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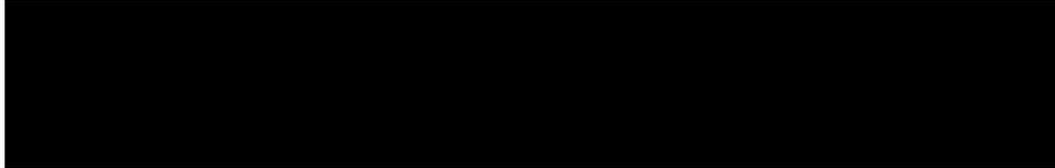
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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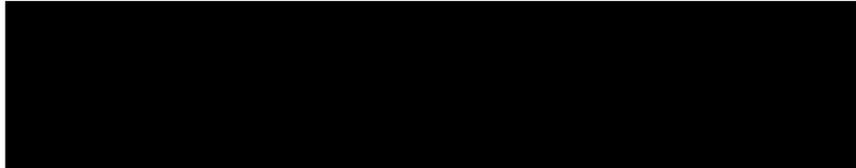


MAY 28 2010

FILE: WAC 08 138 52873 Office: CALIFORNIA SERVICE CENTER Date:

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 skilled nursing healthcare facility with 97 employees. It seeks to employ the beneficiary as a charge nurse 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 and 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 (5<sup>th</sup> 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 charge nurse. The petitioner’s support letter states that, “[The beneficiary] will work as Charge Nurse to plan, coordinate and provide total nursing care for residents as well as providing supervision and guidance to clinical staff members. . . .” The petitioner provides a long list of proffered duties that entail an administrative function (including, in pertinent part, directing the day-to-day functions of the nursing assistants), a nursing care function (including, in pertinent part, informing nursing personnel of new admissions, making rounds and coordinating residents’ care with physicians, and ensuring that prescribed treatments and direct nursing care are provided to residents), and a drug administration function (including, in pertinent part, preparing and administering medications as ordered by the physician and ensuring that supplies are on hand to meet the needs of the residents).

The support letter states that the proffered position requires a Bachelor’s Degree in Nursing. The petitioner submitted the beneficiary’s education documents and education evaluation, indicating that she received the equivalent of a Bachelor of Science degree in Nursing from a regionally accredited university in the United States. 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 charge nurse to work at the petitioner’s facility at an hourly rate of \$28, with a prevailing wage of \$25.29 per hour.

The petitioner also submitted a copy of its offer letter to the beneficiary, which titles the proffered position as a Registered Nurse and states that, “[y]our primary job duties and responsibilities shall include plans, coordinates and provides total nursing care for residents and provides supervision and guidance to clinical staff members.”

On April 25, 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 stated that of its 97 employees, 67 are nursing personnel and, of those, 41 are Certified Nurse Assistants, 10 are Licensed Vocational Nurses, and 16 are Registered Nurses. The petitioner stated that it is a 24-hour skilled nursing care facility and each day there are three shifts, each one of which requires one Charge Nurse to supervise between 4 and 12 Certified Nurse Assistants and/or Licensed Vocational Nurses. The petitioner also provided an organizational chart, which indicates that it employs three Charge Nurses (one for each shift), each of whom holds a Bachelor of Science degree in Nursing. According to the chart, each Charge Nurse supervises 4-12 Certified Nursing Assistants and each Charge Nurse reports to both the Assistant Director of Nurses and the Director of Staff Development, both of whom have a Bachelor of Science degree in Nursing. These positions in turn report to one Director of Nurses, whom also holds a Bachelor of Science degree in Nursing. However, the petitioner does not provide copies of these employees’ degrees such that the AAO can independently verify that these employees hold the degrees claimed in 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)).

Prior counsel for the petitioner also submitted an expert opinion letter from [REDACTED] who is employed as a psychiatric nurse practitioner and previously taught nursing at various universities. Additionally, prior counsel submitted one advertisement from a hospital, which describes itself as a general and acute care facility, for a registered nurse. The advertisement states that a bachelor’s degree is required, but does not indicate that the degree must be in a specific specialty.

Prior counsel also submitted a copy of the petitioner’s official job description for a Charge Nurse, which provides, “[T]he primary purpose of your job position is to provide direct nursing care to the residents, and to supervise the day-to-day nursing activities performed by nursing assistants. . . .” [emphasis added]. Although the petitioner never states what percentage of the beneficiary’s time would be spent on providing direct nursing care and what percentage would be spent on supervising nursing assistants, this description indicates that a primary part of the Charge Nurse’s role at the petitioner’s facilities is to provide direct nursing care. The job description provides a detailed list of duties entailing administrative functions, charting and documentation, drug administration functions, personnel functions, nursing care functions, staff development, safety and sanitation, equipment and supplies, and care plan and assessment functions.

