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



U.S. Citizenship
and Immigration
Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: JUL 01 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 service based in Louisiana with 350 employees. It seeks to employ the beneficiary as a Registered Nurse, Case Manager 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) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B with the petitioner's supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue in this matter 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, Case Manager. The petitioner’s support letter describes the position as follows:

[The beneficiary] will treat and educate patients and provide advice and emotional support to patients’ family members. This requires [the beneficiary] to complete an initial assessment of patient and family to determine their home care needs. After which, he will use health assessment data to determine nursing diagnosis, develop a care plan, which establishes goals based on nursing diagnosis and incorporates therapeutic, preventive, and rehabilitative nursing actions. He is expected to initiate appropriate preventive and rehabilitative nursing procedures, administers medications and treatments as prescribed by the physician, counsels the patient and family in meeting nursing and related needs, provide health care instructions to the patient as appropriate per assessment and plan, and identify discharge planning needs as part of the care plan development and implements [sic] prior to discharge of the patient.

The support letter states that the proffered position requires a Bachelor’s Degree in Nursing or its equivalent as well as current state licensure and CPR certification, along with at least one to two years of recent acute care experience in an institutional setting. The petitioner submitted the beneficiary’s education documents along with his Certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS), evidence that the beneficiary passed the National Council Licensure Examination (NCLEX-R.N.), and evidence

that the beneficiary is licensed as a registered nurse in the State of Vermont.

The Labor Condition Application (LCA) was submitted for a Registered Nurse, Case Manager to work in Lake Charles, LA at a salary of \$41,600 per year, with a prevailing wage of \$40,477 per year.

On May 30, 2008, the director requested additional information from the petitioner to demonstrate that the position's duties are sufficiently specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent). The director also requested additional evidence regarding the beneficiary's qualifications.

In response, the petitioner provides a more detailed job description, which primarily entails: completing an initial assessment of patient and family; re-evaluating patient nursing needs; initiating the plan of care and making revisions as necessary; using health assessment data to determine nursing diagnosis; and developing a care plan. The description also indicates that 3% of the beneficiary's time would be spent instructing, supervising, and evaluating home health aide care provided every 14 days. It appears that no other duties to be performed by the beneficiary are supervisory. The description also indicates that the beneficiary would report directly to a Clinical Supervisor and that the minimum degree requirements are a "Bachelors [sic] or Associate's degree, with one year of clinical experience." There is an additional note regarding these requirements, which states, "[a]ll areas require the expertise of an individual who holds a bachelor's degree or its equivalent since qualifications include a Bachelor's or Associate degree with one year of clinical experience."

Under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), for purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. An Associate Degree is usually a two-year degree program and, given that the regulation requires three years of specialized training and/or work experience for each year of college, this means that, in addition to the Associate's Degree, the petitioner would need to require at least six years of specialized training and/or work experience related to that specialty for a requirement of an Associate's Degree plus relevant experience to be considered equivalent to a Bachelor's Degree. As the petitioner only requires an Associate's Degree plus one year of clinical experience for the proffered position, the petitioner does not require at least a Bachelor's Degree or its equivalent in a specific specialty for the proffered position as defined under 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner also provided a copy of the Louisiana Home Health State Regulations, which state that a Registered Nurse (RN) must be currently licensed by the Louisiana State Board of Registered Nurse Examiners without restrictions and have, at a minimum, one year of clinical experience as an RN. Minimum Standards for Home Health Agencies (LAC 48:I.Chapter 91), LA Reg., Vol. 27, No. 12, pp. 2238-2253 (Dec. 20, 2001) (hereinafter LA Minimum Standards for Home Health Agencies). The regulations also state that, "[t]his requirement may be waived for an RN with recent clinical experience as a [Licensed Practical Nurse] or an RN currently working for a home health agency at the time this rule takes effect" and "[a] registered nurse applicant may not work in the home health setting as a registered nurse." [Emphasis added.] See Minimum Standards for Home Health Agencies, LA Reg., Vol. 27, No. 12 at 2244.

The petitioner also submitted Louisiana's instructions for applying for RN licensure. This document states that Louisiana requires the following eligibility criteria: (1) applicant is currently licensed as an RN in another state

and holds an "active" RN license in at least one State/Province/Country; (2) Applicant must have completed a nursing education program approved by the Board or have written the [REDACTED] exam and earned a passing score; (3) Applicant is not under restriction of any form by any nursing or health regulatory board in any state or country; (4) Applicant has no civil or criminal charges pending; (5) There is no allegation of cause for denial of licensure; and (6) Clearance from state, national, and international criminal records check via fingerprinting. Although the petitioner demonstrated the beneficiary met requirements (1) and (2) for RN licensure in Louisiana, the petitioner did not provide evidence that the beneficiary met requirements (3), (4), (5) and (6). 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)).

