

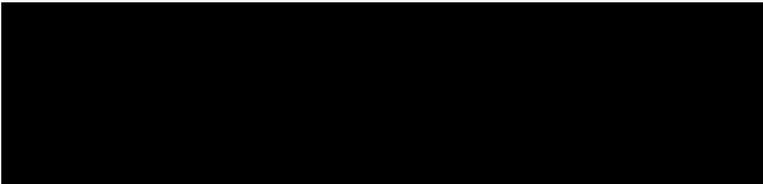
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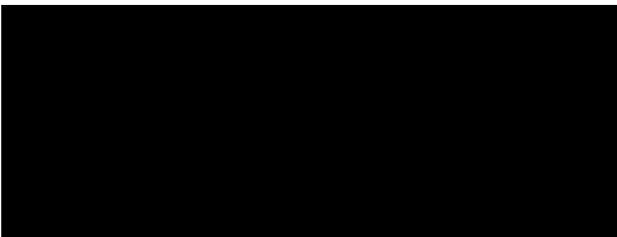


FILE: WAC 02 265 52199 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

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:



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, 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 healthcare consulting and staffing solutions. It seeks to employ the beneficiary as a registered nurse/charge nurse. 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 states that the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of 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 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 registered nurse/charge nurse. Evidence of the beneficiary's duties includes: the Form I-129 and the letter accompanying the Form I-129. According to this evidence, the beneficiary would perform duties that entail providing leadership to the care team; coordinating the delivery of patient care; assessing, planning, implementing, and evaluating leadership, care management, and patient care, education, and comfort; and facilitating and enhancing communication. The petitioner stated that a candidate must possess a bachelor's degree in nursing, a Nevada state nursing license, ACLS certification, and experience.

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 proffered position's duties resemble those of a registered nurse. According to the director, the State Board of Nursing recognizes that a candidate holding a degree in nursing, which is less than a baccalaureate degree, can perform the duties of a registered nurse. The director stated that it is not common in the industry for employers to require a baccalaureate or higher degree in the field, and that the proposed duties and stated level of responsibility do not indicate a complexity or authority beyond what is normally encountered in the occupational field.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Counsel contends that it is common for hospitals and the petitioner's industry to require that a nurse in a supervisory role possess a bachelor's degree or the equivalent. Counsel claims that the petitioner hires only candidates with bachelor's degrees because many registered nurse/charge nurse positions are in clinical specialty areas or have charge, head nurse, or clinical training or supervisory duties. Counsel emphasizes that there is a shortage of registered nurses in the United States.

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 first 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

CIS often looks to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement

for entry into a particular position. The *Handbook* reveals that the beneficiary's duties closely resemble those performed by head nurses or nurse supervisors that direct nursing activities, primarily in hospitals. According to the *Handbook*, they plan work schedules, assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and ensure proper care of patients.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

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

...

. . . [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.

Thus, according to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the proffered position. Consequently, the petitioner cannot establish that a baccalaureate degree in a specific specialty is the minimum for entry into the particular position, registered nurse/charge nurse.

Counsel claims that the petitioner hires only candidates with bachelor's degrees because many registered nurse/charge nurse positions are in clinical specialty areas or have charge, head nurse, or clinical training or supervisory duties. The *Handbook* reveals that the beneficiary's proposed duties are not at the level of a clinical nurse specialist. Unlike the proffered position, a clinical nurse specialist must meet educational and clinical practice requirements beyond the basic nursing education and licensing required of all RNs. Furthermore, as already discussed, a head nurse or nurse supervisor directs nursing activities, primarily in hospitals. Accordingly, the petitioner fails to establish the criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1).

The criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) requires that the petitioner demonstrate that a specific degree requirement is common to the industry in parallel positions among similar organizations. Counsel contends that hospitals and the petitioner's industry commonly require a specific degree for "nurses undertaking supervisory roles." No independent evidence corroborates counsel's contentions. The statements of counsel on appeal or in a motion are not evidence, and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n. 6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner fails to establish 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2).

Nor does the record contain evidence that would establish that the proffered position is so complex or unique that it can be performed only by a person with a degree. Again, the *Handbook* reveals that the beneficiary's duties resemble those performed by head nurses or nurse supervisors, occupations that do not require a specific bachelor's degree.

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. Although counsel states that the petitioner's policy is to hire only nurses with bachelor's degrees for the proffered position, this is not persuasive in establishing 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Once again, the Handbook reports that the beneficiary's duties resemble those performed by head nurses or nurse supervisors, occupations that do not require a specific bachelor's degree.

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). As already discussed, the *Handbook* reveals that the beneficiary's duties resemble those performed by head nurses or nurse supervisors, occupations that do not require a specific bachelor's degree. Accordingly, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that according to the *Handbook*, all states and the District of Columbia require that students graduate from an approved nursing program and pass a national licensing examination. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien seeking H classification in that occupation must have that license prior to the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. Although the petitioner claims that the beneficiary recently passed the national nursing exam (NCLEX), no evidence in the record substantiates this claim or indicates that the beneficiary possesses a license to practice the duties of the proffered position. Consequently, the beneficiary is not qualified to perform the duties of the proffered position.

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 id.* at 387.

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.