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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: EAC 01 023 50977 Office: Vermont Service Center Date: MAY 01 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 long term care facility with 183 employees and a gross annual income of over \$9.4 million. It seeks to employ the beneficiary as a charge 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 additional evidence.

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 because the petitioner had not demonstrated that the proposed duties are so complex as to require a bachelor's degree, or that it has consistently required at least a bachelor's degree for the offered position.

The petitioner described the duties of the offered position as follows:

1. Overall management of a rehabilitation unit.
2. Assessment of residents with rehab potential and assigning them to a program of therapy.
3. Physical and mental examination of patients.
4. Create care plans to ensure the early recovery of subacute patients and update same regularly.
5. Develop therapy schedules and coordinate with members of the health care team in the proper utilization of the scheduled therapy.
6. Monitor the progress of patients and their response to therapy programs.
7. Develop and maintain proficiency in the effective use of therapy equipment.
8. Train and supervise staff members assigned to the unit.
9. Analyze documentation and prepare reports.

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.

First, the Service does not agree with counsel's argument that the beneficiary's position as a registered nurse is an occupation that 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), 2000-2001 edition at pages 210-212 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. Additionally, the Handbook indicates that attempts to raise the educational requirements for a registered nursing license to a baccalaureate degree in nursing have not been successful. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Counsel submits a list of nurses and asserts they were employed in positions similar to that offered to the beneficiary. The petitioner indicates that all of these persons held a "B.S. in Nursing." The petitioner has not forwarded sufficient evidence to support that assertion.

Counsel forwards a news release dated December 18, 1998 distributed by the United States Department of Veterans Affairs (DVA) entitled "VA Commits \$50 Million to New National Nursing Initiative."

Counsel notes that the DVA now endorses a policy whereby all newly hired registered nurses employed in its medical facilities and hospitals are now required to hold a baccalaureate degree in nursing. Counsel argues that this establishes that an organization similar to the petitioner's requires a "BSN" for similar positions.

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, 36 F.Supp.2d 1151, 1165 (D.Min. 1999). One employer's hiring practices does not exemplify the industry standard.

The Service further contends that the DNA may not be considered a similar organization, as it employs approximately 36,000 registered nurses, while the petitioner employs far less than that number of registered nurses.

Additionally, the position statement published by the American Association of Colleges of Nursing submitted by the petitioner indicates that this organization recognizes the Bachelor of Science degree in nursing as the minimum educational requirement for professional nursing practice. That recognition by this one organization does not alter the fact that the attempts to raise the educational requirements for a registered nursing license to a baccalaureate degree in nursing have not been successful to date. It is also consistent that an association representing colleges of nursing should hold such an opinion.

Counsel has provided six newspaper advertisements which indicate a requirement of a baccalaureate degree for similar positions. Six advertisements are not sufficient to demonstrate an industry standard.

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.

Beyond the decision of the director, the record contains no evaluation of the beneficiary's credentials from a service which specializes in evaluating foreign educational credentials as required by 8 C.F.R. 214.2(h)(2)(iii)(D)(3). As this matter will be dismissed on the grounds discussed, 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.