

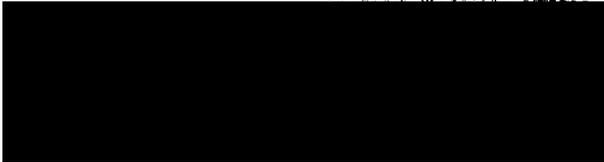
U.S. Department of Homeland Security

Citizenship and Immigration Services

DR

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



OCT 27 2003

File: WAC 02 174 51252 Office: CALIFORNIA SERVICE CENTER Date:

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:



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 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 appeal will be dismissed.

The petitioner is a California convalescent care center. It has 120 employees and a gross annual income of \$4,500,000. It seeks to temporarily employ the beneficiary as an associate administrator 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 CIS erred in its analysis of the petition. Counsel states that the proffered position is distinct from other administrative positions due to its emphasis on determining the quality of patient care. Counsel also asserts that the petitioner established the fourth criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), based on the complexity of the proffered position. Counsel submits additional job advertisements.

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 initial petition received by the California Service Center on May 1, 2002, the petitioner described the duties of the proffered position as follows:

[The beneficiary's] duties will be the interpretation, analysis and implementation of quality standards for each of our clients pursuant to our company operational manuals and existing contracts. She will schedule or monitor each nurse and healthcare provider to make sure that each personnel has the requisite training, instruction or continuing education to fully comply with our quality standards.

[The beneficiary] will implement an effective communication/information system between the client, nurses and our personnel department to monitor, avoid and eventually eliminate tardiness, absenteeism and truancy among our staff, which to date are predominant complaint[s] from our patients.

[The beneficiary] will oversee that each of our employees comply with the requirements of the Board of Registered Nurses and that their qualifications/experience match the requirements of their assigned position[s]. She will monitor each employee's license to practice nursing [to ensure it] is up to date and that the continuing education requirements are met.

[The beneficiary] will schedule and organize monthly training for the registered nurses, licensed vocational nurses and certified nursing assistants in order to update them with the latest medical breakthroughs, equipment, and procedures.

[The beneficiary] will assist the undersigned in formulating solutions to complaints and suggestions of clients. She will review the nurses'[sic] and staff's

performance record before negotiation or renewing his/her contract.

[The beneficiary] will focus on the [sic] preventive care. She will also be called upon to improve efficiency in health care facilities and the quality of the health care provided. She will optimize the efficiency of a variety of services provided by the health care facility.

The petitioner also made the following statement:

[REDACTED] has substantially grown during the last decade. Everyday, our company is involved with contracts, payroll and other administrative problems involving clients and workers. Due to the increasing problems in the quality of care received by patients and allegations of medical malpractice and negligence, health care facilities have lately been concerned with the quality of health care services being rendered by its staff. At present, there is a vital need for Health Services Administrators whose job will be to monitor quality of health services provided by the staff. . . . A person unfamiliar with healthcare industry principles normally associated with the attainment of a baccalaureate degree or its equivalent would not be able to fulfill the duties of an associate administrator required by our hospital.

On March 8, 2002, the director identified the proffered position as an administrative assistant and asked the petitioner for further information to establish that the proffered position was a specialty occupation as outlined in 8 C.F.R. § 214.2 (h)(4)(iii)(A). In particular, the director requested a more specific breakdown of job duties, including the percentage of time to be spent on each duty outlined in the initial petition, the level of responsibility for these duties, the hours per week of work, the types of employees supervised, and the minimum specific education, training, and experience necessary to do the job. The director also requested more information on any previous associate administrators employed by the petitioner and their academic credentials, and information on whether the petitioner's competitors normally required degrees for closely related positions.

In response, the petitioner stated that the position was not that of an administrative assistant and reiterated the job duties provided in the initial petition. The petitioner then stated:

In addition to purely administrative matters, the position of Associate Administrator at a healthcare facility includes determination of the quality of care provided to the patients. It is a very distinct function for an administrator and it applies only in

the field of healthcare services. . . .In the position of Associate Administrator, [the beneficiary] will review patient's [sic] records to insure the proper treatment.

