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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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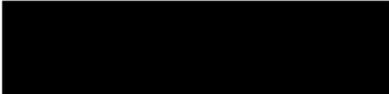
ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

File: WAC-02-167-52879

Office: CALIFORNIA SERVICE CENTER

Date: JUL 22 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:



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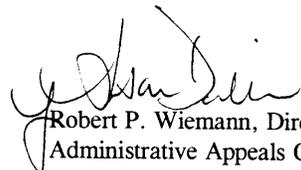
INSTRUCTIONS:

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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Medicare certified home health agency with 32 employees and an approximate gross annual income of \$1,020,000. 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 or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief.

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 nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not demonstrated that a baccalaureate degree is required for the proffered position, or that the beneficiary holds the required license from the place of intended employment. On appeal, counsel states, in part, that the petitioner normally requires a baccalaureate degree in nursing for its registered nurse positions, and provides evidence that its eight registered nurses hold such a degree. Counsel also submits an excerpt from an article entitled *Community-Based Nursing* by [REDACTED] RN, PhD, CS, of the Baylor University School of Nursing in Dallas, Texas, in support of her claim that the proffered position requires a baccalaureate degree. Counsel additionally submits a

copy of the beneficiary's license authorizing her to practice as a registered nurse in Guam.

Counsel's statement on appeal is not persuasive. The Bureau 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 Bureau considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

In her professional capacity in the specialty occupation of Registered Nurse for GNS, [the beneficiary] will be responsible for reviewing physicians' orders and performing comprehensive assessments of the patients' status, including the patients' medical history, current medical condition, functional ability, and psychosocial factors, in order to assist in developing and/or carrying out a Plan of Care for each patient based on the individual needs of the patient. In carrying out the nursing requirements for the Individual Plans of Care, [the beneficiary's] duties will include examining and observing patients, administering prescribed medications, administering prescribed medical treatments and dressings, according to Plan of Care, specific instructions from physicians' [sic] and condition of the patient. [The beneficiary] will also be responsible for teaching patients and family members care-based skills taking into consideration patient's environment, support system and physical/emotional status. [The beneficiary] will further be responsible for evaluating the patients' progress at various stages; initiating action to improve the quality of the patient care; and reporting changes and information necessary to modify and/or update the Plan of Care to reflect progress towards goals. Additionally, [the beneficiary] will be responsible, as needed, to apply independent emergency measures to counteract adverse developments and immediately notifying the physician of the patients' condition. [The beneficiary] will also be responsible for reporting, in a timely manner, to the physicians and/or other members of the home care team significant changes in the patients' status; reactions to medications or treatments; and significant incidents impacting on the patients' medical condition. [The beneficiary] will further be responsible for preparing

accurate, complete, and timely clinical documentation in accordance with GNS policies and procedures and Medicare regulatory requirements. In performing these and other responsibilities, [the beneficiary] will be required to take appropriate action independently and responsively and meet the highest professional standards for the position of Registered Nurse.

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 Bureau does not agree with counsel's assertion that the proffered position would normally require a bachelor's degree in nursing or a related field. The proffered position is that of a registered nurse. A review of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, at page 269, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a registered 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:

[S]ome 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.

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, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner provides evidence that it normally requires a baccalaureate degree in nursing for its registered nurse positions, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Bureau 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 or an employer's self-imposed standards, 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if the Bureau was limited to reviewing a petitioner's self-imposed employment 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. See *id.* at 388.

In this case, although the petitioner hires only individuals with a bachelor's degree in nursing for its registered nurse positions, the position, nevertheless, does not meet the statutory definition

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<sup>1</sup> 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 specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner. Counsel submits an excerpt from an article entitled *Community-Based Nursing* by [REDACTED] RN, PhD, CS, of the Baylor University School of Nursing in Dallas, Texas, who states, in part, as follows:

The standards for home health nursing identify two levels of practice: the generalist and the specialist. The roles of the generalist include direct care provision, teaching, resource management, monitoring care, collaboration with other disciplines and supervision of ancillary personnel. The nurse in the specialist role has a Master's degree and performs consultation with other providers; develops and evaluates agency policy; performs staff development and organizing; and manages, supports, and develops the home health services (ANA, 1986).

Certification in home health nursing is offered by the ANCC (a subsidiary of the ANA) to enhance professional development and recognize professional achievement. Eligibility requirements for certification as a generalist in home health nursing are (1) an active Registered Nurse (RN) license in the United States; (2) a baccalaureate or higher degree in nursing. . . .

The information provided by [REDACTED] RN, PhD, CS, of the Baylor University School of Nursing in Dallas, Texas in her article, *Community-Based Nursing*, is noted. The article does not specify, however, that certification is required for a generalist position. It appears, rather, that a generalist may choose to become certified to "enhance" her position. Nor does the record demonstrate that certification is required for the proffered position.

The *Handbook*, 2000-2001 edition, at page 212, states, in part:

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 view of the foregoing, it appears that the petitioner and the nursing industry, in general, prefer rather than require a baccalaureate degree in nursing for the proffered position.

Finally, on November 27, 2002, the Bureau issued a policy memorandum on H-1B nurse petitions (nurse memo) and 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.<sup>2</sup> However, the mere fact that a nursing position has a title such as "critical care" or that it is a home health nursing position does not necessarily mean that it qualifies as a specialty occupation.<sup>3</sup>

The Bureau looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, 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 as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), the Bureau maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The Bureau must be satisfied that the

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<sup>2</sup> Memorandum from [REDACTED] Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002).

<sup>3</sup> It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

Here, although the proffered position is for home health nursing, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. As previously stated, the duties ascribed to the position, which include reviewing physicians' orders and performing comprehensive assessments of the patients' status, including the patients' medical history, current medical condition, functional ability, and psychosocial factors, and examining and observing patients, are routine to many registered nurse positions. Just because the beneficiary would perform these duties in a home health care setting does not elevate the duties' complexity. As the record is presently constituted, the Bureau cannot find that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

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.