

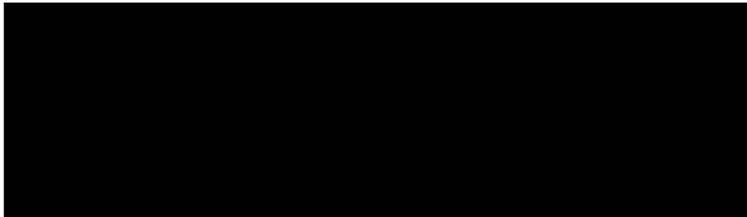
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



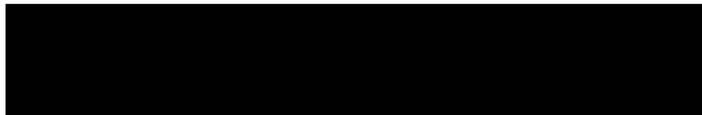
U.S. Citizenship
and Immigration
Services



D2

FILE: WAC 09 184 51688 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 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 director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of home healthcare services with 25 employees. It seeks to employ the beneficiary as a quality improvements 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 counsel's brief. 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 quality improvements manager. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s June 6, 2009 support letter; an organizational chart; and a job description. The petitioner indicates the proffered position would require the beneficiary to coordinate quality activities for more than 100 patients, which may include:

- Staff education;
- Clinical risk management/patient satisfaction;
- Analyzing outcome reports;
- Determining areas for improvement;
- Tracking trends;
- Compiling information for management; and
- Preparing/reviewing procedural manual.

The support letter states that the proffered position requires a Bachelor’s Degree in Nursing, or a related field. The petitioner submitted the beneficiary’s education documents, indicating that she received a Bachelor of Science degree in Nursing from Perpetual Help College of Manila in the Philippines. The petitioner also submitted a copy of a letter from the Board of Registered Nursing in California addressed to the beneficiary that states that the beneficiary has passed the NCLEX-RN examination.

The Labor Condition Application (LCA) was submitted for a quality improvements manager to work at the petitioner's offices at an annual rate of \$52,458.

On June 30, 2009, the director requested additional information from the petitioner. In part, the director requested the following: (1) a more detailed description of the work to be performed, including specific job duties and percentage of time to be spent on each duty; (2) evidence that the proffered position is a specialty occupation; (3) more information about the nature of the position; and (4) more information about the nature of the petitioner's business. The director also requested an organizational chart.

Counsel for the petitioner wrote a response and provided an organizational chart for the petitioner along with the petitioner's business pamphlets, copies of the beneficiary's education certificates and transcripts, and the beneficiary's employment agreement. Counsel argues in its response that the proffered position is closest to the description of Medical and Health Service Managers in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, although counsel states, "However, it must be stressed that the proffered position does not envision to perform all of the duties under the title 'Medical and Health Service Manager' nor is the proffered position similar to the position of 'Health Administrator' of petitioner."

In response to the RFE, counsel also includes printouts from the website of the Illinois Department of Employment Security, which lists General and Operations Managers as well as Administrative Service Managers as requiring a bachelor's degree. However, these documents do not indicate that a bachelor's degree in a specific specialty is required for entry into these positions.

Counsel also stated that the beneficiary received a bachelor's degree in pharmacy and provides a copy of a diploma, but the diploma is not in English and no translation of or credential evaluation for this document was provided. Because the petitioner failed to submit certified translations of this document, the AAO cannot determine whether the evidence supports counsel's claim. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. In addition, counsel provided copies of the beneficiary's Commission on Graduates of Foreign Nursing Schools (CGFNS) certificates.

The organizational chart provided in response to the RFE indicates that the beneficiary would be directly supervised by the Director of Nursing (a Registered Nurse), who, in turn, is supervised by the petitioner's Administrator. The chart also indicates that the beneficiary would not be responsible for supervising any individuals. In addition to the proffered position of Quality Improvement Manager, the chart indicates that the petitioner also employs an Administrative Services Manager, a Health Education Manager, a Patient Services Manager, and a Clinical Supervisor, although several of these positions are listed as vacant. No additional explanation or breakdown of the proffered position's duties was provided, despite the director's request in the RFE for this information. The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i).

Counsel also provided six advertisements for coordinators/managers, quality improvement.

The director denied the petition, finding that the petitioner had satisfied none of the 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 for the petitioner argues that:

[t]he position of “Medical and Health Service Managers” is an approximation of the functions/duties to be performed by the proffered position as the OOH does not provide a particular section for Quality Improvement/Assurance Managers in the healthcare service industry. This approximation is proper as the duties to be performed by the proffered position are present under said position. Finally, a baccalaureate level of education was demonstrated to be the minimum requirement for entry. . . .

