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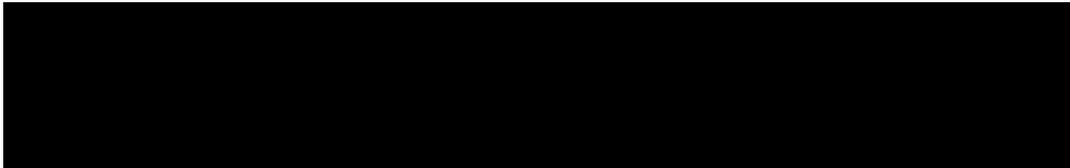
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 03 186 54518 Office: CALIFORNIA SERVICE CENTER Date: JUN 17 2005

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 is a skilled nursing facility that seeks to employ the beneficiary as an infection control specialist. 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. Counsel submits the petitioner's reasons for appeal on the Form I-290B, along with a brief and additional evidence.

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 documents; (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 attachments. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a part-time infection control specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail managing the infection control budget; serve as a specialist adviser on all matters relating to hospital infection control including surveillance and control aspects of hospital infection, sterilization and disinfection methods, types of ventilation, isolation facilities, kitchen, laundries, housekeeping, waste disposal, pest control, antibiotic usage and infection control aspects of nursing procedures; investigating outbreaks of hospital infection; preparing and up-dating policies, together with relevant personnel, in relation to hospital infection control e.g. disinfection, sterilization, isolation, patient care procedures, pre-employment screening, fitness to work and immunization; advising administrator directly on all aspects of infection control in the hospital and on implementation of agreed policies; participation in the preparation of tender documents for support services and advising on infection aspects of these services following award of a contract; being involved in the setting of quality standards with regard to hospital infections and in audits of infections; being involved in the planning and upgrading of hospital facilities; taking part in the training of nursing staff and other health care workers of all grades; and making arrangements for the provision of infection control medical advice outside normal working hours.

In the initial petition, the petitioner did not specify the minimum requirements for the proffered position but indicated that the beneficiary received his diploma in dentistry and has worked in the area of infection control.

The director issued a request for evidence specifically inquiring about the percentage of time to be spent on each duty, level of responsibility, hours per week of work, types of employees supervised and the minimum education, training, and experience necessary to do the job. The director also requested an explanation of why the petitioner requires the services of a person who has a college degree or its equivalent in the occupational field. The director requested evidence that the petitioner and its competitors normally require a degree for the position of infection control specialist. Additionally, the director requested evidence that the employer normally requires a degree or its equivalent for the position. Specifically, the director requested evidence that the position of infection control specialist is a common position required by similarly sized offices with similar incomes. Additionally, the director requested evidence to establish the level and type of education that the beneficiary has obtained abroad and its educational equivalent in the United States.

The director requested information about the petitioner such as a copy of the company's line and block organizational chart. The director specifically requested the petitioner to identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Finally, the director requested a more detailed description about the petitioner's business and a copy of the petitioner's federal income tax return.

In response, counsel submitted an augmented position description and indicated that the petitioner required a bachelor's degree in a health related field as the minimum education necessary to do the job. The petitioner provided copies of federal income tax returns for the years 2002 and 2001. The petitioner provided an organizational chart, which did not include the beneficiary's position or an indication of an infection control program.

The director denied the petition. The director noted that the petitioner amended the duties of the proffered position and determined that the petitioner had materially altered the initial description to the extent that it is a different position. The director highlighted what he considered the most notable additions, in part, as follows:

- Ensure that all personnel know whether they have medical conditions or receive medical treatment that renders them more susceptible to or more likely to transmit infections, so that they can follow recommendations to greatly reduce their risk of transmitting or acquiring infections (e.g. request for work reassignment).
- Maintain a record on health care personnel that includes information obtained during the medical evaluation, immunization records, results of tests obtained in any screening or control programs, and reports of work-related illnesses or exposures in accordance with state and federal regulatory requirements. Establish a readily available mechanism for personnel to obtain advice about illnesses that may acquire from or transmit to patients.
- Establish and keep an updated record of all personnel and maintain the confidentiality of their records while ensuring that they receive appropriate management for occupational illness or exposures. Ensure that the individual records for volunteers, trainees, contractual personnel, and personnel who provide care outside of hospital are similarly kept and maintained.
- Develop a list of needed immunization for each employee during screening and an individual plan to provide the necessary vaccines.

