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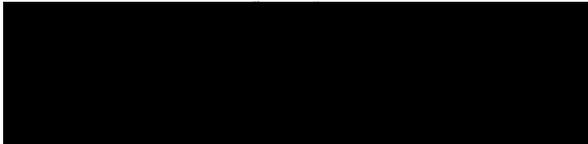


FILE: WAC 03 234 52746 Office: CALIFORNIA SERVICE CENTER Date:

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
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 is a home health care provider with 160 employees. It seeks to hire the beneficiary as a quality assurance coordinator. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. 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 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.

The petitioner states that it is seeking the beneficiary’s services as a quality assurance coordinator. Evidence of the beneficiary’s duties includes: the Form I-129, with an August 7, 2003 letter of support from the petitioner; and counsel’s November 10, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner provided an initial description of its proffered position that was elaborated upon by counsel in her response to the director’s request for evidence. As stated by counsel, the position’s duties require the beneficiary to:

- Interpret and implement quality assurance standards to ensure quality patient care, requiring the review of existing quality assurance standards, and the study of existing medical and clinical policies and procedures;
- Interview home-bound care providers and medical facilities personnel and patients in order to evaluate health care workers’ performance;
- Review and evaluate patient records applying quality assurance criteria;
- Identify specific areas for quality assurance review, including problem procedures, drugs, high-volume and high-risk cases;
- Review the work product of health care staff, including resident nurses, LVNs and CNAs; and
- Compile statistical data and write reports summarizing quality assurance findings.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook*

Handbook (Handbook), on which the AAO routinely relies for the educational requirements of particular occupations, reports 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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director determined that the quality assurance duties of the proffered position were related to those handled by the nursing profession in administering health care, rather than those of medical or health services managers, as asserted by counsel. Based on this determination, the director concluded that the position did not require the beneficiary to have the minimum of a baccalaureate or higher degree, or its equivalent, but rather to be licensed or registered as a nurse.

In reaching its own conclusions regarding the degree requirements of the proffered position, the AAO has relied upon the 2004-2005 edition of the DOL *Handbook*. In light of counsel's contention that the proffered position is that of a medical or health services manager, the AAO has reviewed the *Handbook's* description of that occupation and finds the following language within that description to be pertinent:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. The occupation, medical and health services manager, encompasses all individuals who plan, direct, coordinate, and supervise the delivery of healthcare.

In response to the director's request for evidence and on appeal, counsel asserts that the beneficiary will be required to perform duties "similar to and beyond" those just described. She contends that the beneficiary's evaluation of the health care provided by the petitioner's employees establishes a supervisory role for the beneficiary comparable to that of a medical or health services manager, specifically stating, on appeal, that the beneficiary will supervise the work of the petitioner's employees and see that these employees are appropriately trained.

The AAO does not, however, find this reading of the beneficiary's duties to be persuasive. As presented in response to the director's request for evidence, the duties of the proffered position focus on the identification of deficiencies in the petitioner's existing health care program and require the beneficiary to review both the petitioner's medical records, as well as the care provided by its employees, in order to identify areas in which improvement is needed. Counsel's estimate of the time to spent by the beneficiary performing the position's various duties stated that 25 percent of her time would be spent establishing quality assurance guidelines, 50 percent reviewing patient records, 15 percent on research, and 10 percent on administrative tasks and "advising" employees of health care developments.

This description does not support counsel's assertions that the beneficiary will perform duties that "overlap and exceed" those of a medical or health services manager. It outlines the beneficiary's responsibility for establishing and implementing a program to identify deficiencies in the petitioner's delivery of health care, but describes no direct role for the beneficiary in correcting those deficiencies. Further, these duties do not describe any managerial responsibilities that might connect the position to that of a medical or health services manager. As noted in the *Handbook's* description of the occupation, the characteristic that links the various

professions within the occupation of medical and health service manager is their direct responsibility for the management of health care services and personnel.

Counsel introduces, on appeal, a direct supervisory role for the beneficiary, assigning to her the responsibility for seeing that employees are trained, and observe rules and regulations, and directing employees "as to the proper way of administering the treatment." However, the AAO will not consider this expansion of the beneficiary's duties. On appeal, the 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). Further, the AAO will also not consider evidence that is offered for the first time on appeal. As the petitioner was put on notice of all required evidence, including a detailed description of the position's duties, and given an opportunity to provide that evidence before the petition was adjudicated, the AAO will not consider counsel's statements, made on appeal, regarding the beneficiary's direct supervision of the petitioner's employees. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Instead, the AAO views the duties of the proffered position to be those described in response to the director's request for evidence.

As it finds the proffered position to be unrelated to the occupation of medical and health services manager, the AAO turns again to the *Handbook* to identify employment comparable to that of the proffered position. While the *Handbook* offers no specific discussion of the occupational title of quality assurance coordinator, its description of the occupation of registered nurse leads the AAO to conclude that the duties of the proffered position are subsumed within the responsibilities of supervisory nurses whose activities, as they relate to the delivery of quality health care, are described as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness.... RNs also develop and manage nursing care plans....

Nursing care facility nurses manage care for residents.... RNs also assess residents' health, develop treatment plans, supervise licensed practical nurses....

