

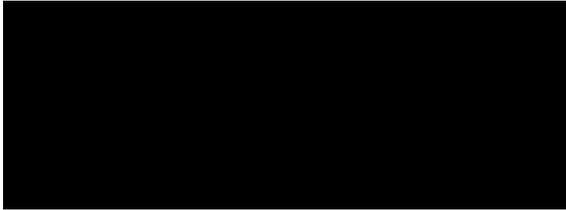
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

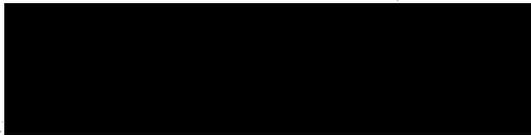
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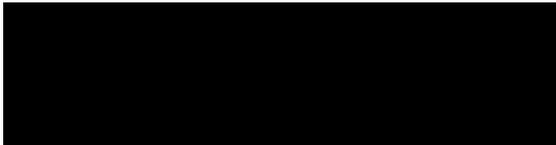
FILE: EAC 03 046 53066 Office: VERMONT SERVICE CENTER Date:

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner provides training and job placement services to disadvantaged individuals. It seeks to employ the beneficiary as a nursing instructor and to classify her 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 on the grounds that the record failed to establish (1) that the proffered position is a specialty occupation or (2) that the beneficiary qualifies to work in 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is a not-for-profit corporation, established in 1972, that provides workforce training programs and job placement services to the chronically unemployed. Program participants include welfare recipients, ex-convicts and prisoners in work release programs, former substance abusers, non-custodial parents, crime victims, youth dropouts and delinquents, as well as Latinos with limited English proficiency. The petitioner is seeking to hire the petitioner as a nursing instructor, the duties of which were listed in a letter from the Training Director, [REDACTED] submitted with the petition:

1. Demonstrate and teach patient care in classroom and clinical units to nursing students, home health aides, CNAs [certified nursing assistants] and nurse's aides.
2. Instruct students in the principles and application of physical, biological and psychological subjects related to nursing.
3. Provide classroom instruction on the principles of nursing, medical billing, CNA, clinical skills, hospital procedures, and patient care.
4. Prepare and administer examinations, evaluate student progress, and maintain records of student classroom and clinical experience.
5. Lecture to students, issue assignments, and direct seminars and panels.
6. Provide other related nursing instruction and education.

The petitioner asserted that a bachelor's degree in nursing was required to perform the services of the job. The beneficiary earned a bachelor of science in nursing from Our Lady of Fatima College in Valenzuela City, the Philippines on May 31, 1995. According to Morningside Evaluations and Consulting, an academic credentials evaluator in New York City, the beneficiary's degree is equivalent to a bachelor of science in nursing degree from an accredited institution of higher education in the United States.

The service center determined that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the director's judgement, the duties of the position paralleled the responsibilities of a registered nurse, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The director noted that the state of intended employment, New York, does not require registered nurses to have a bachelor of science in nursing (B.S.N.). Moreover, the *Handbook* indicated that a B.S.N. degree was not the normal minimum requirement for entry into a registered nurse position. The director was not persuaded by the evidence that a B.S.N. degree was common to the industry in parallel positions among similar organizations, or that the petitioner normally requires a B.S.N. degree for the proffered position. Nor did the director find that the nature of the position was so specialized, complex, or unique that it could only be performed by an individual with a B.S.N. degree. To the contrary, the director determined that the beneficiary would be "working as a nursing instructor of very basic nursing and medical courses, some of which are simply administrative classes." Lastly, the director found that the record failed to establish the beneficiary's qualifications to perform the services of the proffered position, since there was no evidence that she was a licensed registered nurse or teacher in the State of New York, as required by section 214(i)(2) of the Act.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel asserts that a B.S.N. is required for entry into the position of nursing instructor. The AAO agrees with the director that the duties of the proffered position reflect the responsibilities of a registered nurse. A recent policy memorandum providing guidance for CIS on the adjudication of H-1B petitions for nurses (*H-1B Memorandum*) confirms that the minimum requirement for entry into the field of nursing as a registered nurse is a two-year associate degree in nursing (A.D.N.). Though a four-year bachelor of science in nursing (B.S.N.) can be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. As indicated in the *H-1B Memorandum*, certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nurses in high-level management positions require a B.S.N. or higher degree, making them specialty occupations. In addition, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – require a B.S.N. or equivalent knowledge, making them specialty occupations as well. The nursing instructor position at issue in this case, however, does not fit any of the examples of an advanced practice nurse or any of the nursing specialties discussed in the *H-1B Memorandum*. Accordingly, the AAO determines that a baccalaureate or higher degree in the specific specialty of nursing – a B.S.N. – is not the minimum requirement for entry into the proffered position, as required for it to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With respect to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record does not establish that a B.S.N. degree is common to the industry in parallel positions among similar organizations. Counsel cites a job announcement in the New York Times, submitted on appeal, for a critical care nurse instructor requiring a bachelor's degree in nursing. The employer is a community hospital in Brooklyn, however, not a workforce training and job placement organization like the petitioner. Furthermore, the critical care nurse instructor described in the job announcement is responsible for training the clinical staff, teaching critical care procedures, and helping to develop additional emergency care programs. These duties are at a far higher level and demand considerably more knowledge of nursing than the basic courses to be given the participants in the petitioner's training program for nurse's aides. Thus, the New York Times advertisement involves a position that is not parallel and an organization that is not similar to those at issue in this petition. Accordingly, the record fails to establish that the proffered position qualifies as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner has also failed to show that its nursing instructor position is so complex or unique that it can only be performed by an individual with a B.S.N. degree, as required for it to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3), the petitioner asserts that it already employs two nursing instructors, one of whom has a B.S.N. and the other of whom has a B.S. in medicine, with a major in general surgery (presumably from a foreign university). The only evidence of those two employees in the file is a faculty roster, submitted in response to the RFE in March 2003, indicating the two employees were hired in October 1999 and June 2002, respectively. There is no corroborating evidence that the job duties of these individuals are the same as those of the proffered position, however, or that the two employees have bachelor's degrees. The petitioner has also submitted a copy of its job announcement for nursing instructors, which states that a B.S. in nursing is required, but has not submitted any further evidence that nurses with the required degree have been hired in the position. Simply going on record 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). Moreover, to qualify as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3) the petitioner must establish that its degree requirement is compelled by the performance demands of the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). The record does not establish that the performance demands of the supervisory nurse position at issue in this case are demanding enough to compel the petitioner to require a B.S.N. degree. Accordingly, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Counsel asserts on appeal that the duties of the nursing instructor position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree, as required to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4). As evidence thereof counsel cites a series of nursing occupations discussed in DOL's *Dictionary of Occupational Titles (DOT)*, as well as two non-nursing instructor occupations in *DOT*, all of which are listed with an SVP ("specific vocational preparation") of level 8, which translates to 4-10 years of experience in the field. The *DOT*, however, is not a persuasive source of information about whether a particular job requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not specify how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a particular position would require. There is nothing in the course description for the petitioner's nurse's aide training program that indicates it could not be taught by a registered nurse with less than a baccalaureate degree. Thus, the record does not establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the proffered position does not meet any of the regulatory criteria to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

As previously discussed, the director also determined that the beneficiary was not qualified to perform the services of a specialty occupation. Since the beneficiary's credentials are relevant only if the proffered position is found to be a specialty occupation, which is not the case here, the AAO need not further address the issue of the beneficiary's qualifications.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.