

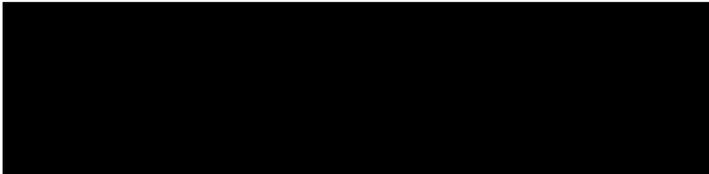
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**U.S. Citizenship  
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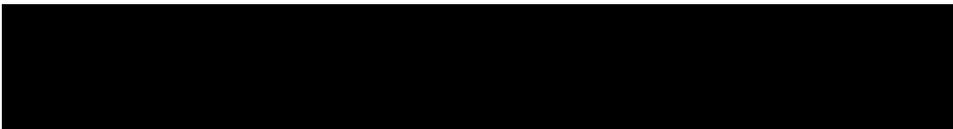
FILE: WAC 05 184 50251 Office: CALIFORNIA SERVICE CENTER Date: FEB 20 2007

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 Director, 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 operates a convalescent hospital. It seeks to employ the beneficiary as a nurse manager. Accordingly, 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).

On October 7, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner submits a brief and additional documentation.

The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the statutory and regulatory requirements for a specialty occupation as follows:

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:

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 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 June 20, 2005 Form I-129 and supporting documentation; (2) the director's July 1, 2005 request for further evidence (RFE); (3) counsel's September 22, 2005 response to the director's RFE and documentation; (4) the director's October 7, 2005 denial letter; and (5) the Form I-290B, counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner avers that it is seeking the beneficiary's services as a nursing manager. According to the petitioner's undated letter appended to the Form I-129, the duties to be performed by the beneficiary would include the following:

The Alien provides symptom management and offers physical, psychological, social and spiritual care to the patient and family in order to improve quality of life and enhance death with dignity. These services are provided in accordance with the physicians' orders, and with recognition of the Standards of Nursing Practice. Initiates preventive and rehabilitative nursing procedures. Re-evaluates the patient's nursing needs on an ongoing basis. Reports to and collaborates with the interdisciplinary team members. Prepares and coordinates clinical notes and progress notes on nursing services delivered. Submits all documentation in a timely manner and according to established policies for documentation. Provides supervision of nursing services delivered by licensed practical nurses, nursing assistants and other nursing support staff while the employee is present and service is being delivered. Observes the patient at timely basis and immediately reports the patient's reactions to treatments, tolerance for the intravenous therapy program, and any change in the patient's physical or emotional condition or in the plan of care to the attending physician and other hospice staff involved in the case.

Evaluates new cases to identify placement on a continuum of low-acuity cases to high-acuity cases and assigns clients to staff accordingly; coordinates services within the treatment team; reviews staff charts and cases to ensure effectiveness of treatment plans; oversees case discussion and review; ensures that staff comply with departmental policies and procedures

governing treatment and rehabilitation services and that staff employ best practices within the System of Care framework.

Provides direct services, which may include direct clinical assessment, psychotherapy, and rehabilitation and medication services, within the scope of licensure and professional expertise; provides collateral consultation to partner agencies and/or family members involved in the client's life; prepares case reports.

Within the scope of licensure and/or area(s) of expertise, provides clinical oversight of treatment team members, including supervision of assessment, diagnosis, therapeutic treatment, and rehabilitation services by medical/health care professionals; ensures that staff members are informed of and in compliance with the department's policies and procedures for delivering clinical services.

Compiles and prepares statistics on clients served; ensures that proper documentation is kept and that charts are complete to maximize revenue from billing; identifies training needs and provides or arranges training for staff in program policies and procedures; prepares correspondence to clients; tracks participation of staff in training necessary for continued licensure or to ensure staff members remain current with the department's administrative and program policies and procedures.

Within the scope of licensure and/or areas of expertise, may develop and provide site intern training programs and supervise interns for licensure.