Head nurses or nurse supervisors direct nursing activities.... They...visit patients to observe nurses and to ensure that the patients receive proper care. They may also ensure that records are maintained....

Nurses appear to have a range of responsibilities -- particularly those involving the development and management of treatment and care plans -- that require them to evaluate the health care they provide to the patients under their care. Specifically, head or supervisory nurses, who oversee the delivery of health care in a range of settings, appear to perform duties similar to those described in relation to the proffered position. As noted above, these nurses review patient records and observe care givers under their supervision to ensure patients receive appropriate treatment. Even though such activities are not specifically described as quality assurance functions, their purpose is, nevertheless, to ensure quality patient care. Further, the type of analysis undertaken by nurses to identify deficiencies in the health care systems they supervise appears no different than that required of a quality assurance coordinator. The AAO, therefore, finds the duties of the proffered position to be much like those of nurses who supervise health care givers and services in hospitals, nursing

homes or home care businesses, and concludes that the proffered position is, therefore, closely aligned to that of a registered nurse with supervisory responsibilities.

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:

In all States and the District of Columbia, students must graduate from an approved nursing program and pass a national licensing examination in order to obtain a nursing license.... All States require periodic renewal of licenses, which may involve continuing education.

There are three major 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 staff nurses.

In that the *Handbook* indicates that individuals with associate degrees in nursing, as well as nursing diplomas, may obtain entry-level employment as nurses, the AAO finds that the petitioner's proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish eligibility under the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – counsel, in response to the director's request for evidence, relied on what she characterized as the *Handbook's* discussion of the degree requirement for the occupation of quality assurance coordinator, equating the proffered position to that of a medical and health services manager. On appeal, counsel submits seven Internet job announcements advertising quality assurance positions to establish that the petitioner's degree requirement is the norm within its industry. However, the AAO does not find counsel's assertions regarding the position's degree requirement or the seven job advertisements provided on appeal to satisfy the requirements of the second criterion.

As just discussed, the proffered position is not that of a medical or health services manager. Therefore, counsel cannot establish the petitioner's degree requirement as an industry norm based on the *Handbook's* discussion of medical and health services managers. Further, although all seven Internet job postings are in the health care field, none responds to the second criterion's stipulation that a petitioner establish its degree requirement as common to its industry in parallel positions among similar organizations. Five of the positions advertised by hospitals do not state the duties of the positions, while the sixth hospital posting, which does include a discussion of the position's duties, does not require applicants to have the minimum of a bachelor's or higher degree. The seventh announcement posted by a not-for-profit health care organization provides no description of the organization's operations, precluding an AAO analysis as to whether it is similar to the petitioner.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; 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.

To determine a petitioner's ability to meet the third 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. In this case, counsel, in response to the director's request for evidence, asserted that the individual who previously served in the proffered position possessed a degree, as it was required by the petitioner. Counsel also submitted a job advertisement for the proffered position but noted that it did not state a degree requirement as the petitioner "utilized its own recruitment method." However, neither counsel's statement, nor the advertisement, establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As stated by counsel, the classified advertisement submitted by counsel does not discuss a degree requirement. However, even if it did state such a requirement, the advertisement concerns the petitioner's current opening and cannot serve as evidence of the petitioner's past hiring practices regarding its position. Further, the AAO finds no documentation to support counsel's assertion that the proffered position was previously filled by a degreed individual. As a result, it will not accept counsel's statement as evidence of the petitioner's normal hiring practice with regard to its proffered position. Assertions of counsel, in the absence of documentation, do not constitute evidence and will not satisfy the petitioner's burden of proof in this proceeding. *Matter of Obaigbena*, 19 I&N Dec. 533,534 (BIA 1988).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has again reviewed the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of a supervisory nurse or represent an amalgam of jobs that require different skills and qualifications.

In response to the director's request for evidence, counsel stated that an individual filling the position of a quality assurance coordinator must have a comprehensive understanding of medical treatment, people, management and business, and that such understanding could be obtained only through a baccalaureate education. She further contended that the occupation of quality assurance coordinator included individuals, who like medical and health services managers, were responsible for the planning, direction, coordination and supervision of health care delivery. On appeal, counsel, again, attempts to equate quality assurance coordinators with medical and health services managers in order to establish the specialized and complex nature of the petitioner's proffered position.

However, the AAO has already determined that the proffered position is not that of a medical or health services manager. As a result, counsel's assertions regarding the similarity between the occupations of

quality assurance coordinator and medical and health services managers cannot establish the proffered position as a specialty occupation under the fourth criterion. Further, counsel's contention that the minimum of a baccalaureate degree is required to perform the duties of a quality assurance coordinator is not persuasive. The AAO notes that registered nurses who perform quality assurance duties may fulfill those duties with associate degrees or diplomas.

Having considered the duties of the proffered position, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by nurses who supervise patient care. Further, the proffered position, as described, does not appear to represent a combination of jobs that would require a beneficiary to have a unique set of skills not normally possessed by a nurse in a supervisory position. As a result, the AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, the petitioner has failed to establish that its proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the beneficiary does not appear to be qualified to perform the duties of the position. The evidence of record does not indicate that the beneficiary has a state license to practice nursing, as required by the regulations. For this additional reason, the petition may not be approved.

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.