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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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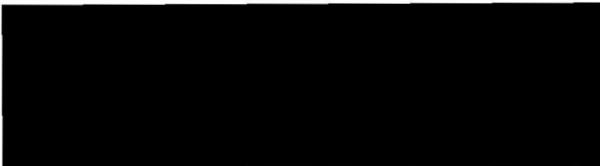
FILE: WAC 08 149 54785 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 provides nursing services by assigning nurses to healthcare facilities nationwide. It does not directly provide health care to patients nor does it operate any health care facility. It seeks to employ the beneficiary as a registered nurse 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 failed to establish that the proffered position is a specialty occupation.

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

The primary issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

An 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 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.

In this matter, the petitioner seeks the beneficiary’s services as a registered nurse. Evidence of the beneficiary’s duties includes the petitioner’s April 1, 2008 letter of support and a copy of an employment agreement dated February 22, 2008 between the petitioner and the beneficiary. The support letter indicates the proffered position would require the beneficiary to perform the following duties:

- Report to the Director of Nursing to gain orientation of the facility and get up to speed on the caseload of the facility;
- Assess patient health problems and needs;
- Develop and implement nursing care plans;
- Maintain medical records; and
- Administer nursing care to ill, injured, convalescent, or disabled patients.

The petitioner also states that the beneficiary:

[m]ay advise patients on health maintenance and disease prevention or provide case management. . . . Includes [sic] advance practice nurses such as: nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists. Advanced practice nursing is practiced by RNs who have specialized formal, post-basic education and who function in highly autonomous and specialized roles.

Along with the petition, the petitioner submitted a copy of an employment agreement that is signed both by the petitioner and the beneficiary. The employment agreement gives the beneficiary the title of "Healthcare Professional." The agreement states in pertinent part the following:

WHEREAS, [the petitioner] provides the services of Physical, Occupational Therapy and Nursing (Healthcare Professional) to hospitals, clinics, rehabilitative agencies, physician groups, and other health care providers . . . in the United States and Canada;

WHEREAS, [the petitioner] has identified a need for qualified Healthcare Professional's [sic] to perform health care services at any one or more of the Facilities with which [the petitioner] contracts or may contract to provide such services[.]

The agreement later states:

Upon the terms and conditions contained herein, [the petitioner] hereby employs Healthcare Professional for the term indicated and Healthcare Professional hereby accepts such employment for the term indicated, provided, however, both parties hereto agree that such employment shall not commence until Healthcare Professional's first assignment at the Facility.

* * *

If Healthcare Professional is employed, [the petitioner] will provide housing for Healthcare Professional only during the time when Healthcare Professional is active and working.

* * *

Although [the petitioner] shall use its best efforts to assign Healthcare Professional to a Facility for a minimum of thirteen (13) weeks, [the petitioner] cannot guarantee that Healthcare Professional will remain at an assignment for any given time. Healthcare Professional agrees that he/she will accept assignments as, when and where arranged.

(Emphasis added.) Based on this signed agreement, it is therefore clear that the petitioner is a contractor or agent for nurses and other healthcare professionals to work at different third party locations in the United States as the need arises and, moreover, that the beneficiary's potential assignments to these various facilities are short-term and not guaranteed.

Interestingly, the Form I-129 and Labor Condition Application (LCA) submitted by the petitioner indicate that the beneficiary will be employed in Stockton, CA from October 1, 2008 to October 1, 2010. However, none of the supporting documentation provided by the petitioner indicates at which facility the beneficiary will be assigned in Stockton, CA and there is no letter or agreement provided from any facility in Stockton, CA or any other location where the beneficiary might be assigned. For that matter, there is no supporting documentation provided that illuminates which facility or facilities the beneficiary will be assigned to by the petitioner, the exact time period the beneficiary will work at any given location, and what the beneficiary will actually be doing day-to-day at the third party location. Without such supporting evidence, the location of the worksite and time period written on the Form I-129 and LCA that are signed by the petitioner appear to be in

direct contradiction with the terms of the employment agreement, which indicates that the beneficiary's assignments to third party locations will be short-term, sporadic, and speculative.

