

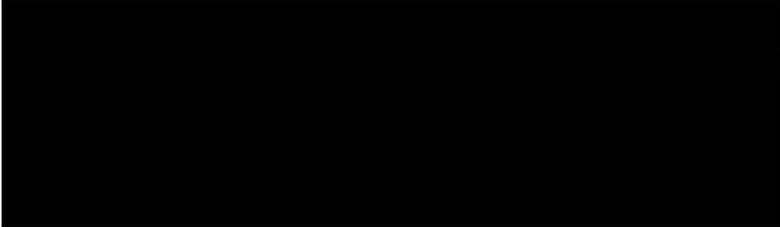
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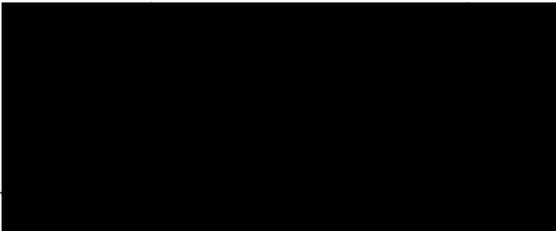
FILE: WAC 04 013 53346 Office: CALIFORNIA SERVICE CENTER Date:

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 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

DISCUSSION: The director of the 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 provides long-term healthcare consulting and staffing solutions and seeks to employ the beneficiary as a director of nursing, adult medical and surgical unit. The petitioner, therefore, endeavors to classify the beneficiary 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, counsel submits a brief and evidence.

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.

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.

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 proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a director of nursing, adult medical and surgical unit. Evidence of the beneficiary's duties includes: the Form I-129; a statement accompanying the Form I-129 and a job description provided in the October 29, 2003 response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, planning, directing, coordinating the delivery of healthcare; improving the efficiency of the department and the quality of healthcare provided; establishing and implementing policies, objectives and procedures for the medical surgical department; evaluating personnel and work; developing reports and budgets; allocating department or unit resources; coordinating activities with other directors. Additionally, the petitioner stated that the beneficiary would be responsible for developing and supervising the nursing services of one or more nursing units through assessment of care needs, and the development, implementation and evaluation of programs of care. The petitioner stated that the minimum education required for this position is a baccalaureate degree or higher.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proffered position's duties resembled those of a Health Services Manager and that this title encompasses individuals in many different positions who plan, organize, coordinate and supervise the delivery of health care. The *Handbook* states that medical and health services managers must be familiar with management principles and practices. The director noted that the AAO states that 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. The director added that a bachelor's degree is adequate for some entry-level positions in smaller facilities and at the department level within healthcare organizations. The director found that the proposed duties and level of responsibility do not indicate a complexity or authority that is beyond what is normally encountered in the occupational field for individuals who hold a degree in nursing. The director determined that the petitioner has not established that the position meets the requirements for a specialty occupation.

On appeal, counsel contends that the proffered position qualifies as a specialty occupation as evidenced by the description of the proffered position, an advisory opinion letter, and the U.S. INS Memorandum of November 27, 2002 HQISD 70/6.2.8-P (Nursing Memo). Additionally, counsel refers to unpublished decisions to provide guidance in review of this instant petition. However, the AAO notes, while 8 C.F.R. § 103.3(c) provides that Citizenship & Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner asserts that CIS failed to properly consider an advisory opinion submitted by a nursing consultant and research service. In reviewing this letter, the AAO notes that this letter was dated October 6, 2003, six months prior to the filing of the petition, and evaluates whether the combined education and work experience of the beneficiary is equivalent to a bachelor's of science degree in nursing from an accredited college or university in the United States. The petitioner stated that this opinion letter establishes that the position offered to the beneficiary is a specialty occupation as required by the regulation and that the beneficiary is qualified to perform in the specialty occupation. However, upon reviewing the letter, the AAO notes that the authors of this letter refer to "her proposed employment as Director of Nursing at Providence St. Vincent Medical Center in Portland Oregon . . ." The authors also indicate that they based their opinion on a job description for the position of Director of Nursing-Medical Surgical Unit, Sunrise Hospital and Medical Center in Las Vegas, Nevada. Because this letter refers to two different positions and job locations,

the evidence has no probative value. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel cites the Nursing Memo to support his contention that the position offered is a specialty occupation. The petitioner contends that the position is an "upper-level nurse manager" as described in the Nursing Memo and therefore, is an H-1B specialty occupation. The petitioner contends that the actual duties of the proffered position are distinct duties from those of a medical and health services manager. The petitioner contends that the described job duties are those of an upper level "nurse manager" in a hospital administrative position. The petitioner notes that the holder of the proffered position reports to the Vice President of nursing and that the vice president of nursing position, and not the proffered position, is most comparable to the Health Service Manager and Administrator. Counsel relies on the memorandum and opinion letter and states that they "more appropriately and properly determine the characterization of the proffered position as specialty occupation."

