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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



D2

File: WAC 01 130 51494 Office: CALIFORNIA SERVICE CENTER

Date: **JUL 18 2003**

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)

ON BEHALF OF PETITIONER:



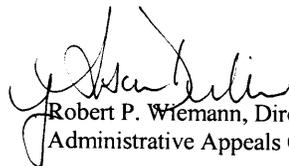
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convalescent hospital with 160 employees and a gross annual income of \$7.3 million. It seeks to employ the beneficiary as a head nurse for a period of three years. The director determined the petitioner had not shown that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

The term "specialty occupation" is defined at section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) 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 issue to be addressed in this proceeding is whether the petitioner has shown that the proffered position is a specialty occupation.

The director determined that the petitioner had not shown that a Bachelor of Science degree in Nursing (BSN) is normally the minimum requirement for entry into the occupation.

On appeal, counsel asserts that compliance with one of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) qualifies a given position as a specialty occupation, even if the job does not meet the statutory and regulatory definition of "specialty occupation." In support of his assertion, counsel cites the holding reached in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). Counsel further asserts that the position is an administrative position and as such requires at least a BSN degree.

In the initial I-129 petition filing, the petitioner described the duties of the offered position as follows:

The Head Nurse will provide professional nursing care that is consistent with the Dept. of Nursing objectives and standards. Specifically, the individual will participate in the interdisciplinary care approach to patients/residents and families. The Head Nurse is ultimately responsible for the care of 80+ residents of the unit. He will supervise and direct at least 3 licensed nurse[s], 11 Certified Nursing Assistants, 1 Lifter and [REDACTED] assistants. Further, [the beneficiary] will administer the nursing program to maintain standards and advise medical staff and administrators in matters relating to nursing services. He will also assist in the preparation of the department budget and establish in-service program and policies of nursing unit. The Head Nurse will assess the competence and performance of nursing staff and participate in the quality assessment and improvement process and activities and organize and monitor human and material resources necessary for meeting needs of nursing unit.

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 duties of the position are those of a head nurse in a convalescent hospital setting. The Department of Labor (DOL) describes the responsibilities of a head nurse at pages 268-270 of the *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, as follows:

Head nurses or nurse supervisors direct nursing activities. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure the proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered.

On November 27, 2002, the Service (now the Bureau) issued a policy memorandum on H-1B nurse petitions (nurse memo). In the memo, the Bureau acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.¹ However, the mere fact that a nursing position has a title such as "registered nurse/head nurse" does

¹ Memorandum from [REDACTED]

of H-1B Petitions Filed on Behalf of Nurses, HQISD 70/6.2.8-P (November 27, 2002.)

not necessarily mean that it qualifies as a specialty occupation.² A review of the *Handbook* at pages 269-270 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a head 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 asserts that the proffered position is an administrative position and as such requires the services of an individual with a BSN degree. The *Handbook* does not elaborate on administrative nursing positions within this classification. The nurse memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook* at page 75.)"³ The *Handbook* reference applies to the classification of medical and health services managers rather than that of head nurse or nurse supervisor. The *Handbook* describes the work of medical and health services managers at page 75 as follows:

² It is worth noting that the nurse memo also mentions that certification examinations are available to registered nurses who work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

³ *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002), *supra*.

The term "medical and health services manager" encompasses all individuals who plan, direct, coordinate and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

While the duties of the proffered position are clearly more complex than those of an entry-level registered nurse, the evidence of record does not support a conclusion that the job is an administrative or medical and health services management position. Although the petitioner states that the beneficiary's duties include the supervision and coordination of nursing activities, this phrase does not provide any insight into the specific tasks the beneficiary would be expected to perform. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a BSN is normally the minimum requirement for employment as a head nurse/registered nurse in a hospital setting.

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the Department of Labor's *Dictionary of Occupational Titles* (DOT) (4th Ed., Rev. 1991). However, the DOT is not considered to be a persuasive source of information regarding whether a particular job 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.

The DOL has replaced the DOT with the *Occupational Information Network* (O*Net). Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Bureau is not persuaded by a claim that the proffered position is a specialty occupation simply because the DOL has assigned it a specific SVP rating in the DOT. Thus, the petitioner has not shown that a BSN degree is normally the minimum requirement for entry into the occupation.

Additionally, the petitioner has not submitted any evidence to show that it requires a baccalaureate degree in a specific specialty as part of the hiring process for the position in question.

Furthermore, the petitioner has not shown that the degree requirement is common to the industry in parallel positions among similar organizations.

Finally, the petitioner has not shown that the duties of the position in question are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. The duties of this position do not appear to be any more specialized or complex than those normally performed by a head nurse in a hospital setting. The *Handbook* specifically notes that a head nurse's duties include both supervisory and management functions such as planning work schedules, assigning duties, providing training programs, maintaining records, and ordering supplies and equipment. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for employment as a head nurse.

On appeal, counsel concedes that a registered nurse position does not meet the statutory definition of "specialty occupation" because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into the occupation. Counsel asserts, however, that compliance with one of the four criteria for classification as a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) qualifies a given position as a specialty occupation. In support of his assertion, counsel cites the holding reached in *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

In *Defensor*, the court noted that the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) appear to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. In analyzing the regulation, the court observed that the criteria may be interpreted in two distinct manners: as conditions that are "both necessary and sufficient" to qualify as a specialty occupation, or as conditions that are merely "necessary" to meet the statutory requirement. The court noted that, if 8 C.F.R. § 214.2(h)(4)(iii)(A) is read to create

conditions for classification as a specialty occupation, a petitioner may classify a given position as a specialty occupation if the position meets one of the four criteria, even though it does not meet the statutory and regulatory definition of "specialty occupation." The court stated:

Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. In other words, if a regulation says "To qualify as a lawyer, one must have a law degree," then a law degree is a necessary but not necessarily sufficient condition for becoming a lawyer, as there may be other requirements. For example, the next regulation may say "To qualify as a lawyer, one must pass the bar exam.

It must be noted that the court's discussion of the criteria is non-binding *gratis dictum*; the court in *Defensor* did not make a determination as to whether the regulatory language at 8 C.F.R. § 214.2(h)(4)(iii)(A) creates "necessary" or "necessary and sufficient" conditions for classification as a specialty occupation. Instead, the court determined that the petitioner was not the beneficiary's actual employer and therefore could not rely on 8 C.F.R. § 214.2(h)(4)(iii)(A). The Bureau interprets the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) to create a necessary condition for classification as a specialty occupation. In other words, a given position may satisfy one of the four criteria set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A), but the position still does not qualify as a specialty occupation if it does not meet the statutory and regulatory definition of "specialty occupation."

The critical element is not an employer's self-imposed hiring standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation. To interpret the regulations in any other way would lead to absurd results. Even if a trash collection company required that all of its trash collectors have a bachelor's degree, the position of trash collector still would not qualify as a specialty occupation because the position does not require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate degree in a specific specialty as the normal minimum requirement for

entry into the occupation. If the Bureau were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees in a specific specialty. See *id* at 388.

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.