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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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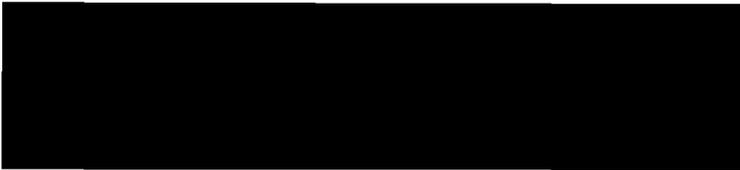
FILE: WAC 08 148 54261 OFFICE: CALIFORNIA SERVICE CENTER DATE: **JAN 13 2010**

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a home health care business that was established in 2005 and has 27 employees. It seeks permission to employ the beneficiary as a nurse coordinator and, 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, finding that the proposed position was not a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner stated in an attached letter that it would employ the beneficiary as a nursing coordinator, a position that entailed the following duties:

1. Directing and evaluating work activities of medical, nursing, technical, clerical, service maintenance and other personnel;
2. Establishing objectives and evaluating or operating criteria for units they manage;
3. Developing and maintaining computerized record management systems to store and process data such as personnel activities and information to produce reports;
4. Developing and implementing organizational policies and procedures for the facility;
5. Conducting and administrating fiscal operations including accounting, planning budgets, authorizing expenditures, establishing rates for services and coordinating financing reporting;
6. Establishing work schedules and assignments for staff according to work load, space and equipment availability;
7. Maintaining communication between governing boards, medical staff and department heads by attending board meetings and coordinating interdepartmental functioning;
8. Monitoring the use of diagnostic services, inpatient beds, facilities and staff to ensure effective use of resources and assess the need for additional staff, equipment and services; and
9. Maintaining awareness of advances in medicine, computerized diagnostic and treatment equipment, data processing technology, government regulations, health insurance changes and financing options.

In a June 27, 2008 RFE, the director asked the petitioner to submit additional evidence relating to the proffered position such as: a more detailed job description; evidence that similar organizations require their nursing coordinators to have a bachelor's degree, or its equivalent, in a specific specialty; documentation, if available, to show that an industry-related professional association has made a degree in a specific specialty a requirement for entry into the position; and letters or

affidavits from firms or individuals in the petitioner's industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty.

In response, counsel submitted a cover letter and the petitioner submitted additional information. Counsel stated that the position qualifies as a specialty occupation because other firms routinely hire only degreed individuals, and the position's duties are complex. The petitioner submitted an expert opinion letter from [REDACTED] of Radiation Oncology and Internal Medicine at the University of Virginia, who opined that the proffered position can only be performed by a person with a baccalaureate degree in nursing.

On September 4, 2008 the director denied the petition. The director noted that the position does not require the incumbent to hold a bachelor's degree in a specific specialty. The director also did not concur with the petitioner that the duties were complex, unique or specialized to require a bachelor's degree. The director assessed each eligibility criterion listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) and found that the position could not qualify as a specialty occupation.

On appeal, counsel disagrees with the director's findings. Counsel states that the expert opinion letter that the petitioner previously submitted as well as the two additional letters that are being submitted on appeal establish that the industry standard for a position like the proffered one is a bachelor's degree in nursing. The petitioner submits a new letter from [REDACTED], as well as a letter from [REDACTED] of Nursing at the University of Rochester School of Nursing. Like [REDACTED] also states that a position like the one the petitioner is proffering requires a bachelor's degree in nursing.

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.

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 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

After review of the record, the AAO questions the veracity of the petitioner's statement regarding the beneficiary's alleged duties. As shall be discussed, when looking at the petitioner's organizational structure and the nature of its business, as it was set forth in the petitioner's floor plan and the accompanying documentation, the beneficiary could not be performing several of the duties listed in the job description for a nurse coordinator.

According to the petitioner's floor plan, it consists of the following personnel areas¹:

- Q.A. (Quality Assurance)
- Billing Office
- Director of Nursing
- Administrator's Office
- Intake Area (reception)
- Data Entry

From a review of this floor plan, it is apparent that the director of nursing and the administrator are the only two managerial positions within the company. It is also apparent from the floor plan that the petitioner is not divided into specific departments. Given such an organizational structure, it is not clear how the proffered position could entail the following duty that the petitioner listed: "maintaining communication between governing boards, medical staff and department heads by attending board meetings and coordinating interdepartmental functioning." As the floor plan indicates, the petitioner does not have any department heads, as it is not divided into departments. Also, the petitioner has not submitted any evidence that it is operated or controlled by governing boards. The petitioner's Articles of Incorporation list three shareholders only. 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, it is unclear how

¹ The plan also lists areas such as "lobby," "medical records room," and "conference room"; however, because these areas do not relate to units that contain employees, such as the petitioner's data entry area, they are not included in the list of the areas that typically contain personnel.

the beneficiary could attend board meetings when the petitioner is not controlled by a board, or why she would need to coordinate “interdepartmental functioning” when no such organizational structure exists.

In addition, the petitioner’s Articles of Incorporation state the purpose of its business as: “we provide nurses, Physical Therapist, Home Health aid, MSW, OT, Speech Therapists to homebound patients.” In contrast, one of the beneficiary’s duties is listed as “monitoring the use of diagnostic services, inpatient beds, facilities and staff to ensure effective use of resources and assess the need for additional staff, equipment and services.” As the petitioner provides aide to homebound patients, it also is not clear why it would be necessary for the beneficiary to monitor inpatient beds or facilities, as stated in the job description.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based upon the inconsistencies noted above, the AAO cannot conclude that the duties listed for the beneficiary realistically depict her actual responsibilities. Without a credible listing of the responsibilities that the proffered position entails, the proposed position does not qualify 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), and this petition was properly denied.²

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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

² Because the conclusions drawn by [REDACTED] and [REDACTED] regarding the specialized nature of the proffered position were based upon the petitioner’s list of duties that the AAO has found questionable, the AAO shall not consider their opinions persuasive. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).