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 baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

It is noted that the petitioner indicates that it provides long-term healthcare and staffing solutions and states that it will place the beneficiary in the proffered position at a healthcare facility in another state. There is no description of the duties in the record from that facility. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (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.

The record does not contain a service agreement between the petitioner and the facility where the beneficiary will work. The record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the facility. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the facility will qualify as a specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation. The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

First, the AAO does not agree with the director's conclusion that the proffered position is a medical and health services manager. Based on the petitioner's position description the offered position is similar to that of a nurse supervisor. In its *Handbook*, 2004-2005 edition, the DOL states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (A.D.N.), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as staff nurses.

[S]ome 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.

The *Handbook* does not elaborate on administrative nursing positions within this classification, although reference is made to two nursing positions within the classification of registered nurse that appear analogous to the proffered position. The *Handbook* states the following about head nurses or nurse supervisors:

Head nurses or nurse supervisors direct nursing activities, primarily in hospitals. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure that the patients receive proper care. They also may ensure that records are maintained and equipment and supplies are ordered.

The proffered position appears to resemble a nursing position beyond the entry-level registered nurse, but it does not appear to be analogous to an administrative nursing position. A recent CIS policy 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. The *Handbook* states:

The occupation, medical and health services manager, encompasses all individuals who plan, direct, coordinate and supervise the delivery of healthcare. 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.

Counsel contends that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the opinion letter from the nursing consultation and research service and the Nursing Memo clearly establish that the requirement of a bachelor's degree for the instant position is a common minimum requirement in the medical industry for the described Director of Nursing position. Because the opinion letter discusses two

different positions, the AAO does not give it any evidentiary weight. Additionally, this letter stated that the requirement of a BSN as educational preparation for the position of Director of Nursing is consistent with requirements of similar positions in similar hospital settings. Although the authors of this letter stated that they reviewed similar employment advertisements in four hospitals, neither the authors nor the petitioner provided copies of these advertisements. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The assertions of counsel do not prevail in establishing that the proffered position qualifies as a specialty occupation under the first criterion. Indeed, the Nursing Memo acknowledged that certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administrative position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree. The memo continues to state "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration." Nevertheless, the mere fact that a nursing position has a title such as "nursing director" does not necessarily mean that it is an upper level nurse manager and qualifies as a specialty occupation.

In this case, the petitioner has not demonstrated that the proffered position is an administrative position, which would require a registered nurse with a master's degree in nursing or health administration. Rather, the proposed duties are similar to those of a head nurse or nurse supervisor, as described herein. As such, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

The evidence in the record fails to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. Counsel contends that the opinion letter from a nursing consultation research service establishes that a bachelor's degree for the instant position is a common minimum requirement for a director of nursing position. However, as discussed above, the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988.)

The record also does not include any evidence from professional associations regarding an industry standard. In addition, no documentation to support the complexity or uniqueness of the proffered position was submitted. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. Neither the petitioner nor counsel discussed this criterion, and the record does not establish it.

The evidence in the record is inadequate to establish that the nature of the specific duties is so specialized and complex that the 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). Counsel contends that the advisory opinion

letter from a nursing consultation and research service has provided "clear, substantial and probative evidence" that the proffered position is a specialty occupation. As discussed above, the AAO is unable to accord weight to this evidence. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the AAO notes that the petitioner, LifeScience Resources is located in California and states that it provides healthcare staffing solutions. The Form I-129 indicated that the location of employment is Sunrise Hospital & Medical Center located in Las Vegas, Nevada. The petitioner has not provided copies of contracts between the place of employment and the petitioner. As such, it is unclear with whom the beneficiary would have the employee-employer relationship pursuant to 8 C.F.R. § 214.2(h)(4)(ii)(2). The petitioner indicated that the proffered position would report to the Vice President of Nursing at Sunrise Hospital. The petitioner has not indicated who would have the authority to pay, fire, supervise, or otherwise control the work of the beneficiary in the proffered position. Based on the record, there is insufficient information in the record to determine essential characteristics of the employment relationship with respect to the petitioner as a U.S. employer as required by 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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