The petitioner stated that 60 percent of the beneficiary's time would be spent on implementing quality standards and monitoring personnel activities and that the rest of her time would be spent on reviewing patients' records and analyzing the quality of care provided. The petitioner stated that it had established three out of the four prongs outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A), and compared the proffered position to that of a health services manager. The petitioner submitted five job advertisements taken off the Internet for administrative positions within various health facilities or organizations.

On June 29, 2002, the director denied the petition. The director determined that the work as described by the petitioner did not appear to require a baccalaureate degree, and that the position appeared to require skill and business acumen, rather than a baccalaureate degree in a specific specialty. The director also determined that the petitioner had not established any of the criteria outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A).

On appeal, counsel asserts that the review of patients' records and the analysis of quality of care, which is to occupy 40 percent of the beneficiary's time, distinguish the proffered position from any other administrative position. According to counsel, this job responsibility mandates a much higher level of expertise than normally associated with administrative positions. Counsel cites to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and also to the DOL's *Dictionary of Occupational Titles (DOT)* and its classification of administrators of health care facilities. With regard to whether the degree requirement is common to the industry in parallel positions among similar organizations, counsel submits four additional job advertisements for positions within healthcare facilities or organizations that involve quality review duties.

Upon review of the record, the petitioner has not articulated a 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)

Citizenship and Immigration Services (CIS) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

A review of the record reveals that the director requested additional evidence because there was insufficient evidence that the proffered position was a specialty occupation. In response, the petitioner submitted the same job description with one additional duty, the review of patients' records to ensure proper treatment. The position as initially described appeared to focus on procedural and administrative issues involving proper licensure and training of staff, with emphasis on a predominant problem of absenteeism and truancy of employees.

The expanded description of the job does not mention the truancy problem but rather focuses on the review of patients' records, a job duty not previously noted in the initial petition. In addition, the petitioner originally submitted job advertisements for administrative positions, and on appeal, submits additional job advertisements for jobs concerned with quality assurance issues.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corporation, id.* If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

In the instant petition, although the petitioner did not change the job title of the proffered position, it appears to have amplified the duties of the proffered position. According to the information provided following the director's request for further evidence, the beneficiary will be spending substantial amount of her time doing review of patients' files to ensure that they receive adequate health care. This duty is quite distinct from ensuring that licensure and continuing education requirements for nurses, certified nursing assistants, or licensed practical nurses are up to date or observed. For this reason, the analysis of the first criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A) will be based on the job description of associate administrator originally submitted with the original petition.

Upon review of the record, the proffered position appears to be an administrative position within a healthcare facility that involves monitoring of licensure and continuing education of staff, maintaining lines of communication between staff and patients, and promoting the use of efficient practices in nursing and healthcare services. The position involves no direct nursing care of patients.

The petitioner has stated that the proffered position is similar to that of a health services manager. With regard to medical and health services managers, on page 75-76, the *Handbook* outlines the duties of this classification as follows:

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

Large facilities usually have several assistant administrators to aid the top administrator and to handle daily decisions. They may direct activities in clinical areas such as nursing, surgery, therapy, medical records, or health information. . . .

In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

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

Medical and health services managers must be familiar with management principles and practices. 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.

When comparing the initial job description with the *Handbook* classification, the proffered position does not appear to be analogous to the health services manager position. For example, the record does not indicate that the petitioner presently has a quality assurance department with personnel who review medical records. In addition the record does not indicate that the beneficiary will be managing any specific facility or department within the petitioner's healthcare business. In the alternative,

the record also does not indicate that the beneficiary will be an administrator in a small healthcare facility, managing several functions such as finances, or personnel. It should also be noted that the academic disciplines required for health service managers would be the same at either the baccalaureate or master's level. Therefore a bachelor of science degree in nursing would not necessarily be the preferred baccalaureate degree for a health services manager.

