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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: DEC 09 2011 Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

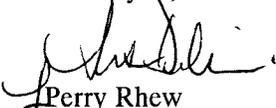


INSTRUCTIONS:

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 \$630. 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, 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 remain denied.

The petitioner claims to be a 213-bed nursing home established in 1968 with 102 employees. It seeks to employ the beneficiary as an infection control 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, Petition for Nonimmigrant Worker, 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, Notice of Appeal or Motion, with counsel's supplemental 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 [1] 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 [2] 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 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as an infection control manager. The petitioner described the proposed beneficiary’s duties of the position as follows:

[P]lanning, developing, directing, implementing and evaluating infection control activities throughout the facility. The Manager will also recommend and evaluate policies and procedures relating to infection control, conduct formal and informal

educational programs, collaborate with department heads and staff to implement action plans and facilitate evaluations to reduce risk of healthcare associated infections, gather data and information relating to infections and infection control practices, participate in infection control risk assessment, safety and prevention improvement activities.

In addition, the Infection Control Manager will maintain communication, between management, medical staff and department heads by attending meetings and coordinating interdepartmental infection control educational and hygiene training functions, analyze internal processes and recommend and implement procedural or design/implement training modules based on an analysis of feedbacks [sic] from the Department Directors, healthcare personnel and staff, with the express aim of enhancing control functions throughout the facility, and ultimately enhancing the petitioner's infection control standards, contribute to the development of a better understanding of prevention and control of infections.

The petitioner, in the December 7, 2010 letter in support of the petition stated that the proffered position requires, at a minimum, a bachelor's degree in nursing, health science or related field, or its equivalent work experience in the health care industry. The Labor Condition Application (LCA) submitted was for an infection control manager to work at the petitioner's facility at an annual salary of \$59,696 from December 15, 2010 until December 14, 2013.

On December 27, 2010, the director requested a more detailed description of the work to be performed including specific job duties and an allocation of the percentage of time spent on the duties, among other items.

In response to the director's RFE, counsel for the petitioner indicated the beneficiary would spend 60 percent of her time:

[P]lanning, developing, directing, implementing and evaluating infection control activities throughout the facility, recommending and evaluating policies and procedures relating to infection control, conducting formal and informal educational programs, collaborating with department heads and staff to implement action plans and facilitate evaluations to reduce risk of healthcare associated infections.

Counsel also indicated the beneficiary would spend: 20 percent of her time "gathering data and information relating to infections and infection control practices, participating in infection control risk assessment, safety and prevention improvement activities;" ten percent of her time "maintaining communication, between management, medical staff and department heads by attending meetings and coordinating interdepartmental infection control educational and hygiene training functions;" and ten percent of her time "analyzing internal processes and recommending and implementing procedural or policy changes to improve infection control practices, streamlining training efforts and designing/implementing training modules based on an analysis of feedbacks [sic] from the Department Directors, healthcare personnel and staff."

Counsel for the petitioner noted that the position is not that of a clinical nurse, but rather is a medical administrative position. Counsel acknowledged that the Department of Labor's *Occupational Outlook Handbook's (Handbook)* chapter on Medical and Health Services Manager indicated that only a general baccalaureate degree would be required for this position; counsel, however, asserted that the petitioner required a baccalaureate level of education in a specific specialty, nursing or an health science related field, as a minimum for entry into the occupation. Counsel also noted that although the beneficiary would work in conjunction with the nursing services director and other department heads, she would not supervise others. Counsel indicated that the petitioner required a bachelor's degree in nursing or a health science related field because the infection control manager "is entrusted with the task of planning, developing, directing, implementing and evaluating infection control activities throughout the facility, which is a fairly complex undertaking given the fact that it is undertaken in the context of a several hundred bed facility, with hundreds of patients and staff,¹ necessitating a high level of health care knowledge to accomplish the job."

Counsel also provided seven advertisements including advertisements: (1) for an infection control manager that required a bachelor of science in nursing posted by an undisclosed entity; (2) for a director of infection control at a medical center that required a bachelor's degree in nursing, microbiology, or medical technology with an advanced degree in public health or nursing preferred and certification by the Board of Infection Control; (3) for an infection control manager at a full-service acute care hospital that required a bachelor's degree in nursing or a degree in a field such as public health/epidemiology; (4) for an infection prevention and control manager for an integrated network of hospitals, physician clinics and home medical services that required a bachelor's degree and certification in infection control; (5) for an infection control manager for a hospital that required a bachelor's degree and preferred a bachelor's degree in nursing; (6) for a manager of infection control posted by an undisclosed entity that listed minimum qualifications as a graduate of a state accredited school of nursing or of an accredited collegiate program in public health/epidemiology - bachelor's degree in nursing; and (7) for an infection control practitioner posted by an undisclosed entity that listed a minimum of a baccalaureate degree in a healthcare field. Counsel also provided a July 12, 2010 letter from [REDACTED] signed by its chief executive officer who is the same person as the petitioner's chief executive officer. The letter noted that due to the complexity and nature of the task, the [REDACTED] made it a point to only employ individuals possessing a bachelor's degree or higher for the position of infection control manager and that it had only hired applicants who had nursing degrees or science related degrees. The letter writer indicated his belief that this is common practice in the industry.

