically update the written procedure for ensuring that professional nursing personnel, including private duty nurses, have valid and current licenses as required by the State.
- Make daily rounds of the unit to ensure that all nursing service personnel are performing their work assignments in accordance with acceptable nursing standards.
- Monitor absenteeism to ensure that an adequate number of nursing care personnel are performing their work assignments in accordance with acceptable nursing standards.
- Review complaints and grievances made or filed by unit personnel.
- Make appropriate reports to the Subacute Unit Manager and Nurse Supervisor as required or as may be necessary.
- Ensure that disciplinary action is administered fairly and without regard to race, color, creed, national origin, age, sex, religion, handicap or marital status.
- Provide the Subacute Unit Manager and Nurse Supervisor with information relative to the nursing needs of the residents and the unit's ability to meet those needs.

- Review nurses' notes to ensure that they are informative and descriptive of the nursing care being provided and that they reflect the residents' response to the care.
- Schedule daily rounds to observe residents and to determine if nursing needs are being met.
- Monitor medication passes and treatment schedules to assure that medications are being administered as ordered and that treatment is provided as scheduled.
- Provide direct nursing care as necessary.
- Authorize the use of restraints when necessary and in accordance with established policies and procedures.
- Assist with all aspects of staff development.
- Oversee safety, sanitation and infection control of the unit.
- Assure that a stock level of medication, medical supplies and equipment is maintained on premises at all times to adequately meet the needs of the resident.
- Develop and implement procedures for the safe operation of all nursing service equipment.
- Ensure that only trained and authorized personnel operate the unit equipment.
- Ensure that all personnel operating service equipment in a safe manner.
- Develop and implement procedures that ensure nursing service supplies are used in an efficient manner to avoid waste.

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 offered position of subacute nurse would normally require a bachelor's degree in nursing or a related field. A review of the Department of Labor's 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 registered nurse. Some registered nurses hold baccalaureate degrees while others hold diplomas or associate (two-year) degrees.

As the record does not demonstrate that the beneficiary's offered position is an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. (It is noted that the petitioner's labor condition application is certified for 79 "staff nurses.") Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. It is noted that the Handbook does not support the petitioner's assertion that the offered position is a specialty occupation based on the beneficiary's supervision of other nurses and performance of administrative duties. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

While counsel asserts on appeal that a BSN degree is a minimum requirement for the position being offered, he has not provided any independent evidence to corroborate this assertion.

Counsel further asserts that the degree requirement is common to the industry in parallel positions among similar organizations and submits a list of 28 subacute and long-term care centers in New Jersey which "preferably require" a BSN degree for certain middle-management nursing positions such as subacute unit manager, supervisors, and infection control coordinators. However, no evidence has been submitted from any of the facilities named on the list to corroborate this assertion. Thus, counsel has not submitted sufficient evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

While counsel claims that the specific duties of the offered position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, he has not submitted any evidence to corroborate his claim.

Counsel's statement that there is a critical shortage of qualified registered nurses in the State of New Jersey is noted. However, the fact remains that 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.