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

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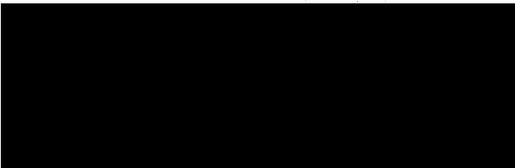


File: WAC 02 172 53564 Office: CALIFORNIA SERVICE CENTER Date: NOV 24 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter remanded to the director for further consideration with regard to the beneficiary's qualifications.

The petitioner is a nursing home with 175 employees and a gross annual income of \$11,918,826. It seeks to temporarily employ the beneficiary as a utilization review manager for a period of three years. The director determined that the proffered position was not a specialty occupation.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) erroneously attributed statements made by the petitioner to counsel and also erroneously analyzed the evidence provided by the petitioner with regard to the proffered position. Counsel submits additional documentation.

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 April 29, 2002, the petitioner described the duties of the proffered position as follows:

Responsible for ensuring clinical documentation compliance, in cooperation with the Assistant Director of Nursing:

Assists with development and implementation of auditing/monitoring tools.

Oversees daily, weekly and monthly auditing of medical records to monitor compliance.

Follows up on all deficiencies found, and submits a report of deficiencies to the Director of Nursing, Assistant Director of Nursing, and Administrator.

Monitors residents' records for completeness, i.e., Medical Administration Records (MARS), Treatment Administration Records (TARS), [and] monthly summaries.

Performs audit of admission paperwork within forty-eight (48) hours of admission. Notifies Social Services Department for follow-up with missing documents.

Oversees completion of discharged medical records.

Oversees weekly and biweekly documentation of residents' weights:

Notifies physician, [r]egistered [d]ietician and [the d]irector of [n]ursing [s]ervices of significant changes.

In the absence of the [a]ssistant [d]irector of [n]ursing, monitors follow-up.

Responsible for generating, reviewing and distributing MARS and TARS each month and [p]hysician [o]rders every two (2) months.

Oversees utilization of services:

Reviews documentation for residents receiving skilled services to ensure medical necessity.

Acts as [a] liaison between clinical staff and [f]inancial [s]ervices [d]epartment to ensure accuracy of diagnoses coding, and Minimum Data Set (MDS) to prevent delays in reimbursement for services.

Assists with DHS Medicaid Utilization report, and completion of the nursing section on DHS Form 1147 (level of care evaluation form).

Prepares medical records for claims review.

Keeps current on regulations affecting medical records and reimbursement. Assists with development and implementation of policies and procedures to ensure documentation compliance.

Coordinates, plans and conducts in service training in the area of documentation compliance.

Serves as member of [q]uality [a]ssurance and [a]ssessment [c]ommittee. Perform[s] quarterly audits of the facility's Quality Indicator Profile to ensure the accuracy of coding and data collection.

Assists with the RAI [Resident Assessment Instrument] process (MDS, [c]are [p]lans[,] and RAPS [Resident Assessment Protocols]) as needed.

Ensures the safety and well-being of residents entrusted to the facility's care.

Participates in other meetings and committees as assigned.

Maintains current knowledge/practice of proper infection control and safety procedures.

Attends mandatory in service training, general staff and departmental meetings regularly.

Maintains current physical examination and TB [tuberculosis] clearance per regulation.

Performs other duties as assigned or required.

The petitioner also stated that the position required an employee who held a bachelor of science degree in nursing or medical records administration as well as one year of experience as a registered nurse or in a related field. In addition the petitioner preferred prior experience in long-term care. Finally the petitioner stated that the person who held the position would also be responsible for ensuring that the facility's clinical documentation was completed in compliance with federal and state regulations.

On May 2, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested a detailed statement on the beneficiary's proposed duties and her level of responsibility, types of employees supervised and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested more evidence with regard to whether the petitioner and its competitors normally required a baccalaureate degree for the position of utilization review manager. The director also required evidence that the other firms in the nursing home industry required a baccalaureate for closely related positions, or that the petitioner had hired employees previously in the proffered position who were required to have a baccalaureate degree in a specific specialty. Finally the director requested copies of the petitioner's present and past job announcements or classified advertisements used to solicit candidates for the current position.