The director denied the petition, finding that the petitioner had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, the petitioner argues that because the Louisiana regulations require one year of clinical experience regardless of what type of nursing degree an RN working in a home health care setting holds, the proffered position is a specialty occupation because it requires a theoretical and practical application of specialized knowledge and the equivalent of at least a Bachelor's Degree or higher. Again, as explained previously, an Associate's Degree plus one year of experience is not considered equivalent to a Bachelor's Degree under the H-1B regulations. Moreover, none of the documentation submitted indicates that either the petitioner requires at least a Bachelor's Degree in a specific specialty or its equivalent for the proffered position or that the State of Louisiana requires at least a Bachelor's Degree in a specific specialty for RNs in a home health care setting.

Additionally, the petitioner provides a copy of an organizational chart on appeal, which does not include either the proffered position by the title used in this petition or the title of Clinical Supervisor to whom the petitioner previously stated the beneficiary would report. There is a Branch Manager listed in the chart, but this position reports directly to the Director of Nursing, which is not the same title as a Clinical Supervisor. Additionally, the petitioner provides a list of 21 names and titles regarding personnel that the beneficiary would supervise, including Licensed Practical Nurses, Home Health Aides, Physical Therapists, Physical Therapist Assistants, and Occupational Therapists. However, this information contradicts the job description the petitioner provided in response to the RFE, which indicated that only 3% of the beneficiary's time would be spent instructing and supervising. It therefore appears that the petitioner is trying to change the proffered position on appeal to have a more supervisory role than what was previously indicated. As this documentation regarding the beneficiary's supervisory responsibilities presented on appeal materially change the scope and nature of the position for which the petition was filed, they will not be considered on appeal. 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. 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). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the

normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 [redacted] specialty. Factors considered by the AAO when determining these criteria include: whether [redacted] on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

USCIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The *Handbook's* section on Registered Nurses, 2010-11 online edition, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse. The *Handbook* does state, however, that:

[I]ndividuals who complete a bachelor's degree receive more training in areas such as communication, leadership, and critical thinking, all of which are becoming more important as nursing practice becomes more complex. Additionally, bachelor's degree programs offer more clinical experience in nonhospital settings. A bachelor's or higher degree is often necessary for administrative positions, research, consulting, and teaching. . . .

The proffered position appears in part to resemble a nursing position beyond the entry-level registered nurse, but it is not analogous to an administrative nursing position. A Service policy memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (See Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook at 75.)." See Memorandum from [redacted] 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). Although the proffered position appears to entail some duties that are supervisory in nature, the beneficiary would not be supervising other nurses and the evidence demonstrates that a primary part of the proffered position is to provide direct patient care as a nurse. Moreover, according to the organizational chart submitted on appeal, the petitioner has already hired a Director of Nursing, who in turn would supervise an Assistant Director of Nursing. Therefore, the proffered position is not that of an administrative nursing position. Even if it were, the *Handbook* only states that a "bachelor's or higher degree is often necessary"; it does not state that such a degree is a prerequisite or even a normal requirement for entry into the position.

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.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specific specialty for employment in the proffered position. Experience and good performance can lead to promotion for a registered nurse to more responsible positions, such as assistant head nurse or head nurse/nurse supervisor. Likewise, good performance and experience can equip a nurse to perform the duties of a patient care coordinator or quality assurance coordinator/staff developer in the healthcare field. There is no requirement, however, that a Case Manager, or any other healthcare professional performing the duties of a Case Manager, have a baccalaureate or higher degree or its equivalent in a specific specialty as a minimum requirement for entry into that position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted advertisements, expert letters, or other documentation establishing a degree requirement in a specific specialty in parallel positions. Additionally, Louisiana does not require that RNs in a home health care setting hold at least a bachelor's degree in nursing or the equivalent.

The petitioner also failed to satisfy the second alternative 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 evidence of record does not refute the *Handbook's* information to the effect that a Bachelor's Degree or its equivalent is not required in a specific specialty. As evident in the earlier discussion, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than registered nursing positions that can be performed by persons without a specialty degree or its equivalent. The official job description as well as the offer letter provided by the petitioner indicate that a primary part of the proffered position's function is to direct patient care, and the petitioner does not demonstrate that the minimal supervisory functions rise to a level of complexity that requires a Bachelor's Degree in a specific specialty. Moreover, as discussed previously, the petitioner's official job description indicates that an Associate's Degree plus one year of relevant experience, rather than a Bachelor's Degree or its equivalent in Nursing, is acceptable for the proffered position. Therefore, this contradicts the petitioner's statement that it requires at least a Bachelor's Degree in Nursing or its equivalent for the proffered position. 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).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO does not find that the proffered duties, as described by the petitioner in support of the petition and in response to the RFE, reflect a higher degree of knowledge and skill than would normally be required of RNs working in the business side of healthcare. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a registered nurse. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, as discussed previously, the petitioner did not submit sufficient documentation to establish that the beneficiary is qualified for RN Endorsement in Louisiana, which is mandatory for RNs working in a home health care setting in Louisiana and was listed as a minimum requirement by the petitioner. As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

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.

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