The petitioner’s official job description also states the education requirements for a Charge Nurse as follows, “[m]ust possess, as a minimum, a Nursing Degree from an accredited college or university, or be a graduate of an approved LPN/LVN program.” Requiring a nursing degree or certification from an LPN/LVN program is not the

same as a requiring a bachelor's degree in nursing.<sup>1</sup> Therefore, this requirement conflicts with the petitioner's assertion that it requires a minimum of a bachelor's degree in nursing for its Charge Nurses. 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).

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, new counsel for the petitioner argues that the director did not take into account some of the evidence previously provided, including the expert opinion letter from [REDACTED], in making her determination.

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. 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

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<sup>1</sup> According to the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, licensed practical and licensed vocational nursing training programs generally last only about one year and are offered by vocational and technical schools or community or junior colleges.

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). 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, the petitioner has already hired a Director of Nursing, who in turn would supervise an Assistant Director of Nurses and a Director of Staff Development, 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 charge nurse, or any other healthcare professional performing the duties of a charge nurse, 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. As mentioned previously, in response to the RFE, and on appeal, counsel for the petitioner provides an Expert Opinion from [REDACTED]

This letter states that:

[F]or me, the question is whether the position of Charge Nurse with the duties described justify the necessity to hire a nurse with a bachelor's degree or its equivalent and whether or not this is the industry standard. To answer this question, I reviewed advertisements for charge nurses on AOL job search and reviewed the American Nursing Association (ANA) website that defines the different levels of nursing education. It was found that most companies who advertised for employees through the AOL job search requested that the applicant be a licensed registered nurse, however the education level was not specified.

The lack of specificity of education specified can be attributed to the genuine shortage of nurses which is widely known and accepted. While companies would prefer a nurse with more education, they often do not have this luxury.

At present, the general route of education for all registered nurses is the following: a two-year community college degree, a three-year diploma from a school of nursing, or a four-year university program[.] There are exceptions, but community college and university degrees are considered the rule.

\* \* \*

In essence, a registered nurse is the minimal qualification for the position of charge nurse. In terms of education, as a rule, the more experienced registered nurse is often promoted to charge nurse after years of on-the-job experience. However, this often is a poor decision and can cause much frustration for that individual and that organization unless the nurse has been taught advanced courses such as managerial skills, research, data analysis, pathophysiology, and pharmacology, just to name a few. These more advanced courses are offered in the last two years of the four-year baccalaureate program of nursing and continued on in the master's and doctoral program. The two-year community college registered nurse is considered by most a bedside nurse and not a manager or charge nurse.

Therefore, largely based on my 24 years of experience as a nurse and my ten years of teaching nursing students at all levels, it is my opinion that the industry standard for such organizations as the petitioner routinely employ and recruit only individuals with a bachelor's in science or nursing for the position of charge nurse. Additionally, if I was hiring for this position, there would be no question but to hire the nurse with the minimum education of a bachelor's degree.

The letter writer bases her opinion on the petitioner's letter, information about the petitioner available in its brochure and on its website, and an e-mail from prior counsel with information about the company. It therefore appears that [REDACTED] did not base her opinion on any objective evidence, but instead restates the proffered position description as provided by the petitioner. [REDACTED] does not indicate that she reviewed the statement

or duties listed in the petitioner's official job description of charge nurses, which provides that a large part of the proffered position's function is direct patient care and that a bachelor's degree in nursing is not a minimum requirement. [REDACTED] also does not indicate that she reviewed the petitioner's organization chart, which indicates that other administrative nurses would supervise the beneficiary and that the beneficiary would not supervise other registered nurses. 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).

Moreover, [REDACTED] specifically states that it is the norm to hire a registered nurse with varying levels of education and that, while many employers would *prefer* a nurse to have a bachelor's degree, the shortage of nurses means that they will hire nurses who do not have at least a bachelor's degree in a specific specialty. While the AAO understands that there is a nursing shortage, the fact remains that even [REDACTED] acknowledges that employers similar to the petitioner only prefer a bachelor's degree for charge nurses and usually do not require them to have a bachelor's degree in a specific specialty.

Further, to establish its degree requirement as an industry norm, the petitioner has submitted one advertisement. This evidence, however, does not establish the petitioner's degree requirement as the norm within its industry as one ad is not sufficient to demonstrate an industry-wide requirement. Moreover, although the petitioner claims that the hospital placing the ad has facilities similar to the petitioner, the hospital states that the position advertised is for a registered nurse to work in a burn center. This is a critical care facility that provides services that differ significantly from those of the petitioner. Therefore, the announcement is not probative for the purposes of these proceedings. Moreover, the advertisement does not list a requirement of a bachelor's degree in a specific specialty. As a result, this announcement does 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 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 direct patient care and the petitioner does not demonstrate that the supervisory functions rise to a level of complexity that requires a bachelor's degree in a specific specialty.

The petitioner indicates that it currently employs three charge nurses (one for each shift), each of whom has a bachelor's degree in nursing. However, the petitioner does not provide copies of their degrees, so the petitioner's statements cannot be verified through objective evidence. Moreover, as stated previously, the petitioner's official job description of a charge nurse indicates that either a nursing degree or graduation from an approved LPN/LVN program, 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 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 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.