



U.S. Citizenship
and Immigration
Services

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Date: **JUN 12 2012** Office: VERMONT SERVICE CENTER [REDACTED]

IN RE:

[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:

[REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Vermont Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a home health company, and it seeks to employ the beneficiary as a registered nurse/case manager. The petitioner, therefore, endeavors to classify the beneficiary 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 proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means 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.

The record of proceeding before the AAO contains: (1) 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 decision denying the petition; and (5) the petitioner’s Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

In a letter dated February 2, 2010, the petitioner claims to be a home health service company “that provides coordinated and comprehensive health care to patients in their homes.” It further claimed to provide services including skilled nursing, medical social services, rehabilitation services and nutritional dietary consultation.

Regarding the proffered position, the petitioner claimed to require the services of the beneficiary as a registered nurse, and claimed that her duties would be as follows:

Assess patient health problems and needs, develop and implement nursing care plans, and maintain medical records. Administer nursing care to ill, injured, convalescent, or disabled patients. May advise patients on health maintenance and disease prevention or provide case management.

The petitioner further claimed that the proffered position of registered nurse is considered a specialty due to the following:

1. A Bachelor's Degree is normally the minimum requirement for entry into the position. The degree requirement is an industry standard in parallel positions among similar firms;
2. The high level of responsibility in the offered position requires the use of and application of knowledge obtained in a baccalaureate level of university education. We have attached the evaluated educational standards of the beneficiary to support the level of education required for the said position;
3. Also, the job duties are so complex that knowledge and skills normally gained by the attainment of bachelor's degree are required;
4. To be able to perform each specific job duties and responsibilities in a reasonable manner, the alien must possess the appropriate knowledge, training and experience.

The petitioner concluded by stating that the beneficiary possessed the U.S. equivalent to a bachelor of science degree in nursing and thus was qualified to perform the duties of the proffered position.

On April 27, 2010, the director issued an RFE, which requested a more detailed description of the work to be performed by the beneficiary as well as information pertaining to licensing requirements for such positions in the State of Texas.

The petitioner responded on June 7, 2010, and submitted several documents in response to the director's requests. The petitioner submitted the following updated description of the proffered position:

Baccalaureate Degree is a standard minimum requirement for the job of Registered Nurse/Case Manager offered in our company as the work requires that the employee have finished a complete four-year course of study. The job requires possession not only that of basic nursing care skills and knowledge but also critical thinking and leadership qualities. Our company offers a coordinated and comprehensive health care to patients in their homes. The registered nurse/case manager does not only administer nursing care to the ill, injured, or convalescent or disabled patients but also

perform[s] selected nursing and administrative duties as instructed by the Administrator, as well as monitors and evaluates efficiency and effectiveness of clinical programming of service delivery methods and procedures within the scope of the responsibility and identified opportunities for improvement. The Registered Nurse/Case Manager will also develop, implement and monitor consistent care policies and conduct quality improvement processes related to patient care, become familiar with equipments/technology in use and maximize efficiency of these processes.

The workload of the Registered Nurse/Case Manager is as follows: Eighty percent (80%) of the time will be spent on the administrative duty of monitoring and evaluating the delivery of clinical programming of service delivery methods as well as conducting quality improvement processes related to patient care. Twenty percent (20%) of the work will be on administering patient care.

The petitioner also submitted a copy of its organizational chart, a copy of the beneficiary's Texas nursing license, and a letter from counsel reiterating the requirements of the position, along with overviews of nursing programs in the State of Texas.

On August 17, 2010, the director denied the petition. Specifically, the director concluded that the record did not establish that the proffered position met any of the four supplemental criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director acknowledged that the duties of the proffered position appeared akin to those of a registered nurse as described by the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, but concluded that the *Handbook*, upon which USCIS routinely relies in determining whether a position qualifies as a specialty occupation, indicated that there were three alternative ways to become a registered nurse which did not require at least a bachelor's degree in a specific specialty.

On appeal, counsel contends that the director's findings were erroneous, and asserts that, since the proffered position is more of a case manager than a registered nurse, the position's requirements are specialized and complex, thus indicating that the proffered position is a specialty occupation. Counsel resubmits documentation included in the record prior to adjudication in support of this contention.

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The *Handbook* describes the occupation of registered nurse in relevant part as follows:

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

Duties

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Give patients medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record the observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment
- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage their illnesses or injuries
- Explain what to do at home after treatment

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, "Registered Nurses," <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-2> (last visited May 29, 2012). The AAO agrees with the classification of the proffered position into this occupational category by counsel and the director.

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that it does not require a bachelor's degree in a specific specialty or its equivalent for entry into the position:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.

Education

In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.

All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.

Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical

experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

Handbook, 2012-13 ed., "Registered Nurses," <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited May 29, 2012).

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1), which provides for specialty occupation qualification of those positions whose normal minimum entry requirement is a baccalaureate or higher degree in a specific specialty or its equivalent. The *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, indicates that the position of registered nurse can be filled by RNs with associate degrees or two or three-year hospital diplomas, as well as BSNs, and indicates that any of these three educational backgrounds would prepare a candidate for an entry-level position as a registered nurse. Based on this evidence, the petitioner has failed to establish that a baccalaureate or higher degree, or the equivalent, in a specific specialty, is normally required for entry into this occupational category. The petitioner, therefore, has failed to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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.

Neither the petitioner nor counsel submit evidence that responds to this criterion. The record contains no documentation establishing that a degree requirement is common for parallel positions within the petitioner's industry. Moreover, the record contains no evidence, such as letters from organizations within the petitioner's industry attesting to general hiring standards for registered nurses, to establish that a degree requirement is common in the industry. Therefore, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty or its equivalent can perform the duties associated with the position. The AAO observes that the petitioner has

indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. Counsel addresses this prong on appeal, arguing that the proffered position is specialized and complex by virtue of the fact that the majority of the beneficiary's time will be devoted to "creating and developing nursing policies." However, counsel submits no additional evidence to support these contentions. 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).

Neither the petitioner nor counsel explain or clarify at any time in the record which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-specialty-degreed baccalaureate employment. The petitioner has thus failed to establish that it has satisfied either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner provides no evidence and makes no claims with regard to its past hiring practices for registered nurses, but simply repeats on appeal that the company "prefers: an employee with a four year degree in nursing" for the position. Although counsel indicates that this criterion is satisfied by virtue of the petitioner's allegation in its petition that it requires someone with at least a baccalaureate degree to perform the duties of the position, this assertion is not sufficient to meet the petitioner's burden of proof in this matter.

Both counsel and the petitioner claim that the proffered position requires the incumbent to possess at least a bachelor's degree in nursing. In addition to conflicting with the statement on appeal that such a degree is only a preference, not a requirement, this claim is not persuasive, since the record does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them. Although the petitioner may believe or otherwise assert that a proffered position requires a specialty degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's or higher degree in a specific specialty or its equivalent could be brought to the United States to perform any occupation as long as the employer required the individual to have such a degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher

degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than registered nurse positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Moreover, counsel for the petitioner simply provides his own unsupported opinions with regard to the qualifications necessary for an individual to perform the duties of the proffered position. Finally, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a baccalaureate, specialty-degreed individual could perform them. The fact that the beneficiary has worked in various nursing positions and gained experience in the field does not establish that the position is inherently more specialized or complex than other similar but non-specialty-degreed baccalaureate employment.¹

Consequently, to the extent that they are depicted in the record, the duties have not been demonstrated as being so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) has been met.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

¹ Moreover, the petitioner has designated the proffered position as a Level I position on the submitted Labor Condition Application (LCA), indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage. 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).