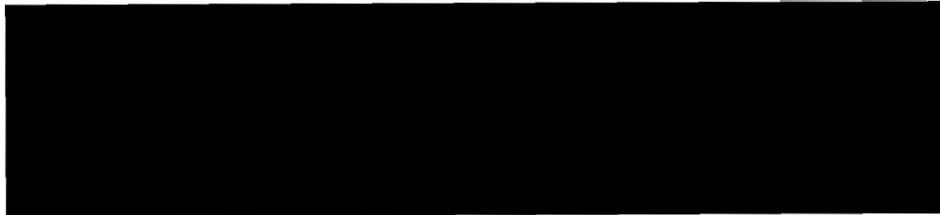


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**U.S. Citizenship
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FILE: EAC 04 056 53071 Office: VERMONT SERVICE CENTER Date: **APR 03 2006**

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.

for Michael T. Kelley
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The acting director of the Vermont 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 health care center, with 330 employees. It seeks to hire the beneficiary as a practice nurse in gerontology. The acting director denied the petition based on her determination that the record did not establish the proffered position as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a practice nurse in gerontology. Evidence of the beneficiary’s duties includes: the Form I-129, the petitioner’s October 23, 2003 letter of support; and the petitioner’s response to the director’s request for evidence.

The petitioner has stated that the proffered position would require the beneficiary to:

- Provide direct nursing care to elderly residents;
- Supervise day-to-day nurse activities performed by nurses and nursing assistants in accordance with current federal, state and local standards, guidelines and regulations governing the petitioner’s facility;
- Delegate and exercise authority on the administration of medication and treatment plans; and
- Delegate authority to subordinates who are responsible and accountable in carrying out assigned duties within the elderly patient population.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In her denial, the director found that the record did not establish that the duties of the proffered position were more complex than those performed by registered nurses throughout the nursing industry. Based on this

determination, she determined that the position did not require the beneficiary to have the minimum of a baccalaureate or higher degree. The AAO agrees.

In reaching this conclusion, the AAO has relied upon the discussion of registered nurses in the 2006-2007 edition of the DOL *Handbook*.¹ It finds the duties of the proffered position, as indicated by the petitioner, to reflect responsibilities the *Handbook* indicates are routinely performed by registered nurses. As described:

Registered nurses (RNs), regardless of specialty or work setting, perform basic duties that include treating patients, educating patients and the public about various medical conditions, and providing advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help to perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

[N]urse administrators supervise nursing staff, establish work schedules and budgets, and maintain medical supply inventories

As to whether the minimum academic entry requirement into the occupation of registered nurse is a baccalaureate or higher degree, or its equivalent, the *Handbook* states:

In all States and the District of Columbia, students must graduate from an approved nursing program and pass a national licensing examination, known as the NCLEX-RN, in order to obtain a nursing license All States require periodic renewal of licenses, which may involve continuing education.

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.

In that the *Handbook* indicates that individuals with associate degrees in nursing, as well as nursing diplomas, may obtain entry-level employment as registered nurses, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹ The 2006-2007 edition of the *Handbook* at www.bls.gov/oco/ocos083.htm.

In reaching its decision, the AAO has noted the petitioner's contention on appeal that the proffered position is that of an advanced practice nurse or clinical nurse specialist, as well as the submission of printed material from the website of the American Association of Colleges of Nursing discussing the certification and regulation of advanced practice nurses. It has also reviewed the November 27, 2002 memorandum issued by the former Immigration and Naturalization Service (INS), now CIS, which discusses the degree requirements for advanced practice nurses, submitted by the petitioner in response to the director's request for evidence. See Memorandum from Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations, U.S. Immigration and Naturalization Service, Department of Justice, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002). Moreover, the AAO has considered the petitioner's assertions on appeal regarding the specialized nature of the beneficiary's duties – the performance of physical examinations, the ordering and interpretation of diagnostic tests, the formulation of medical plans and prognoses, the prescribing or recommendation of drugs or other forms of treatment, and the referral of patients for consultation or treatment – duties that are considerably more detailed and specialized than those previously described. However, the AAO has not found the materials provided by the petitioner, or its claims regarding the specialized nature of the proffered position to be persuasive, and it will not consider the duties described by the petitioner on appeal.

As previously noted, it is not the title of a proffered position, but its duties, that must establish it as a specialty occupation. In the instant case, although the petitioner has assigned to the proffered position the title of advanced practice nurse and asserted its complexity, it has failed to describe duties that distinguish the position from nursing employment that may be performed by individuals who do not hold baccalaureate degrees. Therefore, the material from the website of the American Association of Colleges of Nursing and the November 27, 2002 INS memorandum, which address advanced practice nurses, are not relevant to these proceedings.

The AAO acknowledges that the significantly more complex duties the petitioner offers on appeal, particularly those related to prescribing medicine and treatment, describe the type of primary health care provided by advanced practice nurses. It has not, however, considered these duties in determining the nature of the proffered position as they were not among those discussed by the petitioner at the time of filing. On appeal, a petitioner may not offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Accordingly, the duties the AAO considered in this proceeding have been those indicated by the petitioner at the time of filing and elaborated upon in its response to the director's request for evidence.

To establish eligibility under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In the instant case, the petitioner has submitted no evidence that responds to either of the criterion's prongs. Accordingly, the record does not establish the proffered position as a specialty occupation based on an industry-wide degree requirement or its complexity or unique nature.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. While the petitioner has provided no specific evidence of its hiring practices, the AAO notes that, in response to the director's request for evidence, it indicated that of the 100 nurses it employs, only 29 are registered nurse and of the 29, only four hold baccalaureate degrees. Based on this information, the AAO concludes that the petitioner is unable to establish the proffered position as a specialty occupation based on its normal hiring practices for its nursing staff.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. In the instant case, the AAO finds no evidence to establish that the duties of the proffered position, as described at the time of filing, require greater knowledge or skill than that normally needed by registered nurses without a bachelor's degree who may supervise patient care. Further, the proffered position, as described, does not appear to represent a combination of jobs that would require a beneficiary to have a unique set of skills not normally possessed by a registered nurse. As a result, the record fails to establish that the proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, the petitioner has failed to establish that its 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.