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 asserts that the proffered position most closely resembles a medical and health services manager, which is a broad category of managers. Counsel references the previously submitted advertisements and [REDACTED] letter to establish that a degree

¹ The petitioner stated on the Form I-129 that it is a 213-bed facility with 102 employees.

requirement is common to the industry. Counsel contends that the petitioner's proffered position as described is a medical/health administrative position and as was explained and substantiated is an occupation that requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty. Counsel notes that the petitioner has not hired anyone previously for this position but had recognized that the increase in virulent infections required the creation of an infection control department and an infection control manager.

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 *Occupational Outlook Handbook (Handbook)*,² 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)).

In addition, 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. Similarly, the educational credentials of a proposed beneficiary do not establish that a proffered position is a specialty occupation.

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* does not identify a position titled infection control manager; however, there are sections in the *Handbook* that include duties similar to those described in the proffered position. For example, the section on Registered Nurses 2010-2011 online edition states in pertinent part:

Infection control nurses identify, track, and control infectious outbreaks in healthcare

² Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos001.htm> (last accessed December 2011).

facilities and develop programs for outbreak prevention and response to biological terrorism. *Nurse educators* plan, develop, implement, and evaluate educational programs and curricula for the professional development of student nurses and RNs. *Nurse informaticists* manage and communicate nursing data and information to improve decision making by consumers, patients, nurses, and other healthcare providers. RNs also may work as healthcare consultants, public policy advisors, pharmaceutical and medical supply researchers and salespersons, and medical writers and editors.

The *Handbook's* section on Medical Records and Health Information Technicians states in pertinent part:

Medical records and health information technicians assemble patients' health information including medical history, symptoms, examination results, diagnostic tests, treatment methods, and all other healthcare provider services. Technicians organize and manage health information data by ensuring its quality, accuracy, accessibility, and security. They regularly communicate with physicians and other healthcare professionals to clarify diagnoses or to obtain additional information.

The section on Medical and Health Services Managers states:

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.

* * *

Clinical managers have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. For example, directors of physical therapy are experienced physical therapists, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. Clinical managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work quality; develop reports and budgets; and coordinate activities with other managers.

The petitioner's description of duties in this matter indicates that the successful incumbent will spend 60 percent of her time planning, developing, directing, implementing and evaluating infection control activities throughout the petitioner's 213-bed facility, as well as conducting formal and informal educational programs and collaborating with department heads and staff to implement action plans. This description of duties corresponds to the duties of an infection control nurse/educator as set out in the *Handbook* above. The petitioner does not establish that the duties of the position involve duties and responsibilities that fall within the duties of a managerial executive

who provides administrative services similar to those of a medical and health services manager. Counsel's contention that a bachelor's degree in nursing or a health science related field is necessary because of the importance of infection control in the petitioner's facility is disingenuous. Infection control is no more or less important than the numerous tasks undertaken by registered nurses who deal daily with serious health-related issues. Moreover a number of the described duties such as "gathering data and information relating to infections and infection control practices, participating in infection control risk assessment, safety and prevention improvement activities," are similar to the duties of a health information technician, also an occupation that does not require a bachelor's degree in a specific specialty.

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). Although the proffered position appears to entail some administrative duties requiring health-related knowledge, the position does not include duties that are supervisory in nature. The duties as described although including administrative duties of a technical nature do not include supervisory duties or other duties more specifically associated with the position of a health services manager. The petitioner has not described duties that require coursework additional to the coursework described for a general purpose nurse. Accordingly 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 alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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).

As discussed above, 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 seven advertisements submitted also fail to establish a common industry standard for the proffered position. The advertisements do not include sufficient information to determine that the positions are parallel to the proffered position. In addition, the advertisements are not from organizations that are similar to the petitioner's 213-bed nursing home. Moreover, three of the seven advertisements state that a general bachelor's degree is sufficient and a fourth advertisement indicates that a graduate of a nursing school would be sufficient. Thus, these advertisements

demonstrate at best that a bachelor's degree generally is required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. The AAO also observes that the July 12, 2010 letter from the petitioner's CEO noted that [REDACTED] only employed applicants who had bachelor's degrees and only hired applicants with nursing or science related degrees for its infection control manager, an acknowledgment tantamount to an admission that the position is not a specialty occupation. Upon review of the advertisements submitted and the letter from [REDACTED] [REDACTED] the petitioner has not established that similar organizations routinely require at least a bachelor's degree in a *specific specialty* for parallel positions. The record does not establish that the petitioner satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 for the proffered position as described. The petitioner's recognition of the importance of infection control does not elevate the proffered position to one that requires coursework additional to that of a registered nurse. The petitioner's description of the job duties associated with the proffered position is not distinguishable by its unique nature or complexity from similar but non-degree-requiring positions.

The petitioner in this matter has not submitted evidence of its past employment practices as regards to the proffered position; thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Moreover, if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Based on the evidence of record, 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 in the record, reflect a higher degree of knowledge and skill than would normally be required of registered nurse assigned to gathering information regarding infection control and educating others in regard to the importance of maintaining certain standards and policies. The duties as described do not represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a registered nurse. Although counsel asserts that the petitioner has substantiated that the proffered position is an occupation that requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, the record does not support the assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The position as described does not represent a position that incorporates duties that are so specialized or complex that the knowledge required to perform them is usually associated with the

attainment of a baccalaureate or higher degree. 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. § 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.