In response, the petitioner submitted letters from [REDACTED] III, its executive director, and from Donna M. Wong, its administrator. Ms. Wong provided more details on the duties of the proffered position. She stated that the State of Hawaii Office of Health Care Assurance (OHCA) had conducted an audit in 2001 examining the adequacy of the petitioner's clinical documentation. Prior to this audit, this documentation had been assigned to registered nurses and included nurses' notes, physicians' orders, plans of care and also an item called the Minimum Data Set (MDS) which was completed and sent to the State of Hawaii in order for the petitioner to receive reimbursement from Medicare and Medicaid for medical services.

According to the petitioner, based on the deficiencies listed in the 2001 audit results, the petitioner had to submit a plan of correction to the above-mentioned state agency and had to increase monitoring of its clinical documentation. According to the administrator, the petitioner, in the past, had assigned responsibility for a large part of the clinical documentation duties to its registered nurses. However, after the 2001 audit, the petitioner reassessed the performance of persons handling clinical documentation, and observed that the associate degree background, the level of responsibilities or training normally possessed by its registered nurses fell short of what was needed

to fix the deficiencies in the petitioner's clinical documentation.

According to the petitioner, the review utilization manager position is a new position. The petitioner's management team decided to seek an employee with a baccalaureate degree in nursing, or medical records administration, because such an individual would have the educational discipline to analyze the manner in which medical personnel were currently being trained, could develop effective systemic solutions to improve the training and documentation process, and could implement and oversee a strategic plan focused on improving the integrity of clinical documentation and related reports including the petitioner's plans of correction.

The administrator also stated that, although the assistant director of nursing is the person responsible for the majority of the monitoring of clinical documentation, an additional position was necessary to monitor and to be accountable for clinical documentation. With regard to education or experience, the administrator stated that the utilization review manager must have actual work experience as a registered nurse or related experience because s/he must work closely with registered nurses assigned to the floor in providing needed training and in overseeing their activities related to compliance with the system of clinical documentation. In addition the administrator stated that the person in the proffered position would be responsible in a managerial capacity for compliance with regulatory requirements. The administrator provided additional details on the proffered position and the complexity of its duties as follows:

The [u]tilization [r]eview [m]anager will actually train [registered nurses] and others on clinical documentation requirements. H/She will conduct and oversee substantive monitoring of clinical documentation and the compilation of reports on said clinical documentation. Depending on a range of circumstances, reports may need to be in a variety of formats. For example, the [u]tilization [r]eview [m]anager may prepare model sample entries, simple narrative descriptions of deficiencies and more advanced memorandum with recommendations for remedial action. The reports will require a person with real world experience in health care but who also possesses a demonstrated background and ability to identify where documentation is deficient, to analyze and problem-solve, to train, to develop a systematic approach for improving documentation, to communicate[,] and to oversee the implementation of an effective compliant program at ANRC [Aloha Nursing & Rehab Centre]. The person will train and engage nurses in conducting clinical documentation[;] however[,] the [u]tilization

[r]eview [m]anager will be the person accountable for the program.

The [u]tilization [r]eview [m]anager will supervise a[n]d participate in the Resident Assessment Instrument (RAI) process, which includes actual resident assessment, completion of the computerized MDS, and the Resident Assessment Protocols (RAPS), a section of the MDS which requires the assessor to complete a narrative assessment of the resident identifying their specific diagnoses and plan of care.

The [u]tilization [r]eview [m]anager will also assist in management of administrative tasks, primarily the responsibilities associated with[:] achieving compliance with HIPAA regulations in the area of medical records[;] providing in service education to staff in the area of clinical documentation[;] and administering ANRC's policies and procedures in the area of medical records.

