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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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File: SRC-02-030-55638 Office: Texas Service Center

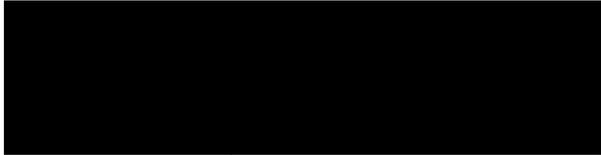
Date: MAR 26 2003

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:



PUBLIC COPY

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 approved by the Director, Texas Service Center, who certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be reversed. The petition will be denied.

The petitioner is a skilled care facility with 180 employees and a gross annual income in excess of \$9 million. It seeks to employ the beneficiary as a team leader for a period of three years. The director determined the petitioner had established that the proffered position was a specialty occupation.

On notice of certification, counsel does not submit a brief or additional evidence.

Section 214(i)(1) of the Immigration and Nationality 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), a "specialty occupation" is defined 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 approved the petition, concluding that the petitioner had established that the position in question was administrative in nature and, as such, the beneficiary would not be involved in any direct patient care. Additionally, the director stated that the petitioner submitted sufficient evidence that similar organizations required a baccalaureate degree or its equivalent for their team leader positions. Based upon evidence in the record, the director concluded that a baccalaureate degree would be required for the proffered position "to ensure that the team leader in the health

facility would be prepared to exercise wide latitude in complex decision making."

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

- Supervision and coordination of nursing activities and professional and nonprofessional personnel assigned to the unit;
- Implement policies and procedures for nursing unit and coordination of nursing services;
- Evaluation of nursing activities to ensure patient care, staff relations and efficiency of service;
- Observation and evaluation of techniques and services rendered by nursing staff to ensure that nursing care is carried out as directed and treatment administered in accordance with physician's instructions;
- Identification of weaknesses in nursing unit and recommendation of changes to personnel to increase efficiency of nursing activities and nursing unit;
- Coordinate preparation and maintenance of patients' clinical records;
- Coordinate and supervise the ordering of drugs, solutions and equipments and narcotics records;
- Investigation and resolution of complaints and problems in nursing unit;
- Consultations with Director of Nursing on unusual nursing problems and interpretation of facility policies to ensure patients' needs are met;
- Planning and organizing, with the supervision of the Director of Nursing, the orientation and in-service training for unit staff members and participate in guidance and educational programs;
- Accompany physician on rounds and keeps informed of special orders concerning patients;
- Coordinate preparation of work schedule and assignment of duties to nursing staff in unit for efficient use of personnel; and

- Monitoring of the continued development and implementation of procedures and systems of nursing activities and nursing unit.

In a November 14, 2001 request for additional evidence, the director requested, among other items, an organizational chart and a listing of the petitioner's employees' job titles and duties. In response, the petitioner stated the following about its organizational structure and the specific responsibilities of the proffered position:

The *Team Leader* has complete responsibility over the administrative functions and management activities of the entire nursing staff. The Team Leader's supervisory authority is limited to the Unit Managers in each wing. The duties of this Team Leader include the following: conduct administrative duties for the nursing staff such as supervision and coordination of nursing activities, implementation of policies and procedures for nursing unit and coordination of nursing services, evaluation of nursing activities to ensure patient care, staff relations and efficiency of service, identification of weaknesses in nursing unit and recommendation of changes to increase efficiency of nursing activities and nursing unit, investigation and resolution of complaints and problems in nursing unit, planning and organization, with the supervision of the Director of Nursing, the orientation and in-service training for unit staff members and participate [sic] in guidance and educational programs, and monitoring of the continued development and implementation of procedures and systems of nursing activities and nursing unit. (Emphasis in original.)

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 the petitioner's position, as set forth in its request for premium processing of October 30, 2001, that the proffered position of team leader is administrative in nature and would normally require a baccalaureate degree in nursing or a related specific specialty. Nor does the Bureau concur with counsel's statement in a letter to the director that the position offered to the beneficiary is comparable to that of "health services manager," as set forth in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. At page 75 of the 2002-2003 edition of the *Handbook*, the DOL describes the duties of *mental and health services managers* as follows:

The term...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.

Clinical managers have more specific responsibilities than generalists, and have training or experience in a specific clinical area. For example, directors of physical therapy are experienced physical therapists.... These managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work; develop reports and budgets; and coordinate activities with other managers.

The position offered by the petitioner appears to be that of a nursing supervisor, rather than that of health services manager. A review of the *Handbook* at page 268 sets forth the following duties generally performed by these individuals:

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.

