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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: WAC 08 223 50852 Office: CALIFORNIA SERVICE CENTER Date **AUG 02 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, 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 [REDACTED] that seeks to employ the beneficiary as a nursing supervisor. 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 concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's second RFE; (5) the petitioner's response to the second RFE; (6) the director's denial letter; and (7) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner is a hospital with a 26 bed capacity, 41 employees, and a gross annual income of \$1.3 million. In the support letter, dated August 5, 2008, the petitioner submitted a job description for the proffered position which described the proposed duties as follows:

The position offered is that of a Nursing Supervisor. As Nursing Supervisor, her duties would include planning, organizing, and overseeing staff to provide quality patient care; evaluating care and ensuring customer satisfaction; overseeing the department's daily staffing requirements; orientating clinical staff to their job responsibilities; providing leadership in clinical problem-solving.

She would also be responsible for assisting with staff recruitment; ensuring an orientation plan for new staff members, and providing timely feedback; evaluating and scheduling in-services/training as needed; serve as a liaison with physicians and the communities that we serve. Ensuring that department activities and records are in adherence to Hospital Policies and various licensing and regulatory requirements; maintaining the clinical skills and knowledge necessary to set standard and work in clinical areas of nursing; assisting with patients' examinations, and/or answering their questions.

Finally, [the beneficiary] would be responsible for interpreting and implementing organizational policies and procedures, nursing standards and regulations. She would also be assisting in preparing the departmental fiscal budget, and performing other duties as assigned.

On August 18, 2008, the director sent a request for additional information. In the request, the director requested further information regarding the job duties of the proffered position.

In the response letter, dated September 5, 2008, counsel for the petitioner reiterated the job duties initially submitted with the petition. In addition, counsel stated that the position of Nurse Supervisor "is not a general RN position since it is in fact a management level position where advanced supervisory duties are required." Counsel also stated that the position requires "at least a 4 years [sic] baccalaureate degree in nursing plus a [sic] nursing supervisory experience."

The petitioner also submitted a professional position evaluation from [REDACTED] Professor of Radiation Oncology and Internal Medicine from the [REDACTED]. The author notes that the position of Nursing Supervisor is not an entry-level position and "based on the advanced and specialized nature" of these duties, the position requires the attainment of at least a bachelor's degree in Nursing.

On appeal, the petitioner further explains the duties of the proffered position as follows:

As you pointed out, we are a small Hospital; therefore we lean fairly heavy on some of our nurses. We simply do not have the luxury of having many nurses, so that there cannot be a nurse for every different need of position. The supervising

nurse is the one we depend on to fill those jobs that are necessary for us to do, but do not require, and cannot support, a nurse dedicated to that position.

In determining whether a proposed position qualifies as a specialty occupation, USCIS 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. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In reviewing the 2010-2011 edition of the *Handbook*, the AAO looked at the description of registered nurses. In determining whether a proposed position qualifies as a specialty occupation, USCIS 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 or its equivalent in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry for registered nurses as follows:

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

RNs teach patients and their families how to manage their illnesses or injuries, explaining post-treatment home care needs; diet, nutrition, and exercise programs; and self-administration of medication and physical therapy. Some RNs may work to promote general health by educating the public on warning signs and symptoms of disease. RNs also might run general health screening or immunization clinics, blood drives, and public seminars on various conditions.

When caring for patients, RNs establish a care plan or contribute to an existing plan. Plans may include numerous activities, such as administering medication, including careful checking of dosages and avoiding interactions; starting, maintaining, and discontinuing intravenous (IV) lines for fluid, medication, blood, and blood products; administering therapies and treatments; observing the patient and recording those observations; and consulting with physicians and other healthcare clinicians. Some RNs provide direction to licensed practical nurses and nursing aides regarding patient care. (See the statements on licensed practical and licensed vocational nurses; nursing and psychiatric aides; and home health aides

elsewhere in the Handbook). RNs with advanced educational preparation and training may perform diagnostic and therapeutic procedures and may have prescriptive authority.

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:

There are three typical 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 a staff nurse. There are hundreds of registered nursing programs that result in an ADN or BSN; however, there are relatively few diploma programs.

As such, the *Handbook* indicates that individuals with associate degrees in nursing, as well as nursing diplomas, may obtain entry-level employment as registered nurses. In addition, although the AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by a nurse, the petitioner's listing of these duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis and whether the position goes beyond that of an entry-level position and requires at least a bachelor's degree or its equivalent in a specific specialty. The record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. For example, the petitioner did not provide information and corroborating evidence regarding the positions the beneficiary will supervise, if any, and a more detailed description of the responsibilities of the nurse supervisor. Without this type of evidence, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Moreover, even if the petitioner established the proffered position as being more than an entry-level position, the *Handbook* still does not state that such a position normally requires a bachelor's degree or higher degree or its equivalent in a specific specialty. Accordingly, the AAO finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

For all of these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A),

may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. The petitioner submitted three job postings for the position of nurse supervisor. The first posting is for a nurse supervisor that will supervise a team of 8 RNs and one data manager, and it requires a master's degree. The second posting is for a nurse supervisor for a 645-bed institution and it requires a bachelor's degree. The third posting is for a nurse supervisor for a 100-bed facility and it states that a bachelor's degree in nursing or a related field is preferred.

The record fails to establish that these job postings come from company's that are "similar" to the petitioner, as the postings are facilities with over 100-bed capacity and the petitioner is a smaller hospital with a 26-bed capacity. There is insufficient evidence to establish that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Simply 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)).

In addition, one posting requires a master's degree, one posting requires a bachelor's degree but in no specific specialty and the third posting states that a bachelor's degree is preferred but not required. The fact that obtaining a 4-year degree is preferred is not synonymous with the standard imposed by the regulation of normally requiring a bachelor's degree, or its equivalent. Moreover, even if the AAO were to find that the companies were similar to the petitioner, three job postings are insufficient by themselves to establish an industry-wide standard.

The petitioner also submitted a professional position evaluation from [REDACTED] Professor of Radiation Oncology and Internal Medicine from the [REDACTED]. The author notes that the position of Nursing Supervisor is not an entry-level position and "based on the advanced and specialized nature" of these duties, the position requires the attainment of at least a bachelor's degree in Nursing. The author stated that it reviewed the "job duties for the position of Nursing Supervisor." Given that the job duties provided by the petitioner are generic and do not specifically explain what the beneficiary will do on a day-to-day basis, it is not clear how the author came to this conclusion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with

other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the description of the position proposed in the petition is very general and vague. The petitioner only offered a generic description of the beneficiary's duties in the proffered position. For example, the petitioner indicated that the duties will include planning, organizing, and overseeing staff to provide quality patient care. However, the petitioner does not explain how many individuals the beneficiary will supervise, what specific positions she will supervise, and how the position differs from the duties performed by an administrative manager. There has been no demonstration that the proposed position is more complex or unique than the general range of registered nurses in other, similar organizations, which would not normally require a degreed individual. Without a detailed description of the work to be performed by a beneficiary, a petitioner cannot establish that the tasks he or she would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent. Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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. The petitioner did not submit any supporting evidence to establish the third criteria. Again, 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. at 165.

While the petitioner states 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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. To interpret the regulations in any other way would lead to absurd results: if USCIS 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.

Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Regardless, there is insufficient evidence in the record to support a finding that the proposed position is so specialized or complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree or its equivalent in a specific specialty. As previously noted, USCIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. However, the petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(#).

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The proposed position in this petition has not been established as being a specialty occupation, so an analysis of the beneficiary's qualifications to perform its duties is moot. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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