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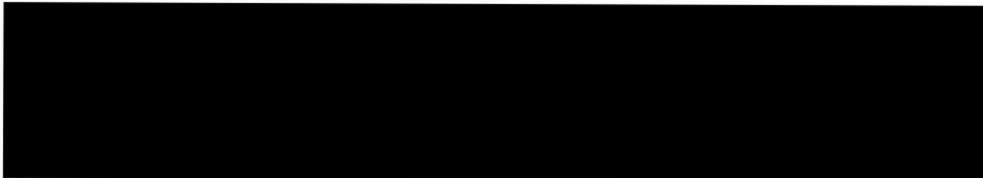
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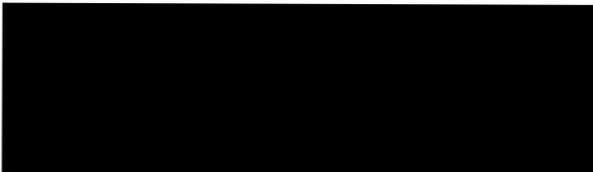
FILE: WAC 07 140 51915 Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2008

IN RE: Petitioner:
Beneficiary:



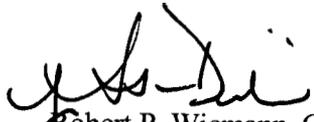
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 skilled nursing facility. It seeks to employ the beneficiary as a staff developer. 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 does not qualify as a specialty occupation. On appeal, counsel submits a brief stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 are 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) the 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) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a staff developer. Evidence of the beneficiary’s duties was included with the Form I-129 petition and in response to the director’s request for evidence. According to this evidence the beneficiary would:

- Develop, implement and evaluate all in-service and educational programs for the current CNA staff and train prospective applicants for the position;
- Create and maintain adequate educational materials for CNA staff;
- Act as program coordinator for the in-service and continuing education programs for CNA staff;
- Participate in staff development plans;
- Survey CNA staff education needs by conducting needs assessments and coordinating with management, pursuant to State regulations and company guidelines; and

Oversee quality care assurance and risk management programs as well as scheduling of CNAs pursuant to state regulations and company guidelines.

The petitioner requires a minimum of a bachelor’s degree in nursing, health education, healthcare administration or a related healthcare field for entry into the proffered position.

CIS often looks to the Department of Labor’s *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The duties to be performed by the beneficiary involve areas of quality assurance within the petitioner’s business environment, and are essentially those performed by nurses (or other healthcare personnel) who have moved into the business side of healthcare. The *Handbook*, 2008-09 edition, notes the following about the training and educational requirements for registered nurse positions:

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 illness or injury, explaining post-treatment home care needs; diet, nutrition, and exercise programs; and self-administration of medication and physical therapy. Some RNs 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 plan of care 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 health care clinicians. Some RNs provide direction to licensed practical nurses and nursing aids regarding patient care. RNs with advanced educational preparation and training may perform diagnostic and therapeutic procedures and may have prescriptive authority.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse. The *Handbook* does state, however, that:

[S]ome career paths are open only to nurses with a bachelor's or master's degree. A bachelor's degree often is necessary for administrative positions and is a prerequisite for admission to graduate nursing programs in research, consulting, and teaching, and all four advanced practice nursing specialties—clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners. . . .

The *Handbook* does not elaborate on administrative nursing positions within this classification, although the *Handbook* does note:

Some nurses move into the business side of health care. Their nursing expertise and experience on a health care team equip them to manage ambulatory, acute, home-based, and chronic care. Employers— including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need RNs for health planning and development, marketing, consulting, policy development, and quality assurance. . . .

The proffered position appears to resemble a nursing position beyond the entry-level registered nurse, but it is not analogous to an administrative nursing position. A recent 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.)” The *Handbook* reference is to the classification of medical and health services managers.¹ 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.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment in the proffered position. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. Experience and good performance can lead to promotion for a registered nurse to more responsible positions, such as assistant head nurse or head nurse/nurse supervisor. Likewise, good performance and experience can equip a nurse to perform the duties of a patient care coordinator or quality assurance coordinator/staff developer in the healthcare field. There is no requirement, however, that a nurse, or any other healthcare professional performing the duties of a quality assurance coordinator/staff developer, have a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into that position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of this criterion the petitioner submitted letters from the following three healthcare providers: [REDACTED], President Aidan Healthcare, Inc.; [REDACTED], Administrator, Lawrence Convalescent Center; and [REDACTED], Administrator, Garden Care Center. Each letter states that the author’s organization employs a staff developer, or similar personnel, with duties similar to those of the beneficiary, and that the minimum requirement for employment in those positions is a bachelor’s degree in nursing, or equivalent education and experience. The letters submitted, however, do not establish the cited criterion. The record does not reflect that the organizations submitting the witness statements are similar in nature and scope to the petitioner’s organization. Further, while the witnesses state that a bachelor’s degree, “or its equivalent,” is required for their positions, the record is silent as to what constitutes the equivalent of a bachelor’s degree in nursing in the witness organizations. For an individual to be deemed qualified to perform the duties of a specialty occupation based upon a combination of education and experience, the record must reflect that the employee satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). The petitioner also makes reference to the Department of Labor’s *Dictionary Of Occupational Titles (DOT)* stating that a four-year degree is required for most positions in the offered position’s job zone category. Neither the *DOT*’s SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

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).

The petitioner asserts that it normally requires a degree or its equivalent for entry into the proffered position. In support of that assertion the petitioner submitted an employee referral job posting stating that the proffered position requires a minimum of a bachelor's degree in nursing, health education, healthcare administration or related field, or equivalent experience. The petitioner then lists four employees previously holding the position who held less than a baccalaureate level education, but had experience in the field. When considering such employer assertions, the AAO usually 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 provide proof of the listed employees formal education, or details concerning their past experience in the field. Further, 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. 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has not been established.

The petitioner has not established that the duties of the proffered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty. Nor has it been established that the duties of the offered position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4). The duties described are general and routine for nurses or other healthcare personnel who work in the business side of healthcare performing duties related to quality assurance. The record does not provide sufficient detail of the beneficiary's ongoing daily activities with regard to the petitioner's specific business operations to establish that the position's duties require a baccalaureate level education in a specific educational discipline. The duties are routinely performed in the industry by healthcare personnel with less than a baccalaureate level education.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. 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 and the appeal shall accordingly be dismissed.

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