

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent disclosure of information granted

ADMINISTRATIVE APPEALS OFFICE
425 I Street N.W.
CIS, AAO, 20 Mass, 3/F
Washington, DC 20536

NOV 14 2003

File: WAC 02 132 54437 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(1)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(1)(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 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, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition 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 a Vacaville, California rehabilitation center with 105 employees and a gross annual income of \$6,000,000. It seeks to employ the beneficiary as a registered nurse specialist for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 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. In the original petition received by the California Service Center on March 11, 2002, the petitioner stated that the duties of the proffered position include:

assessment and evaluation of the physiological and psychosocial health status of the residents, providing professional nursing services, intravenous therapy, diabetic care, ostomy care, tracheostomy care, nutrition support, pain management and specialized wound management.

The petitioner also stated that the beneficiary would be performing these duties under the supervision of a clinical nurse supervisor.

On March 15, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In response, the petitioner submitted a more detailed job description wherein the petitioner characterized the job as "nurse supervisor," adding that the position includes supervisory duties. The petitioner noted that the

proffered duties include administrative, committee, personnel, nursing care, and staff development functions. On April 2, 2002, the director denied the petition.

The AAO notes that, in response to the director's request for evidence, the petitioner changed the name of the proffered position and amended its associated duties. The amended position, however, cannot be considered when determining whether the position offered to the beneficiary is a specialty occupation.

The purpose of a request for evidence is to clarify whether eligibility for the benefit has been established. See 8 C.F.R. § 103.2(b)(9). After filing a petition, a petitioner cannot change the title of an offered job, its associated job duties, or its level of authority within the organizational hierarchy. The petitioner must establish that the position offered to the beneficiary when the petition was filed meets the definition of a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the request for approval, the petitioner should file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, for the purpose of this decision, the nature of the position shall be based upon the job description supplied when the petition was filed.

Before proceeding to an examination of educational requirements for the proffered position, it must be properly classified. Citizenship and Immigration Services (CIS) often looks to the Department of Labor's *Occupational Outlook Handbook (Handbook)* when determining how to most accurately classify a given position.

Much of the work of the proffered position, as originally described, appears to resemble that of a nursing home nurse, as described in the Handbook on page 268:

Nursing home nurses manage nursing care of residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as

starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head-injuries.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1)

The 2002-2003 edition of the *Handbook* at page 269 states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses . . . some 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.

Thus, according to the *Handbook*, a bachelor's degree is not the normal minimum requirement to perform the duties of a registered nurse.

II. 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 - 8 C.F.R. § 214.1(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook's* treatment of the educational requirements for registered nurses has been discussed above and will not be repeated here.

The record does not contain any evidence with regard to the qualifications requirements of parallel positions in similar organizations. The petitioner submitted no documentation that any professional nursing association has made a bachelor's degree a requirement for registered nurses, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner has submitted no documentation that the position of a registered nurse would involve duties seen as either unique or complex that only an individual with a degree in a specific specialty could perform them.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)

Although the petitioner included a job description of the offered position that mentions its bachelor's degree requirement, the record contains no information with regard to other employees with similar duties and their academic credentials. Without more persuasive evidence, the petitioner has not established this criterion.

IV. 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 - 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position. The job description in the original petition contains work duties that are similar to any registered nurse position. Without more persuasive evidence as to the specialized or complex nature of the team leader position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The petition is denied.