The position as described appears to be more analogous to a registered nurse position beyond entry level who is employed as a quality assurance employee than to a health services manager position. To the extent that a two-year associate's degree in nursing is sufficient to perform the duties of a registered nurse, it does not appear that a bachelor of science degree in nursing is the minimum requirement for entry into the actual position in the instant petition. Accordingly, the *Handbook* 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 other nursing positions beyond entry level that may be analogous to the position in the instant petition, on November 27, 2002, Citizenship and Immigration Services (CIS) issued a policy memorandum on H-1B nurse petitions (nurse memo).¹ This memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook* at 75.)" The *Handbook* reference is to the classification of medical and health services managers that has been examined already in this proceeding. Accordingly, both the administrative nursing positions and the health services managers appear to require the same educational credentials, namely, a graduate degree in nursing, health administration, and other closely related fields.

In the instant petition, the record does not contain sufficient evidence that the proffered position is an administrative nurse position. For example, the record does not indicate that the proffered position involves any supervisory nursing responsibilities. Without more persuasive evidence, the petitioner has not established that the proffered position is that of a health services manager or administrator, or that the actual position requires a bachelor's degree for entry into the position. To the extent that the position appears analogous to a nursing position beyond entry level but distinct from an administrative nursing position, the petitioner has not

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).

established that the position requires a baccalaureate degree for entry into the position.

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 the Bureau when determining the industry standard include: whether the Department of Labor's (DOL) *Occupation Outlook Handbook* (*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* conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted five Internet job announcements for administrative positions and an additional five job advertisements taken from the Internet that entailed quality improvement or review duties. None of these advertisements was found to be for a parallel position in a similar business. In addition some job announcements, such as the assistant administrator for Grey Allen, Inc., required more than a baccalaureate degree for entry into the position. Other job announcements, while specifying the need for a baccalaureate degree, did not identify the need for a baccalaureate degree in a specific specialty or in nursing.

In addition, the petitioner submitted no documentation that any professional association has made a bachelor's degree a requirement for entry into healthcare quality assurance or administrative field, 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. As previously noted, this proceeding is considering only the initial job description submitted by the petitioner. In the instant petition, although the petitioner in its response to the director's request for further evidence stated that

the position of associate administrator is a very unique administrative position, the petitioner submitted no documentation that the actual position described by the petitioner would involve duties seen as either unique or complex that only an individual with a degree in a specific specialty could perform them. For example, while the described duties of monitoring of licensure, and resolution of complaints may be an integral part of healthcare operations and patient care, the record does not contain any substantive evidence as to why these duties should be viewed as either complex or unique.

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

The proffered position in the instant petition appears to be a new position within the petitioner's skilled care facility. The petitioner did not provide any evidence that it had hired anyone previously for the proffered position.

IV. The nature of the specific duties are 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)

The job description in the original petition contained work duties that are similar to numerous other job and management areas, namely the monitoring of truancy and absenteeism within the workplace, and the quality assurance monitoring of licensure, work products and processes. The record is devoid of any information on how many employees the beneficiary would be supervising, the number of employees requiring periodic monitoring of credentials or continuing education, or what specific areas would be within the purview of the beneficiary with regard to greater efficiency of healthcare services. In addition no breakdown is provided as to the numbers of staff involved in various levels of healthcare that the beneficiary would monitor to further substantiate the level and volume of work to be performed. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence as to the specialized or complex nature of the proffered 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 proffered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the beneficiary does not appear qualified to perform the duties of the proffered position. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary

must hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record of proceeding contains no educational equivalency document that evaluates the beneficiary's foreign baccalaureate degree and its equivalency to a baccalaureate degree from an accredited U.S. institution. As the appeal will be dismissed on other grounds, this issue need not be examined further.

To the extent that the petitioner has not established that the actual position in the instant petition is a specialty occupation and that the beneficiary is qualified to perform the duties of the proffered position, the petition cannot be approved.

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.