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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 02 059 55396 Office: VERMONT SERVICE CENTER Date: [illegible] 2 2 [illegible]

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 an acute care general hospital that seeks to employ the beneficiary as a team leader nurse. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) (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 additional evidence.

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 team leader nurse. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; the position description; and the

petitioner's response to the director's request for evidence. According to this evidence, under the supervision of a nurse manager, the beneficiary would perform duties that entail, in part: providing overall administration of a nursing unit at an acute care general hospital such as training, assigning and supervising professional and nonprofessional personnel in the unit, and occasionally engaging in patient care. 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 because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that, according to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), registered nurse positions do not generally require a bachelor's degree, with the exception of some administrative positions. The director, after reviewing the petitioner's evidence, stated that the proposed position would not require a bachelor's degree or its equivalent.

On appeal, counsel states that the director's denial is inconsistent with the regulations, precedent decisions, and fails to take into account submitted evidence. Counsel contends that the petitioner has satisfied all criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

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) because the beneficiary's duties involve managerial skills not performed by ordinary staff nurses, and not offered in associate degree or diploma nursing programs. To substantiate this, counsel submits the opinions of: (1) Judith K. Sands, Associate Professor and Baccalaureate Program Director, University of Virginia School of Nursing; (2) Judith Ann Rogers, Assistant Professor Marymount University; and (3) Kathleen Hartman Sabatier, Clinical Instructor and Director, The Institute for Johns Hopkins Nursing. Counsel claims that a health services manager's duties resemble the beneficiary's duties and states that the AAO had previously ruled that, regardless of the title, a team leader nurse functions like a health services manager. Turning to the evidence, counsel states that the director had ignored that the beneficiary would supervise and lead others and that supervision and leadership of subordinate employees is an essential function of a health care manager. With respect to salary, counsel states that the attached survey reveals that advancement in the nursing field in a hospital is incremental, about $2,000 annually. Finally, counsel states that the beneficiary's duties are substantially similar to those of other beneficiaries already approved by the Vermont Service Center.

Counsel's assertions are unpersuasive. The AAO does concur with counsel in that the AAO 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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. After reviewing the *Handbook*, the AAO finds that the proffered

position is not analogous to a health services manager because the duties of the proffered position, coupled with its place within the petitioner's hierarchy, are not of a managerial caliber. A recent Immigration and Naturalization Services (the Service) 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.)"[1] The *Handbook* reference is to the classification of medical and health services managers. On page 75, the *Handbook* states:

> The term "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.

The AAO concludes that the proposed position's duties resemble those of a hospital nurse. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a hospital nurse position. Consequently, the petitioner fails to establish the first criterion.

Counsel's statement that the beneficiary's duties are substantially similar to the duties of other beneficiaries already approved by the Vermont Service Center is also without merit. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO finds that the submitted evidence is not sufficient to satisfy the petitioner's burden of proof. Counsel's salary survey has little relevance in establishing whether the proffered position is a specialty occupation. The document entitled "Nurse Qualification Standard – 1999" does not buttress counsel's claim that a bachelor's degree is required. The document states that new appointments must hold a bachelor's degree, and that by the year 2005, registered nurses must possess a bachelor's degree to advance beyond entry level. However, on page 3, the document states that the new education and experience requirements for the grade of nurse 1 (levels 1-3) is an AD/Diploma, not a bachelor's degree. Set forth on pages 4-5 is the description of the nurse 1 (levels 1-3). The duties of the nurse 1 (level 3) position, such as guiding and directing others who provide care and assisting clients in securing appropriate services, appear to parallel those of the proffered position. The proffered position, therefore, would not require a bachelor's degree. Finally, the AAO finds that the opinion statements from Judith K. Sands, Judith Ann Rogers, and Kathleen Hartman Sabatier, are relevant; however, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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[1] Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses,* HQISD 70/6.2.8-P (November 27, 2002).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel claims that many hospitals, as shown in the submitted Internet postings, recognize that a bachelor's degree in nursing is essential to perform the duties of the position.

Counsel's claim is without substance. Factors often considered by CIS when determining the industry standard include: whether the Department of Labor's (DOL) *Occupational 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." *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)). The submitted postings are insufficient to establish that a bachelor's degree requirement is common to the industry in parallel positions among similar organizations. The job descriptions from CRNA, St. Vincent's Hospital, and Weill Cornell Center are vague, making it nearly impossible to determine whether the duties of assistant nurse managers are similar to the duties of the proffered position. The duties in the postings from Brigham and Women's Hospital, Johns Hopkins University, and the University of Pennsylvania Health System differ from those of the proffered position. The duties of the clinical manager at Albert Einstein are vague, and the job requirements differ from the proffered position. No duties are stated for Virtua Health, North Shore Hospital, LIJ Medical Center, and Huntington Hospital positions; and the duties and requirements of the position at Georgetown University Hospital differ from the proffered position.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual 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. Counsel asserts that the petitioner normal requires a degree and submits a job posting. The AAO is not persuaded that the position is a specialty occupation simply because the petitioner claims that a degree is required. 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. Citizenship and Immigration Service (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.[2] To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment 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. As already related, the responsibilities and duties of the proffered position would not require a bachelor's degree. Furthermore, a careful review of the posting reveals that one of the clinical team leader positions (operating room) requires either a BSN or experience.

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[2] 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.

Another of counsel's claims is 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. According to counsel, a team leader is considered the first level manager in an acute care hospital's patient care unit. As such, counsel states "[s]upervision of patient care is the primary focus of the team leader's responsibilities." Planning and supervising the care of 6 to 28 patients, counsel states, is accomplished primarily by supervising inexperienced registered nurses, licensed practical nurses, and/or unlicensed assistive personnel. Other secondary duties, counsel states, are to assess and prioritize the needs of patients at the beginning of every shift and assign their care to staff; mentor inexperienced staff; manage the flow of patients in and out of the unit; coordinate the acquisition of multidisciplinary services; coordinate and implement quality assurance plans; plan and deliver educational opportunities for staff; resolve conflicts between staff; and address ethical issues.

The AAO finds that counsel's claims do not establish the fourth criterion – that the nature of the specific duties is not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree. Counsel's statement, that the primary focus of the beneficiary's duty is the supervision of patient care, is analogous to the role of a hospital nurse in that the hospital nurse is responsible for supervising licensed practical nurses and nursing aides.

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.