The petitioner also provided a copy of its offer of employment to the beneficiary indicating that the offer of employment is contingent upon the employee obtaining an active California RN license.

In response to the director's RFE, the petitioner submitted a copy of its organizational chart showing the beneficiary's proffered position as nurse manager at station one reporting to an RN supervisor and listing three types of nursing associates subordinate to the proffered position.

On October 7, 2005, the director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director observed that the position of nurse manager most closely resembled the position of a registered nurse. The director further observed that the proffered position included characteristics beyond that of an entry-level registered nurse but was not analogous to an administrative nursing position. The director, relying on a Memorandum by 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) (Williams' memorandum), acknowledged that there were an increasing number of nursing specialties that required a higher degree of knowledge and skill than a typical R.N. or staff nurse position. The director noted that the Williams' memorandum mentioned that a number of certification examinations were available to registered nurses who work in such nursing specialties but who are not advanced practice nurses. The director concluded, based on the record, that the petitioner had not provided evidence regarding parallel

positions in the petitioner's industry or from professional associations regarding an industry standard or documentation to support the complexity or uniqueness of the proffered position or that the nature of the specific duties of the position is so specialized and complex that the position requires knowledge usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel for the petitioner asserts that the degree requirement for the proffered position is common to the industry in parallel positions among similar organizations. Counsel submits eight job announcements in support of his assertion. The job announcements show that the organizations are seeking individuals for positions including: (1) a registered nurse/case manager for a hospital that requires an RN degree but prefers a BSN degree; (2) a case manager RN for a major health care organization that requires a bachelor's degree or equivalent experience in nursing or health related field; (3) a nursing supervisor/manager for a hospital that prefers the successful candidate have a bachelor's degree in nursing; (4) a clinic manager RN for a community care organization that requires a registered nurse, bachelor of science degree; (5) a case manager for a children's hospital that prefers a bachelor's of science in nursing; (6) a nurse case manager for an aids services foundation that requires a licensed registered nurse; (7) a disability clinical nurse case manager specialist for an insurance company that requires an active California RN license and a bachelor's degree in an unspecified field; and (8) a nurse manager for surgical services for a hospital that requires a bachelor's of science degree in nursing as a minimum requirement.

Counsel also contends that the petitioner in this matter normally requires a degree, or its equivalent, for the position of a nurse manager. Counsel indicates that the petitioner has hired two other individuals as nurse managers and both of the individuals hold a bachelor's of science degree in nursing.

Counsel's assertions on appeal are not persuasive. The petitioner has not established that the proffered position fulfills any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel does not contend on appeal that the proffered position satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. However, the AAO concurs with the director's determination that the description of the duties of the proffered position corresponds to the duties of a registered nurse. The petitioner requires that the incumbent: "[initiate] preventive and rehabilitative nursing procedures," "[re-evaluate] the patient's nursing needs on an ongoing basis," "[prepare] and coordinate clinical notes and progress notes on nursing services delivered," and "[observe] the patient at timely basis and immediately reports the patient's reactions to treatments, tolerance for the intravenous therapy program, and any change in the patient's physical or emotional condition or in the plan of care to the attending physician and other hospice staff involved in the case." These are duties associated with providing patient care.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)*, for its information about the duties and educational requirements of particular occupations. The *Handbook* discusses the duties of registered nurses (RNs) as follows:

[P]erform basic duties that include treating patients, educating patients and the public about various medical conditions, and providing advice and emotional support to patients' family members. RNs record patients' medical histories and symptoms, help to perform diagnostic tests and analyze results, operate medical machinery, administer treatment and medications, and help with patient follow-up and rehabilitation.

The *Handbook* reports that 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. The *Handbook* indicates that many individuals begin their employment as staff nurses with an ADN or diploma and later study for a BSN. The description of the duties of the proffered position aligns with that of a typical nursing position, a position that does not require a four-year BSN degree. The petitioner has not provided sufficient evidence to establish that the position satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether 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 often considered by CIS when determining these criteria include: whether the *Handbook* reports that 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As observed above, based on the petitioner's description of duties, the industry does not make a four-year degree a minimum requirement for entry into a nursing position. The petitioner has not presented evidence that the industry's professional association has made a degree a minimum entry requirement into a nursing position consisting of the duties described by the petitioner. 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)). Neither has the petitioner presented letters or affidavits from firms or individuals in the industry attesting that such firms "routinely employ and recruit only degreed individuals."