In the present case, the beneficiary will supervise and coordinate nursing activities, arrange individual nurse work schedules, and investigate and resolve complaints in the nursing unit. Health

services managers, on the other hand, are generally assigned to overall administrative and managerial responsibilities involving the planning and management of the activities of an entire health care facility or system.

A review of the *Handbook* at page 269 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a nursing supervisor. 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:

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 record does not demonstrate that the beneficiary's proffered position is an administrative position, such as a health services manager. In a November 1, 2001 letter from counsel that accompanied the petition filing, counsel emphasized that "the degree requirement is mandatory for this supervisory position in question, as provided for in 8 C.F.R. § 214.2(h)(4)(iii)(A)(i)." Counsel, however, does not support her conclusory statement with any persuasive documentary evidence. No evidence in the record shows that a baccalaureate degree or its equivalent is the minimum requirement for entry into the position. It was held in *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is normally the minimum requirement for entry into the proffered position.

Second, in attempting to demonstrate that a baccalaureate degree or its equivalent is common to the health care industry for similar positions, the petitioner provided photocopies of eleven newspaper job listings. Of the eleven newspaper job listings submitted by the petitioner, two were clearly administrative in nature and, therefore, not parallel to the proffered position. At least six of the eleven listings pertained to acute care hospitals. Other listings concerned pediatric facilities, public health facilities, home health care agencies or health maintenance organizations. Only one or two of the listed positions appeared relevant to facilities similar to that of the petitioner. However, a small number of such listings are not sufficient to demonstrate the existence of an industry standard in this regard.

Moreover, the petitioner has not presented any other evidence, such as letters or affidavits from organizations similar to the petitioner, that such organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse.

Shanti, Inc. v. Reno, 36 F.Supp.2d 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). Again, counsel concludes in her November 1, 2001 letter to the director that the degree requirement for similar supervisory positions has become an industry standard without providing any documentary evidence in support of her claim. As previously noted, it was held in *Matter of Obaigbena* and *Matter of Ramirez-Sanchez, supra*, that the assertions of counsel do not constitute evidence. Simply going on record without supporting documentary evidence is not sufficient for meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Third, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as nursing, for the offered position. In his decision, the director stated that the petitioner had submitted evidence that the position in question normally requires a BSN degree. However, the record fails to disclose the submission of any such evidence. While the petitioner asserted that a baccalaureate degree in nursing is "an essential prerequisite for the offered position," it has submitted no further documentation to support this assertion. As previously noted, simply going on record without supporting documentary evidence is not sufficient for meeting the burden of proof in these proceedings. *Treasure Craft of California, id.*

In addition, 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 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 in such determinations 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.¹ To interpret the regulations any other way would lead to absurd results: if the Bureau was limited to reviewing a petitioner's

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.

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.

The AAO notes that it reviewed the petition's Website at [REDACTED] and found that none of the advertised nursing positions, including the position of Director of Nursing, required a prospective candidate to hold a baccalaureate degree or its equivalent in nursing. For example, a Director of Nursing position in the Melbourne, Florida facility requires the holder of the position to be a licensed RN and have an undisclosed amount of director of nursing experience, among other qualities. The AAO notes that the Director of Nursing position is higher on the organizational chart than the proffered position of team leader and would supervise the team leader. Such evidence does not clarify why the holder of the proffered position would be required to hold a baccalaureate degree or its equivalent if the position's direct supervisor would not be required to have the same credentials.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Yet again, counsel states that the duties of the proffered position are so complex and specialized as to require a degree, without providing any evidence in support of her assertions. *Matter of Obaigbena* and *Matter of Ramirez-Sanchez*, *supra*; *Treasure Craft of California*, *supra*.

On November 27, 2002, the Service 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.² However, the mere fact that

²Williams, Johnny N. INS Office of Field Operations. *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, Memorandum to Regional Directors, Service Center Directors, Director, Administrative Appeals Office, Deputy Executive Associate Commissioner, Immigration Services Division (Washington, DC: 27 November 2002), 4 p.

a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.³

The Service 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 Service maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The Service must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

Here, although the proffered position has the title of "team leader," 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 are routine to many registered nurse positions. These duties include accompanying physicians on rounds, keeping informed of special orders concerning patients, and investigating and resolving complaints and problems within the nursing unit. Simply because the beneficiary would perform these duties as a "team leader" does not elevate the duties' complexity. As the record is presently constituted, the Service 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.

³ 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.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The decision of the director is reversed. The petition is denied.