Finally the administrator stated that, because of the complex nature of the tasks and of the information in which the utilization review manager would be engaged, and because the position was both managerial and administrative, the petitioner decided to place the position within the nursing services department. In addition, the person holding the proffered position would report to the petitioner's administrator rather than to the director of nursing services. The administrator stated that the position would run parallel to that of the director of nursing, with the beneficiary wholly managing an area peripheral to nursing services.

The petitioner also submitted two pages from a 43-page report entitled "Statement of Deficiencies and Plan of Correction" that listed some deficiencies found in the petitioner's clinical documentation. Counsel indicated in its cover letter that this form was required by and filed with the State of Hawaii Office of Health Care Assurance (OHCA). In addition, the petitioner submitted a two-page job description for the proffered position that reiterated the same duties listed in the original petition.

On July 2, 2002, the director denied the petition. In doing so, the director identified nine of the twenty five job duties outlined in the instant petition and then linked these duties to the job classifications of associate administrator and administrator described in the Department of Labor's (DOL) *Dictionary of Occupational Titles* (DOT). The director also referred to the job classification of health services manager in his decision. Finally, the director determined that the proffered position only required an associate degree in nursing, and, therefore, was not a specialty occupation.

In response, counsel states that CIS made gross errors in fact when it stated that counsel's assertions could not be considered evidence, as any assertions or factual representations in the record had been made by the petitioner. In addition, counsel states that CIS did not review the materials submitted by the petitioner in its response to the director's request for further evidence. In addition, counsel affirms that the director's analysis based on the DOT job descriptions is flawed and outdated. Counsel asserts that the positions described in the DOT by the director should not be equated with the proffered position. Counsel refers to the DOT job position of Utilization Review Coordinator as a more analogous classification.

Upon review of the record, both the director and the petitioner refer to job classifications in the Department of Labor's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991), and their respective Specific Vocational Preparation (SVP) levels in their analysis of whether the proffered position is a specialty occupation. The director uses three classifications as evidence of why the proffered position cannot be a specialty occupation while counsel, on appeal, submits another DOT classification as analogous to the proffered position. However, the DOT is not considered 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 Department of Labor 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 Department of Labor's *Occupational Outlook Handbook (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, CIS is not persuaded by a claim that the proffered position is or is not a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the DOT.

It is also noted that the director in his analysis of the petition did not examine all the job duties listed by the petitioner in both the initial petition and in the job description submitted by the petitioner following the director's request for further evidence. All the job duties listed by the petitioner will be considered in this proceeding.

Upon review of the duties outlined by the petitioner's administrator and in the initial petition, the proffered position appears to be an amalgam job that combines knowledge of the nursing and medical professions and practices with the supervision and monitoring of adequate clinical documentation by

various staff members. The petitioner also identified other job duties, such as, oversight of utilization of services, a duty that appears linked to the petitioner's satisfying other State of Hawaii health regulations.

Upon further review of the record, the position does not appear to be a nursing position. The fact that the beneficiary would report to the administrator of the facility as opposed to the director of nursing services adds weight to this supposition. In addition, the beneficiary's job duties of auditing admission paperwork and notifying the social services department with regard to missing documents appear to be analogous to the work of medical records technicians. Finally, the job contains elements of a medical records administrator or administrator position, with the assignment of the position as a distinct position parallel to the director of nursing position and directly reporting to the petitioner's administrator.

The classification of medical records administrator is only examined peripherally in the *Handbook* within the category of medical and health services managers. The basic duties of medical records administrators and comments on educational backgrounds are outlined on page 75 as follows:

The term "medical and health services manager" encompasses all individuals who plan, direct, coordinate, and supervise the delivery of health care.

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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, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. 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.

With regard to educational or training requirements, the *Handbook* states the following:

A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities and at the departmental level within healthcare organizations. Physicians' offices and some other facilities may substitute on-the-

job experience for formal education.

In contrast, as described on page 288 of the *Handbook*, the medical records technician classification does not require a baccalaureate degree for entry into the job.

