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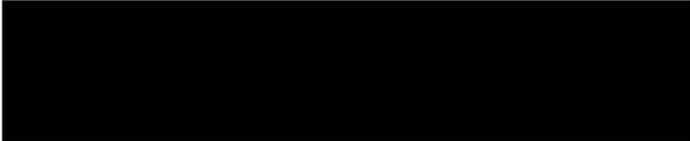
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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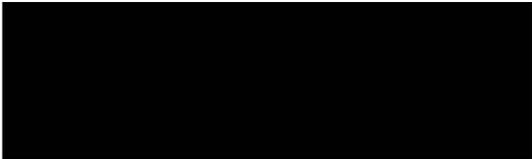
SEP 14 2009

FILE: WAC 08 006 50245 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

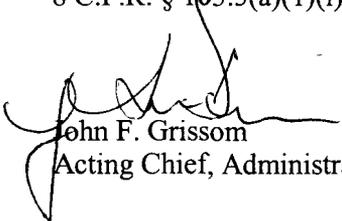
ON BEHALF OF PETITIONER:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The 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 hospital that seeks to employ the beneficiary as a registered nurse. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains the following: (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 petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner, a hospital with 6,000 employees, was established in 1896. It proposes to hire the beneficiary as a registered nurse. In its September 12, 2007 letter of support, the petitioner stated that it requires its registered nurses to have obtained, at minimum, a “Bachelor’s degree or its equivalent in Registered Nurse [sic].” The petitioner stated that the duties of the proposed position would include providing professional nursing services for the care and treatment of patients; accessing, planning, implementing, and evaluating individual patient care in a nursing department, according to the nursing department’s policies and standards of care; modifying patient treatment plans as indicated by patients’ responses and conditions; demonstrating knowledge and use of unit-specific equipment and appropriate supplies used in a delivery of the highest quality patient care; maintaining knowledge and use of current trends in nursing and providing evidence of clinical competency; and accepting responsibility for the direction of coworkers in the implementation of the nursing care plan.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel contends that the proposed position qualifies for classification as a specialty occupation.

At the outset of its analysis, the AAO notes that counsel devotes a substantial portion of his two-page appellate brief to making an argument that the beneficiary is not required to obtain a foreign health care worker certification from the Commission on Graduates of Foreign Nursing Schools. However, as this was not a ground of the director’s denial, and is therefore not at issue on appeal, counsel’s arguments regarding the matter have no relevance here.

The AAO notes further that counsel also devotes a portion of his appellate brief to citing sections 101(a)(15)(H)(i)(c) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(c) and 212(m)(1), 8 U.S.C. § 1182(m)(1), and making the argument that the beneficiary satisfies those portions of the Act. However, counsel and the petitioner made clear on the Form I-129, and in all supporting documentation submitted since the petition was filed, that they are seeking H-1B status for the beneficiary: they seek classification of the beneficiary as a nonimmigrant worker in a specialty occupation. These sections of the Act cited by counsel, however, do not relate to H-1B visas. Rather, they pertain to H-1C visas, and accordingly have no relevance to this proceeding.

Having made these observations, the AAO turns next to the substantive issues involved in this case. In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In order to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner must demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

There is no dispute in this matter that the beneficiary would perform the duties of a registered nurse. As such, the AAO will turn to the *Handbook's* information regarding the training and educational requirements for registered nurse positions, which states, in pertinent part, the following:

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 . . . Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions.¹

As any of these educational programs would qualify an candidate to perform the duties of a registered nurse, such a position does not normally qualify for classification as a specialty occupation under the first criterion.

The AAO acknowledges the petitioner's citation to a 2002 memorandum issued by the legacy Immigration and Naturalization Service (the nurse memo).² The nurse memo noted that the minimum requirement for entry into the field as a registered nurse is a two-year associate degree in nursing, and that although the four-year BSN may be earned at some U.S. and foreign universities, the degree is not required for most entry-level nursing positions in the United States. The nurse memo acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical registered nurse or staff nurse position. Nevertheless, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies for classification as a specialty occupation. Rather, the nurse memo specifically noted that petitions for certain advanced practice nurses, such as clinical nurse specialists who work in critical care, will generally be approved if the position requires, and the alien has obtained, advanced practice certification. Although the petitioner stated in its January 2, 2008 response to the director's request for additional evidence that the beneficiary would be working in its critical care unit, there is no evidence that it requires such certification or that the beneficiary had obtained such certification. The nurse memo, therefore, does not aid the petitioner in establishing the proposed position as a specialty occupation under the first criterion.

For all of these reasons, the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

¹ See <http://www.bls.gov/oco/ocos083.htm> (accessed August 11, 2009).

² See 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 AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

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

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS 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 already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As evidence of an industry-wide standard, counsel submitted several job postings for registered nurses at the time it filed the petition. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. For job postings to be of any probative value, the petitioner must demonstrate that the advertised position is "parallel" to the proposed position, and that the entity placing the advertisement is "similar" to the petitioner.

The petitioner has submitted no evidence to demonstrate that any of these companies advertising their vacancies are similar in size, scale, or scope of operations to the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, the AAO notes that these job postings do not establish that a bachelor's degree, or its equivalent, in a specific field is required for the performance of the proposed duties. Oakwood Rehabilitation and Skilled Nursing Center of Dearborn indicates that it would accept an associate's degree in lieu of a bachelor's degree. The postings from the American Red Cross and William Beaumont Hospital state that a bachelor's degree is preferred, but not required. Employer preferences are not synonymous with minimum entry requirements, and do not satisfy this prong. Although one employer posting its vacancy does require a bachelor's degree, the

AAO notes that a single job posting is insufficient to establish an industry-wide standard, particularly when considered in light of the findings from the *Handbook* and the other job postings submitted by the petitioner, which point to the opposite conclusion.

Accordingly, the petitioner's submission does not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of the registered nurse positions discussed in the *Handbook*, which do not require a bachelor's degree as a minimum entry requirement. The record contains no documentation, beyond the assertions of record, to support a finding that the proposed position is more complex or unique than registered nurse positions in other, similar organizations.

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence has been presented. In its January 2, 2008 letter, the petitioner stated that its business model requires it to hire the most qualified nurses, which "can only be achieved by requiring that our Physical Registered Nurses undertake a rigorous Bachelor's program with a specialization in Nursing." In his appellate brief, counsel states that nurses with bachelor's degrees are attractive to hospitals that seek to provide a superior level of care, and that since the petitioner is one such hospital, it requires candidates for registered nurse positions to possess a bachelor's degree in nursing. As such, both counsel and the petitioner assert that the petitioner normally requires a baccalaureate degree, or its equivalent, for the position. However, no evidence to document these assertions was presented. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, the proposed position does not qualify as a specialty occupation under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the AAO finds that the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent. There is no information beyond the assertions of record to support a finding that the proposed position is more specialized and complex than the general range of registered nurse positions for which the *Handbook* and the 2002 nurse memo indicate no requirement for the highly specialized knowledge associated with at least a bachelor's degree. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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.

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