Additionally, the director noted that the petitioner omitted the following duties: maintaining the infection control budget and being involved in the planning and upgrading of the hospital facilities. The director noted that counsel submitted an occupational guide on an infection control position with the state universities' civil service system of the State of Illinois. Additionally, the petitioner submitted an internet advertisement for an AIDS infection control practitioner. The director noted that neither job listing mentioned a position requirement for a background in a dental field or dentistry. The director noted that the beneficiary has only attended a one-hour session of infection control as part of his continuing education. The director indicated that the petitioner has no record of hiring any employee for this position and that the organizational chart did not show the beneficiary's position. The director indicated that the petitioner did not provide evidence that it is a common position required by similarly sized facilities with similar annual incomes. The director found the position to be that of a nursing, psychiatric and home health aid, a position that does not require a baccalaureate degree.

On appeal, counsel explains that the petitioner had initially provided a brief and general description of the job duties of an infection control specialist and that the petitioner then submitted a lengthy description in response to the director's request. Counsel asserts that the position has not been materially altered and submits on appeal several exhibits that counsel contends demonstrate that all of the listed duties fall within the scope of an infection control specialist's area of work.

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 Department of Labor *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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a 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.

A thorough review of the *Handbook* discloses that the duties of the proffered position most closely resemble those of an occupational health nurse also called industrial nurses. As discussed in the *Handbook*, occupational health nurses provide nursing care at worksites to employees, customers, and others with injuries and illness. Occupational health nurses give emergency care, prepare accident reports, and arrange for further care if necessary. Occupational health nurses also offer health counseling, conduct health examinations and inoculations, and assess work environments to identify potential or actual health problems.

The proffered position's duty of maintaining a record on health care personnel that includes information obtained during the medical evaluation, immunization records, results of tests obtained in any screening or control programs, and reports of work-related illnesses or exposures in accordance with state and federal regulatory requirements; establishing a readily available mechanism for personnel to obtain advice about illnesses that may acquire from or transmit to patients, and other duties as described would be performed by an occupational nurse as illustrated in the *Handbook*.

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.

The *Handbook* continued:

. . . [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 occupation. We find that the evidence contained in the record fails to show that the petitioner established that a baccalaureate degree in a specific specialty is the minimum for entry into the occupation.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel submits one internet job posting for an AIDS Infection Control Practitioner by the City of Philadelphia Personnel Department. In the advertisement, the requirement was a "bachelor's degree in a health related field (such as nursing, medical technology, biology, microbiology, or immunology)." Counsel contends that the requirement of a bachelor's degree in a health related field means any health related field, and not specific health fields such as the examples offered in the advertisement. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. The position listed in the advertisement is markedly different from the proffered position. The advertised position indicates that it requires knowledge of the medical and psychological aspects of AIDS and AIDS-related syndromes. Another deficiency in the posting is that the City of Philadelphia as an entity is obviously dissimilar to the petitioner. Consequently, the posting fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner 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. . To the extent they are described in the record, the duties do not appear so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel submits an article published by the *California Association of Health Facilities* entitled "What everyone should know about skilled nursing facilities." Counsel states the article indicates that in order to be certified under the Medicare program, a skilled nursing facility must have an infection control program and that the petitioner is trying to strengthen its infection control program by hiring a specialist. The petitioner has indicated that the beneficiary would be working within its infection control program yet has not provided any evidence of its infection control program. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The *Handbook* reveals that the proffered position is performed by a nurse, an occupation that does not require a bachelor's degree in a specific specialty. There is no evidence in the record that would show that the duties of the proffered position rise beyond this level. 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).

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.