Upon review of both the medical records technician and medical records administrator jobs, neither job is analogous enough to the proffered position to establish whether a baccalaureate degree is the minimum requirement for entry into the position. With regard to the classification of medical records administrators, the proffered position appears to be focused on the sufficiency of clinical documentation as opposed to the entire ambit of medical records management. With regard to the medical records technician position, the proffered position appears to be at a much higher level of responsibility in terms of duties and placement in the management hierarchy of the petitioner than the classification described in the *Handbook*. Accordingly the *Handbook* provides no definitive guidance with regard to the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner provided no further documentation about similar businesses that employ individuals with baccalaureate degrees in closely related positions. The petitioner also did not provide sufficient evidence to establish the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, that it normally requires employees in the position to have a baccalaureate degree in a specific specialty. Although the petitioner submitted a job description of the proffered position that indicated an effective date of June 1, 1990, it also stated that the proffered position was a new position. The petitioner submitted no other evidence with regard to previous employees in the utilization review manager position.

Nevertheless, when reviewing the duties of the position within the context of the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the proffered position as described by the petitioner does appear to be specialized and unique. While some described duties such as monitoring of admissions records appear to be detail-oriented as opposed to complex, the multiple levels of duties as well as the unique placement of the position within the petitioner's management structure add to the complexity of the position. With regard to clinical documentation, the beneficiary appears to oversee the work product of different levels of nursing and health personnel within the petitioner's facility. These levels include physicians, nurses and other health personnel. The beneficiary also appears to be responsible for the training of health personnel in the field of clinical documentation. Since the petitioner has indicated that the present system of clinical documentation, primarily done by registered nurses with associate degrees, has been determined by the State of Hawaii to be deficient, the petitioner's requirement of an individual with a bachelor of science degree in nursing or

medical records administration to oversee the production of clinical documentation appears reasonable. The placement of the beneficiary's job under the administrator's responsibility also appears to give the position more managerial responsibility and distance from any nursing-related duties, and adds to the complexity and uniqueness of the position. It does not appear excessive that the petitioner would require an individual with a baccalaureate or higher degree in a specific specialty to perform the duties of the position.

The critical element in the analysis of this criterion is not the 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 In the instant petition, the petitioner appears to have met both the statutory requirements as outlined in the Act and the regulatory criteria as outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A).

Beyond the decision of the director, the record is not clear that the beneficiary is qualified to perform the duties of the proffered position. The petitioner indicated that either a baccalaureate degree in medical records or nursing was appropriate academic preparation for the position. Given the fact that the multiple duties within the amalgam position encompass duties in both medical records documentation, and the oversight and monitoring of the work products of registered nurses, physicians, and other health personnel, either academic degree appears relevant to the proffered position. However, it also is reasonable that with either academic degree, the beneficiary would have some substantive experience in the other field.

In the instant petition, the petitioner provided an educational equivalency document that established that the beneficiary's bachelor of science degree in nursing is the equivalent of a baccalaureate degree from a U.S. accredited educational institution. The petitioner submitted continuing education certificates for the beneficiary's training in such areas as advanced cardiac life support, communications, four courses in advanced critical care, a workshop identified as "preceptor," and a course in physical assessment. The record is devoid of any coursework undertaken by the beneficiary in her university studies. More importantly, there is no corroborative evidence in the record that the beneficiary has any training or work experience in medical records oversight or maintenance. In the original petition, the

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." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

petitioner described the beneficiary's work experience as "many years as a professional nurse." Accordingly the record contains no information with regard to the beneficiary's work experiences or exposure to current concepts or procedures in the area of medical documentation. Without more persuasive evidence, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

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 sustained that burden with regard to whether the proffered position is a specialty occupation. However, the record remains incomplete with regard to whether the beneficiary is qualified to perform the proffered position. Accordingly, the decision of the director will be withdrawn and the matter remanded to the director for further consideration with regard to the beneficiary's qualifications.

ORDER: The decision of the director is withdrawn. The matter is remanded to the director for further consideration of the beneficiary's qualifications and entry of a new decision which, if adverse to the petitioner, shall be certified to the AAO for review.