Further, counsel argues that under the Occupational Information Network *O*Net On-line* Summary Report, Quality Improvement/Assurance Managers in healthcare are classified under Medical and Health Services Managers and therefore the proffered position requires a minimum of a bachelor’s degree. On January 21, 2010, the AAO accessed the pertinent section of the *O*Net Online* Internet site, which addresses Medical and Health Services Managers under the Department of Labor’s Standard Occupational Classification code of 11-9111.00.¹ *O*Net Online* assigns Medical and Health Services Managers a Job Zone “Five” rating, which groups them among occupations of which most employers require a graduate school degree and at least five years of experience. As the petitioner does not require a graduate degree plus extensive experience for the proffered position, this is additional evidence that the proffered position does not fit best under the *O*Net Online*’s section on Medical and Health Services Managers. Regardless, the *O*Net Online* does not indicate that degrees required by Job Zone Five occupations must be in a specific specialty closely related to the requirements of that occupation. Therefore, the *O*Net Online* information is not probative of the proffered position being a specialty occupation.

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 a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, 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. In reviewing the duties provided for the proffered position as well as the organizational chart and other supporting documentation, the AAO disagrees with counsel that the *Handbook*’s description of Medical and Health Service Managers is the most suitable approximation of the proffered position. The *Handbook*, 2010-11 edition, provides as follows:

¹ That site is <http://online.onetcenter.org/link/summary/15-1071.00>.

Healthcare is a business and, like every business, it needs good management to keep the business running smoothly. Medical and health services managers, also referred to as healthcare executives or healthcare administrators, plan, direct, coordinate, and supervise the delivery of healthcare. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.

* * *

A small group of 10 to 15 physicians might employ 1 administrator to oversee personnel matters, billing and collection, budgeting, planning, equipment outlays, and patient flow. A large practice of 40 to 50 physicians might have a chief administrator and several assistants, each responsible for a different area of expertise. . . .

No objective evidence was provided to demonstrate that the beneficiary would work as a healthcare executive or administrator. Moreover, the petitioner, which has 25 employees, the majority of whom are registered nurses according to the organizational chart, already employs an Administrator and a Director of Nursing. The only evidence that was provided regarding the proffered position was the vague and general description of duties and the organization chart. 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)).

Instead, the proffered duties to be performed by the beneficiary involve areas of quality assurance within the petitioner's business environment, and are essentially those performed by nurses (or other healthcare personnel) who have moved into the business side of healthcare. The *Handbook*, 2010-11 edition, notes the following:

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, *home-based*, and chronic care businesses. Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need RNs for health planning and development, marketing, consulting, policy development, and *quality assurance*. Other nurses work as college and university faculty or conduct research.

(Emphasis added.) As the petitioner states it requires a bachelor's degree in nursing or a related field and as the proffered position entails having responsibility for quality assurance of the petitioner's home healthcare services business, the AAO finds that the proffered position fits under the *Handbook's* section on Registered Nurses.

A review of the *Handbook* section on Registered Nurses 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 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 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). As discussed previously, the proffered position is not supervisory and the petitioner does not require a graduate degree for the proffered position. Moreover, the petitioner has already hired an Administrator who would supervise the Director of Nursing, who in turn would supervise the beneficiary in the proffered position. 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 nurse, or any other healthcare professional performing the duties of a quality assurance coordinator/staff developer, 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.

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)).

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. To establish its degree requirement as an industry norm, the petitioner has submitted six advertisements from other companies, one for a Quality Improvement Coordinator and five for Quality Improvement Managers. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry as none of the companies placing the ads are sufficiently similar to the petitioner. One of the companies is a large health system of 100 facilities with more than 17,000 employees, two of the companies are responsible for large medical centers, another company is responsible for a large health plan, another company is responsible for a large hospice care business, and the last company does not state what type of employer it is. Therefore, the announcements are not probative for the purposes of these proceedings. Moreover, none of the advertisements list a requirement of a bachelor's degree in a specific specialty. Two companies require a bachelor's degree in a healthcare field generally (and both of these companies also require an RN license), three companies require a bachelor's degree without listing any field (one of which also requires an RN license), and the sixth company lists only a preference for a bachelor's degree, but also requires a licensed registered nurse. As a result, these announcements do not establish a degree requirement in a specific specialty in parallel positions.

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 is not required in a specific specialty. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, 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.

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 registered nurses 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 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.

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.