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

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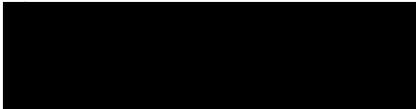
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NOV 12 2009

File: SRC 02 075 51787 Office: TEXAS SERVICE CENTER Date:

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 Citizenship and Immigration Services (CIS) 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
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is Miami Beach recruitment, placement, and consulting service in the health care field with 14 employees and a gross annual income of \$4,000,000. It seeks to employ the beneficiary as a critical care registered nurse for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation, because it involves specialized, complex knowledge, and a Bachelor of Science degree in nursing (BSN) is the minimum requirement for entry into the field.

Section 214(i)(1) of the 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.

The term "specialty occupation" is 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 field 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.

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 issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. The petitioner is an employment agency. The beneficiary's actual proposed worksite would be the [REDACTED]. In the original petition received by the Service Center on January 4, 2002, a letter from [REDACTED] Administrator, on [REDACTED] letterhead, described the duties of the proffered position as follows:

- Administration, coordination and supervision of nursing activities and patient care in a critical care setting;
- Assisting physicians with procedures in the intensive care unit;
- Providing direct and indirect patient care in the critical care setting;
- Communicating with physicians about changes in patient's clinical condition including hemodynamic monitoring, results of diagnostic studies and symptomatology;
- Responding quickly and accurately to changes in condition of patients or response to treatment by patients;
- Performing head-to-toe assessment on all patients and reassessments as required;
- Assessing and reassessing pain and pain management techniques;
- Educating patients and their families in pain management;
- Formulating an individualized plan of care, revising such plan as indicated by the patient's response to treatment and evaluating overall plan daily for effectiveness;
- Cardiac monitoring, identifying dysrhythmias and treating appropriately based upon Advanced Cardiac Life support protocol;
- Caring for patients with compromised nutritional/metabolic status;

- Caring for patients requiring extensive fluid and electrolyte management;
- Communicating appropriately and clearly with physicians and coworkers; [and]
- Consulting other departments as appropriate to provide for an interdisciplinary approach to the patient's needs.

On January 10, 2002, the director requested further evidence that the offered position is a specialty occupation. In response, counsel for the petitioner submitted a copy of the section on registered nurses from the Department of Labor's *Occupational Outlook Handbook (Handbook)* and letters from two senators.

On June 10, 2002, the director denied the petition. The director noted that the record did not establish that the beneficiary's duties would be so complex that a bachelor's degree is necessary to perform them.

On appeal, counsel submits a brief pertaining to a different beneficiary in a similar position as in this case. Counsel asserts that the proffered position requires a bachelor's degree, as evidenced by the fact that the petitioner employs only degreed nurses in this position, and by the opinions expressed in letters from several local university professors in the medical field.

Regarding petitions for "critical care" and other "specialty" nurses, guidance is found in the November 27, 2002 policy memorandum on H-1B nurse petitions (nurse memo), which acknowledges 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 "critical care" does not necessarily mean that it qualifies as a specialty occupation.²

Citizenship and Immigration Services (CIS) 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

¹ Memorandum from Johnny N. Williams, 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).

² 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.

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

CIS notes that although the job description letter provided by Liz Tonkin, Administrator, is printed on KMC letterhead, it is not apparent whether Liz Tonkin is an administrator for KMC or the petitioner. This generic job description of indeterminate origin reflects the primary difficulty in analyzing this case; that is, the lack of specific information about the proffered position and the actual worksite. CIS cannot determine whether the proffered position qualifies as a specialty occupation based on an all-purpose job description and without any other documentation from the job site itself.

Although the record contains the name and address of the petitioner's client, KMC, where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of KMC. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at KMC will qualify as a specialty occupation. *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

Even as currently documented, however, the proffered position does not meet the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The proffered position is analogous to that of a registered nurse, whose basic duties are outlined as follows in the *Handbook* 2002-2003 edition on page 268: "[Registered nurses] observe, assess, and record symptoms, reactions, and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation." The *Handbook* indicates that an associate degree in nursing is sufficient to perform the duties of a registered nurse. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position.

With regard to the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), namely that the degree requirement is common to the industry in parallel positions or that the position is so complex or unique that it can be performed only by an individual with a degree, the evidence supports neither prong of this

provision.

Turning to the third criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3), the record endeavors to prove that the petitioner's currently employed nurses have bachelor's degrees, but there is no evidence regarding the hiring practices of KMC. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. Without more compelling evidence, the petitioner has not established that KMC normally requires a degree or its equivalent for the specific position in question.

With respect to the final criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely that 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 description provided by the petitioner of the beneficiary's work duties does not document that the duties of the proffered position are any more specialized or complex than the duties of any other registered nurse. Here, although the proffered position has the title of "critical care nurse," 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 administering appropriate medical treatments, reading and interpreting medical charts, and developing nurse care plans, are routine to many registered nurse positions. The supportive letters on record from members of the medical community contain generalized statements that do not specifically address the exact duties involved in the proffered position. As the record is presently constituted, the CIS 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 criteria 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.