In the RFE issued on June 27, 2008, the director requested additional documentation evidencing that the proffered position qualifies as a specialty occupation as follows:

Provide a more detailed description of the work to be performed by the beneficiary for the entire requested period of validity. Include specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, and the minimum education, training, and experience necessary to do the job. Also, explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupation field.

The petitioner's response to the RFE with respect to these concerns consisted only of a letter from counsel that states:

Once in the Petitioner's employ, the Beneficiary will be assigned on-site with a hospital within the United States. The requirements and demands of that hospital will dictate the duration of the beneficiary's assignment. The Petitioner will then freely assign the Beneficiary to different hospitals in the U.S., as demand and logistics dictate. The Petitioner will remain the Beneficiary's employer throughout. . . . As stated, the Petitioner's core business is to assign Registered Nurses, such as the Beneficiary who possess Bachelor's degrees to hospitals throughout the U.S. . . . The hospitals in which the Beneficiary will be assigned, and the attendant duties in each assignment will vary, pursuant to the demands of the those hospitals. As such, it is literally impossible to predict the "percentage of time spent on each duty", as these duties will be prescribed by the demands of the hospital. It is likewise impossible to predict the "level of responsibility" the Beneficiary will assume in each hospital, **as the identities of those hospitals are yet to be determined.**

(Emphasis added.) Because the petitioner does not know what duties the beneficiary will perform or even which hospital the beneficiary will work at, the AAO questions how the petitioner can file an H-1B petition asserting that the proffered job is for a registered nurse in Stockton, CA for two years. No independent evidence was provided to corroborate this claim.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO notes that in the appeal, counsel concedes that the proffered position is not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2) or (4). Consequently, the AAO will not consider whether the proffered position is a specialty occupation on these grounds. However, counsel for the petitioner argues that the position offered to the beneficiary is a specialty occupation under the third criterion (because the employer normally requires a degree or its equivalent for the position) at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The AAO will therefore limit its examination of whether this position constitutes a specialty occupation to this ground alone.

The AAO's examination of supporting evidence as outlined above calls into question the truthfulness or accuracy of the proffered position description provided by the petitioner. Specifically, the terms of the employment agreement between the petitioner and the beneficiary submitted by the petitioner in support of

the petition indicates that the beneficiary will work sporadically at different third party locations as a healthcare professional for short term periods while the Form I-129 and LCA indicate that the beneficiary will work for two years in Stockton, CA.

In the response to the RFE, counsel writes, “the basis for the Beneficiary’s H-1B status is clearly established by the Petitioner’s requirement that **ALL** of its Registered Nurses hold Bachelor’s Degrees. . . . the Petitioner’s core business is to assign Registered Nurses, such as the Beneficiary, who possess Bachelor’s degrees to hospitals throughout the U.S.” (Emphasis in original). However, on appeal, counsel argues that the proffered position is actually not that of a registered nurse, without providing any supporting evidence or even signed documentation from the petitioner. In support of this argument, counsel inserts an additional job duty in the appeal brief that was not provided either in the initial filing or the RFE response as follows:

Provide critical care in an Intensive Care Unit, drawing upon extensive experience in Neurological Intensive Care and Stroke Units and educational qualifications.

