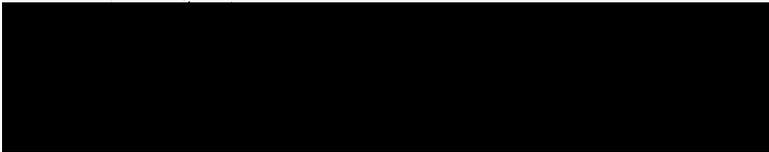


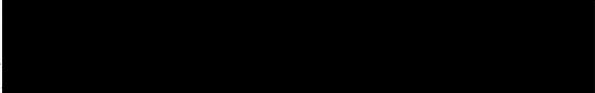
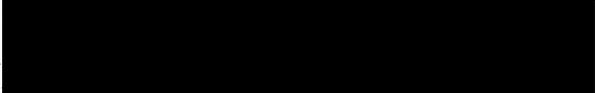
*Dr*



U.S. Citizenship  
and Immigration  
Services



FILE: LIN 03 218 51827 Office: NEBRASKA SERVICE CENTER Date: **OCT 22 2004**

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 of the Administrative Appeals Office 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.

*Robert P. Wiemann*

Robert P. Wiemann, Director  
Administrative Appeals Office

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

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**DISCUSSION:** The service center director 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 an intermediate nursing care and rehabilitation facility. It seeks to employ the beneficiary as a health educator, and endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, the petitioner's representative submits a brief and additional information stating that the proffered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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:

[A]n 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.

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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceedings before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a health educator. Evidence of the beneficiary's duties accompanied the Form I-129 petition in a letter dated May 20, 2003. According to the evidence, the beneficiary would: develop, plan, and implement health education programs for patients and staff; prepare family members, caregivers, and guardians to continue follow-up care programs upon discharge; gather data and research current demographics and in-house conditions of common communicable diseases that could lead to an outbreak in the nursing home or immediately after discharge; address the health care and stress reduction needs of the staff in order to insure that employees operate at peak efficiency and minimize sick days; gather information by monitoring and/or observing websites, publications, health and social service consultants, physicians, nurses, certified nursing assistants, and therapists, and then prepare reports to develop policies for the prevention of disease outbreaks; modify and update existing educational programs; and collaborate with affiliates to facilitate training, development, and education to ensure consistency, continuity, and cost effectiveness. The petitioner then assigned the following time percentages to the following duties:

- Collect and analyze data to determine individual patient and group needs – 30 percent of the time;
- Plan, implement, monitor, and evaluate programs designed to encourage healthy lifestyles, habits, policies, and environments – 20 percent of the time;
- Promote, maintain, and improve individual and group health – 10 percent of the time;
- Assist patients and staff to adopt healthy behaviors – 10 percent of the time;
- Consult with other health professionals and social service professionals – 10 percent of the time;
- Prepare materials and distribute them to patients and staff – 10 percent of the time; and

- Participate with the interdisciplinary team to educate in-home caregivers of patients' health requirements prior to discharge – 10 percent of the time.

The petitioner requires a minimum of a bachelor's degree in public health or its equivalent for entry into the proffered position. The record indicates that the beneficiary has obtained the equivalent of a Bachelor of Science degree in Nursing from an accredited institution of higher education in the United States, based upon her foreign nursing degree.

In a separate position announcement entitled "Notice of Job Availability" dated May 5, 2003 and posted until May 15, 2003, the petitioner described the duties of the proffered position as follows:

Promote, maintain, and improve individual and community health by assisting individuals and communities to adopt healthy behaviors; collect and analyze data to identify community needs prior to planning, implementing, monitoring, and evaluating programs designed to encourage healthy lifestyles, policies, and environments; serve as a resource to assist individuals, other professionals, or the community; and administer fiscal resources for health education programs.

The petitioner has not met any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook (Handbook)*, 2004-05 edition at 301-302, the Department of Labor describes, in part, the duties of a registered nurse:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions and progress in patients; assist physicians during surgeries, treatments, and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

....

*Public health nurses* work in government and private agencies, including clinics, schools, retirements communities, and other community settings. (Emphasis original.) They focus on populations, working with individuals, groups, and families to improve the overall health of communities. They also work with communities to help plan and implement programs. Public health nurses instruct individuals, families, and other groups regarding health issues such as preventive care, nutrition, and childcare. They arrange for immunizations, blood pressure testing, and other health screening. These nurses also work with community leaders, teachers, parents, and physicians in community health education.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. . . . ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. . . . Diploma programs, administered in hospitals, last about 3 years. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses. *Id at 302.*

On November 27, 2002, CIS 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.<sup>1</sup> As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position has a title such as "health educator" does not necessarily mean that the position qualifies as a specialty occupation.

The AAO looks beyond the title of the position and determines, from a review of the position's duties 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 of 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). The AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, 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. The duties ascribed to the offered position are routine to many registered nurse positions. CIS cannot find, based upon the current record, that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no requirement that a nurse have a baccalaureate or higher degree, or its equivalent, for entry into the position. Thus, the petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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<sup>1</sup> 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).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, and offers no evidence in this regard. Nor has the petitioner established that the duties of the position are so complex or unique that they can be performed only by an individual with a degree. As previously noted, the duties ascribed to the offered position are routine to many registered nurse positions. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Finally, the petitioner has not established that it normally requires a degree or its equivalent for the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In support of that assertion the petitioner provides a statement from its chief executive officer indicating that the petitioner has, in the past, employed three health educators at other facilities who held BSN's. The petitioner did not, however, provide copies of diplomas for the employees listed or any other documentation to establish the employee's educational credentials. The petitioner must do more than simply make unsubstantiated statements on the record to meet its burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Even assuming that the petitioner normally requires a baccalaureate level education for entry into the proffered position, the position still does not qualify as a specialty occupation. The performance of the duties of the position must still involve the theoretical and practical application of a body of highly specialized knowledge. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5<sup>th</sup> Cir. 2000). This position does not. The duties of the position are routinely performed in the industry by individuals with less than a baccalaureate level education.

It should further be noted that the director denied the petition, in part, stating that the duties of the proffered position were akin to those of a health services manager. The director then states, however, the duties of the offered position do not appear, "in scope or responsibility," to match those of a health services manager, and denied the petition because the proffered position did not qualify as a specialty occupation. The AAO agrees with that portion of the director's decision that concludes that the offered position does not qualify as a specialty occupation for the reasons previously set forth. The AAO does not agree, however, that the duties of the proffered position are those of a health services manager, and withdraws the director's findings in that regard.

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the director's denial of the Form I-129 petition shall not be disturbed.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

**ORDER:** The appeal is dismissed. The petition is denied.