

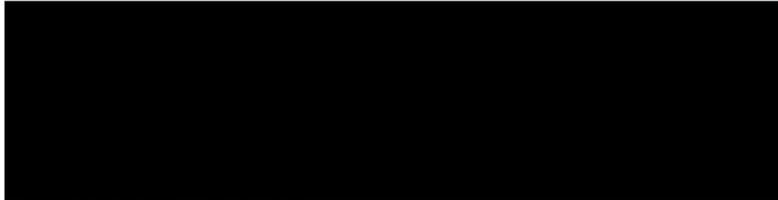
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U.S. Department of Homeland Security  
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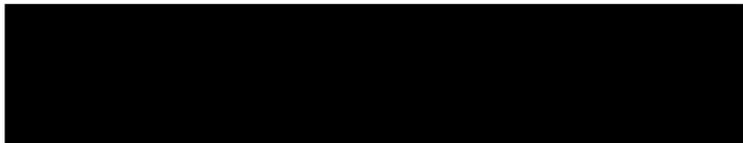
D2

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **NOV 02 2010**

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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,

*for Michael F. Kelly*  
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.

On the Form I-129 visa petition the petitioner stated that it is a provider of health care services and that it has 24 employees. To employ the beneficiary in a position designated as a staff development manager, the petitioner endeavors to classify her 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 petitioner failed to establish that the petitioner would employ the beneficiary in a specialty occupation position. On appeal, counsel submitted a brief and asserted that all of the evidentiary requirements had been satisfied.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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

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

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

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which (2) requires the

attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must 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 a particular position 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.

With the petition counsel submitted a letter, dated March 31, 2009, from the petitioner's administrator. That letter states the duties of the proffered position as follows:

Specifically, [the beneficiary] will ensure for or deliver annual mandatory and continuous education for staff; conduct new employee orientation and coordinate competency completion; ensure for or deliver annual mandatory and continuous education for staff using internal or external resources according to state and federal regulations and company policy; teach in-house courses; coordinate employee health program (immunizations, flu shots, physicals exams, etc.); monitor and ensure current licensure and certification of staff; maintain employee education, training, and health files; assist in the screening and hiring of nursing and other staff; complete required forms and documents in accordance with company policy and state and/or federal regulations.

That letter further stated, "The normal minimum requirements for performance of the above job duties [include] a bachelor's degree in nursing or related studies . . . ."

On April 16, 2009 the service center issued a request for evidence in this matter. The service center requested, *inter alia*, that the petitioner "explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field." In response, counsel provided copies of three vacancy announcements printed from web content.

One of those announcements is for a position designated Manager Patient Care – Labor and Delivery Services for [REDACTED]. The duties of that position include planning, scheduling, and evaluating 24-hour operation of the ante-partum, labor and delivery, mother-baby, and newborn nursery units of the medical center; managing financial, capital, and human resources of those units; monitoring equipment condition and stock levels; and supervising, disciplining, and discharging, as necessary, subordinate personnel. That announcement states that the position requires knowledge of nursing theory, practice and administration at a level acquired through completion of a bachelor's degree from an approved nursing school.

The duties listed bear little resemblance to the duties of the proffered position. Further, that vacancy announcement states that [REDACTED] is a 127-bed hospital with more than 75 physicians, and is clearly much larger than the petitioner, who, as was noted above, stated on the visa petition that it had 24 employees.

Another vacancy announcement was placed by [REDACTED] and is for a Nurse Manager, Cancer Center. The announcement states that the position requires a minimum of a bachelor's degree in nursing. Although many of the duties of the position as stated in that announcement are rather abstract, they include recruitment, hiring, and supervising the nursing, billing, and collections staff; ensuring compliance with Medicare, Medicaid, and insurance company

requirements, and developing and implementing the cancer center's annual budget. Again, those duties bear little resemblance to those of the proffered position in the instant case, and [REDACTED] describes itself as a 489-bed acute care hospital with a cancer center of 35,000 square feet -- obviously a much larger operation than the petitioner, by whatever measure.

The third vacancy announcement was placed by the [REDACTED] in Libertyville, Illinois. That announcement is for a Nurse Manager, Pediatric Emergency Department and states that the position requires a bachelor's degree and a current Illinois registered nursing license. The AAO notes that the announcement did not indicate that the position requires a bachelor's degree *in nursing*. That announcement states the duties of the position as follows:

Develops and maintains systems for insuring [sic] that adequate unit supplies and equipment are available and utilized cost control measures. Ensures [REDACTED] maintains requirements for EDAO (Emergency Department approved Pediatrics), participates in regional meetings. Maintains competence in Pediatric Care of patients. Keeps ED Director informed of operational issues. Performs Patient Rounding on a regular basis, identifying issues and taking appropriate actions. Stays abreast of current Disaster Management principles and ensures ongoing staff knowledge of emergency preparedness related to Pediatric Care. Ensures that standards of patient care are appropriately implemented, including age appropriate assessments. Ensures appropriate documentation of care delivered through staff development and chart review. Assists ED Director and Senior Management in identifying operational issues and participates in resolution as appropriate. Staff scheduling, staff performance evaluations/On-going competency [sic] Develops a process for ensuring Nursing education, pediatric specific Protocols, Policies and Procedure development. Coordinate and design unit orientation with ED Nursing Educator[.] Participates in the identification and implementation of selected projects. Maintains appropriate employee records and department reports. Performs other duties as assigned or directed.

This vacancy announcement further states that ACMC operates eight hospitals with 3,500 beds.

That announcement does not indicate that the position necessarily requires a minimum of a bachelor's degree or the equivalent in nursing or in any specific specialty; the duties of the advertised position are substantially more expansive than those of the proffered position; and the ACMC is considerably larger than the petitioner.