The AAO notes that on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Because the petitioner did not submit any evidence or documentation before the appeal was filed demonstrating that the beneficiary will provide critical care in an intensive care unit, the AAO will not consider this new job duty described by counsel in the letter on appeal as it was not part of the record before the director and as it constitutes a material change to the job description. Therefore, the AAO need not address counsel’s arguments that this additional job duty demonstrates that the duties of the proffered position cannot be performed without a bachelor’s degree or that the proffered position is not actually that of a registered nurse.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

USCIS routinely cites *Defensor*, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation for the purpose of H-1B classification. The petitioner in *Defensor*, Vintage Health Resources (Vintage), like the petitioner in this case, was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court

recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* In *Defensor*, the court found that that evidence of the client companies' job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The petitioner is seeking the beneficiary's services as a registered nurse. Counsel's brief in support of the appeal acknowledges that a traditional registered nurse is not a specialty occupation. Instead, counsel argues that the proffered position is a specialty occupation because the petitioner normally requires a degree or its equivalent for the position. However, insufficient evidence was provided to determine whether the work to be completed by the beneficiary entails the performance of duties that correspond with the job description and supporting documents. The vague job description provided by the petitioner in the support letter initially submitted with the petition is insufficient to establish that the proffered position is one that requires the theoretical and practical application of a body of highly specialized knowledge as well as the attainment of a bachelor's degree or higher in the specific specialty (or its equivalent) for entry into the occupation in the United States.

There is no evidence demonstrating that the petitioner requires that all of its registered nurses hold bachelor's degrees in a specific specialty. Only the statement provided by counsel makes this unsupported claim, and assertions of counsel are not evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The submitted employment agreement states:

Healthcare Professional represents and warrants to [the petitioner] that . . . Healthcare Professional has satisfied the minimum academic credentials necessary to obtain an appropriate provisional license to practice.

Nowhere is it stated that the proffered position requires at least a bachelor's degree in a specific specialty, nor is evidence provided by the petitioner regarding the credentials of the other registered nurses and/or healthcare professionals it employs. Additionally, based upon the evidence in the record, the petitioner has not established that the offered position is a specialty occupation. As stated above, under *Defensor*, where employment agencies are petitioners, USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. The critical element is not the title of the position, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. The petitioner has not forwarded sufficient evidence to support the assertion that the employer normally requires a degree or its equivalent for the offered position. 8 C.F.R. 214.2(h)(4)(iii)(A)(3). As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Moreover, here, as in *Defensor*, the petitioner is not the only relevant employer for purposes of determining the normal degree required by the employer for the position offered. See *Defensor v. Meissner*, 201 F.3d 384, 387-388. Instead, the healthcare facilities to which the beneficiary will be assigned must be examined to determine whether or not they normally require a bachelor's or higher degree in a specific specialty (or its equivalent) in order to perform the duties of the position. As stated in *Defensor*:

To interpret the regulations any other way would lead to an absurd result. If only [the petitioner]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

Id. at 388.

Counsel also submits on appeal a November 27, 2002, USCIS policy memorandum on H-1B nurse petitions that acknowledges that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse staff position. Unpublished and internal opinions cannot be cited as legal authority, and they are not precedent or legally binding on USCIS. However, in any event, nothing in the proffered position's job description indicates that the beneficiary would be working in a nursing specialty that requires a higher degree of knowledge or skill. As stated previously, the description of the duties of the position is vague and does not demonstrate that this position differs from that of a registered nurse. Moreover, there is insufficient evidence regarding third party locations where the beneficiary may be assigned and the work that the beneficiary would perform at these locations to determine if an individual who does not possess a bachelor's degree in a specific specialty or its equivalent would be able to successfully execute the duties of the proffered position. As such, based on the deficient record of proceeding in this matter, it cannot be found that the proffered position is a specialty occupation and the petition must be denied for this reason.

Beyond the decision of the director, the record contains no evaluation of the beneficiary's credentials from a service which specializes in evaluating foreign educational credentials as required by 8 C.F.R. 214.2(h)(2)(iii)(D)(3). Therefore, as the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation, the visa petition must be denied for this additional reason.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO also finds that, based on the evidence presented, the beneficiary is not qualified to perform the duties of a specialty occupation. Accordingly, the AAO shall dismiss the appeal.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). Accordingly, the AAO finds that the record fails to contain substantive evidence about any particular project on which the beneficiary would work during the period of requested employment.

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.