The evidence before the AAO relevant to this criterion consists of the petitioner's offer of employment to the beneficiary, the petitioner's job announcement, eight job announcements from other facilities advertising for a variety of positions in the nursing field, and counsel's assertion that other hospitals usually require a BSN as a minimum for a position equivalent to the proffered position. First, the AAO observes that the petitioner's offer of employment to the beneficiary requires only that the beneficiary have an active California RN License. The petitioner does not specify that the beneficiary must have a BSN. The AAO observes that the petitioner's job announcement for the nurse manager position, submitted for the first time on appeal, indicates that the BSN is required. However, as will be discussed more fully below, a petitioner's self-imposed requirement does not necessarily comport with the educational standards set forth in the industry.

Regarding the eight job announcements submitted, the AAO observes that three of the job announcements from hospitals indicate that a registered nurse degree is required, and note only that a bachelor of science in nursing is preferred for the positions of case manager or nursing supervisor/manager. However, employer preference is not synonymous with the "normally required" language of the criterion. Two job announcements for the position of "case manager" require a bachelor's degree but indicate the degree may be in a general health related field or do not specify a discipline. As noted above, 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 job announcement for an aids service foundation only requires a licensed registered nurse, not a bachelor's degree in nursing. Only two of the eight job announcements actually state that a bachelor's of science degree in nursing is required for the advertised positions of a clinic manager for a community care organization and a nurse manager for a surgical services unit of a hospital. Thus, the record does not contain sufficient evidence to demonstrate that it is common to the industry to "routinely employ and recruit only degreed individuals" in a specific discipline.

In addition, the job announcements do not include detailed descriptions of the type or size of all of the listing organizations. The AAO cannot determine from the advertisements that the organizations are similar to the petitioner.<sup>1</sup> Further, only one of the organizations, a large health care facility advertising for a case manager, provides detail regarding the duties of the advertised position, a position that is not parallel to the proffered position. The other seven organizations provide general descriptions and cannot be compared to the proffered position. Thus, the job announcements submitted do not demonstrate that a degree requirement is common to the industry in parallel positions among similar organizations. The evidence in the record does not support counsel's assertion that other hospitals usually require a BSN as a minimum for a position equivalent to the proffered position. 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).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner does not claim and does not submit documentation demonstrating that the proffered position is either unique or complex so that only an individual with a degree in a specific specialty could perform the duties. Again, going on the 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. 165. The evidence in the record fails to establish that a degree requirement is common to the industry in parallel positions among similar organizations as required by the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner's desire to employ an individual with a bachelor's of science degree in nursing is noted but such a desire does not establish that the position is a specialty occupation. CIS must still examine the ultimate employment of the alien, and determine whether the position

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<sup>1</sup> The AAO notes that the petitioner has not described its number of beds or otherwise noted the number of patients it may enroll in its convalescent hospital.

qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d at 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 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 a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. *See id.* at 388.

The AAO will review 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 when determining whether the petitioner has satisfied this criterion. However, although counsel claims that the petitioner has hired two other nurse managers with bachelor's of science degrees in nursing, the petitioner does not provide copies of the individual's diplomas, their dates of employment, or evidence that all of the petitioner's nurse managers, not just these two have bachelor's of science degrees in nursing. Again, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The evidence in the record is also inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Again, CIS 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 is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a registered nurse nor, according to the *Handbook*, is the knowledge required to perform the duties of a registered nurse usually associated with the attainment of a bachelor's or higher degree in nursing. Upon review of the totality of the record, the petitioner has not established that this position fulfills the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. Therefore, the AAO will not disturb the director's denial of the petition.

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.

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