None of the vacancy announcements provided offer much support for the proposition that a requirement of a minimum of a bachelor's degree or the equivalent in nursing is common to the industry in parallel positions among similar organizations. Even without the flaws noted above, that they have not been shown to be placed by similar organizations, that they are for positions that differ from the proffered position in the instant case, and that some do not specifically state that they require a bachelor's degree in nursing, those few advertised vacancies would be insufficient to demonstrate an industry-wide practice.

In his own letter of April 29, 2009 counsel stated that the evidence provided demonstrates that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel also cited a section of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) pertinent to Staff Development Managers under the occupation heading Human Resources, Training, and Labor Relations Managers and Specialists as evidence that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In the decision of denial, the director observed that the evidence submitted does not demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. On appeal, counsel asserted that the evidence does, in fact, show that the proffered position qualifies as a specialty occupation, and reiterated his assertion that the proffered position is akin to Staff Development Manager positions listed in the Human Resources, Training, and Labor Relations Managers and Specialists section of the *Handbook*.

The AAO recognizes the *Handbook*<sup>1</sup> as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The *Handbook* section pertinent to Human Resources, Training, and Labor Relations Managers, and Specialists describes the duties of training and development managers and specialists as follows:

*Training and development managers and specialists* create, procure, and conduct training and development programs for employees. Managers typically supervise specialists and make budget-impacting decisions in exchange for a reduced training portfolio. Increasingly, executives recognize that training offers a way of developing skills, enhancing productivity and quality of work, and building worker loyalty. Enhancing employee skills can increase individual and organizational performance and help to achieve business results. Increasingly, executives realize that developing the skills and knowledge of its workforce is a business imperative that can give them a competitive edge in recruiting and retaining high quality employees and can lead to business growth.

The record contains no indication that the beneficiary will supervise training development specialists. Therefore, the *Handbook* does not support counsel's assertion that the proffered position qualifies as a training development manager position. The AAO finds, however, that, based on the description of the duties of the proffered position, it might be considered a staff development manager position as described in the *Handbook*. In any event, the description of the requisite education for both positions is the same.

The *Handbook* describes the requisite education for such positions as follows:

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<sup>1</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed September 13, 2010.

Although a bachelor's degree is a typical path of entry into these occupations, many colleges and universities do not offer degree programs in personnel administration, human resources, or labor relations until the graduate degree level. However, many offer individual courses in these subjects at the undergraduate level in addition to concentrations in human resources administration or human resources management, training and development, organizational development, and compensation and benefits.

Because an interdisciplinary background is appropriate in this field, a combination of courses in the social sciences, business administration, and behavioral sciences is useful. Some jobs may require more technical or specialized backgrounds in engineering, science, finance, or law. Most prospective human resources specialists should take courses in principles of management, organizational structure, and industrial psychology; however, courses in accounting or finance are becoming increasingly important. Courses in labor law, collective bargaining, labor economics, and labor history also provide a valuable background for the prospective labor relations specialist. As in many other fields, knowledge of computers and information systems is useful.

The *Handbook* suggests that a bachelor's degree in personnel administration, human resources, or labor relations would be helpful in obtaining such a position, but not that it is essential. The *Handbook* indicates that a bachelor's degree is a typical path of entry, but not that such positions require a minimum of a bachelor's degree or the equivalent in a specific specialty. The *Handbook* does not mention nursing degrees. The *Handbook* offers no support at all for the proposition that the proffered position requires a minimum of a bachelor's degree in nursing or an equivalent degree.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *See Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988).

Because the record does not support the proposition that similar positions typically require a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner is obliged to demonstrate that the proffered position itself, or its specific duties, could not be adequately performed by a person without such a degree.

The duties of the proffered position are largely administrative. In the position, the beneficiary would conduct new employee orientation; coordinate competency completion; coordinate employee health program (immunizations, flu shots, physicals exams, etc.); monitor and ensure current licensure and certification of staff; maintain employee education, training, and health files; assist in the screening and hiring of nursing and other staff; and complete required forms and documents in accordance

with company policy and state and/or federal regulations. None of those duties appear to require a minimum of a bachelor's degree, or the equivalent, in nursing or in any specific specialty. It is definitely not self-evident that the duties as described in the record of proceeding require the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, as required of an H-1B specialty occupation under the governing statutes and regulations.

The beneficiary would also be responsible for overseeing the petitioner's employees required education. She would either personally provide instruction or see that the petitioner's employees obtain it elsewhere. The language of the petitioner's administrator's March 31, 2009 letter specifically provides for both possibilities. Again, absent teaching duties, the proffered position does not appear to require any knowledge of nursing, and certainly not a bachelor's level of education in nursing.

Whether the beneficiary would necessarily teach any classes, rather than referring the petitioner's employees to outside continuing education sources, is unclear. If she would teach any classes, the nature and substance of those classes is unstated. The petitioner cannot rely on unidentified classes the beneficiary would teach, which, according to its administrator's own words, may or may not actually exist, to demonstrate that the proffered position requires a minimum of a bachelor's degree or the equivalent in nursing.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In his response to the RFE, counsel stated, at page nine, footnote 1, that the petitioner has never previously hired anyone to fill the proffered position. The petitioner cannot, therefore demonstrate that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). As indicated by this decision's quotation of the duties as described in the March 31, 2009 letter from the petitioner's administrator, and as reflected in this decision's earlier comments about the duties described in the record of proceeding, the duties are described

exclusively in terms of generalized and generic functions that are not indicative of a need for, or usual association with, any particular level of education, or educational equivalency, in a specific specialty.

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence submitted on appeal has not remedied that failure. The appeal will be dismissed and the petition denied on this basis.

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. The appeal will be dismissed and the petition denied.

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