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U.S. Citizenship and Immigration Services

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identifying data deleted to prevent clearly unwarranted invasion of personal priv

[redacted]

FILE: WAC 02 119 51396 Office: CALIFORNIA SERVICE CENTER Date: JAN 22 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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 is a convalescent hospital that seeks to employ the beneficiary as a case manager. The petitioner 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 and because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (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.

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 entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as a case manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: overseeing treatment plans from initial evaluation to discharge; monitoring patient's progress and communicating this to the patient, family, provider, and physician; participating in weekly conferences; and participating in program development. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing.

The director found that the proffered position was not a specialty occupation and that the beneficiary did not qualify to perform services in a specialty occupation. The director stated that the petitioner cited the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* to compare the proffered position's duties to those of a utilization review coordinator to conclude a baccalaureate or higher degree in nursing is required to perform case manager duties. The director explained that the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), does not follow the *DOT*. The director stated that the duties of the proffered position resemble those of a utilization review coordinator and a registered nurse. The director stated that the 2000-2001 edition of the DOL's *Occupational Outlook Handbook (*the *Handbook),* describes the training and other qualifications required for registered nurses. Reviewing the *Handbook*, the director stated that a registered nurse does not require a bachelor's degree or its equivalent to enter the occupation. Although employers prefer a baccalaureate level of training, the director stated that this preference is not the industry-wide requirement for entry into registered nurse positions. Finally, the director explained why the petitioner failed to establish the other criteria described at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the proffered position qualifies as a specialty occupation. First, counsel maintains that a case manager, a specialty occupation, differs in nature and focus from a registered nurse. Citing the *Handbook* (2002-2003 edition), counsel maintains that nurse positions, including supervisory and administrative positions, involve the direct care of patients such as administering medication and observing symptoms. According to counsel, case managers plan, coordinate, and analyze the delivery of health care; plan, assess, coordinate, monitor, and evaluate caseloads; and explore and implement strategies to reduce the length of stay and use of resources. Counsel claims that the beneficiary will not have contact with patients and will not supervise nurses. Counsel states that the Service has always used the *DOT* as a reference. Referring to the *DOT*, counsel states that the duties of the proffered position are similar, although more complex, than those of utilization review coordinators, and that employers require a bachelor's degree in nursing to enter utilization review coordinator jobs. Counsel states that the job duties of the proffered position overlap with those of utilization review coordinators; consequently, by DOL's standards employers require a bachelor's degree for the instant position.

Second, counsel claims that the submitted advertisements attest that the industry requires a bachelor's or higher degree for case manager positions.

Third, counsel states that the proffered position is newly established.

Finally, counsel claims that candidates must have a comprehensive understanding of medical treatment and management - an understanding associated with the attainment of a bachelor's degree.

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 turns first 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; 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.

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) because the duties of the proffered position are performed by case managers and, to a certain extent, by utilization review coordinators, positions that require a bachelor's degree.

The AAO finds that the evidence in the record is insufficient to establish the first criterion. The petitioner described the beneficiary's responsibilities in the letter and job description accompanying the petition. In response to the request for evidence, counsel materially changed the position's job responsibilities. For example, counsel claims that the beneficiary will "explore and implement strategies to decrease length of stay and resource consumption and resource results," and will "be responsible for assessment, planning, implementation, and evaluation of post hospital care." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Furthermore, the assertions of counsel in the request for evidence do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Consequently, the petitioner's job description, as stated in the letter and job description accompanying the petition, shall supplant counsel's job description.

Another of counsel's assertions is that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the *DOT*. As previously discussed, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *DOT* with the *Occupational Information Network* (*O*Net*). Both the *DOT and O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

A review of the *Handbook* confirms that the director correctly concluded that the duties of the proffered position correspond to those performed by registered nurses: registered nurses assess and observe patients' health condition, and develop and manage treatment plans. The *Handbook* reports that, although registered

nurses must be licensed, employers do not require a bachelor's degree to enter the occupation. Accordingly, the petitioner does not establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Factors often considered by CIS when determining the second criterion - the degree requirement is common to the industry in parallel positions among similar organizations - 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)). Counsel claims that the submitted advertisements attest that the industry usually requires a bachelor's or higher degree for the proffered position. The AAO's examination of the Internet postings reveals that the posted positions are not parallel to the proffered position. For example, the duties of Kforce's case manager differ dramatically from the beneficiary's duties, and no job duties are stated in Convent Healthcare System's postings. The petitioner, therefore, fails to establish the second criterion.

No evidence in the record demonstrates that the proffered position is so complex or unique that it can be performed only by a person with a degree.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. According to counsel, the proffered position is newly established. Consequently, the petitioner would not be able to establish the third criterion.

There is no evidence in the record to substantiate counsel's claim that the nature of the specific duties are 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). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the *Handbook* plainly conveys that a registered nurse position does not require a bachelor's degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Because the offered position does not qualify as a specialty occupation, this proceeding will not address the beneficiary's qualifications.

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.