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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC-01-131-54419 Office: Texas Service Center Date: JUN 21 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center approved the nonimmigrant visa petition and certified his decision to the Associate Commissioner for Examinations for review. The decision of the director will be reversed. The petition will be denied.

The petitioner is a recruiter, placement firm and consultant for the health care field. It employs two persons and has a projected gross annual income of $4 million. It seeks to place the beneficiary as a critical care specialist nurse at Palmetto General Hospital (Palmetto) for a period of three years. The director determined the petitioner had established that the proffered position is a specialty occupation.

On notice of certification, counsel submits a brief and additional evidence. Counsel states, in part, that the petitioner and Palmetto both require their critical care specialist nurses to have a bachelor of science degree in nursing.

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), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" 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 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.

In the initial petition, counsel submitted a letter dated March 10, 2001, from the petitioner's chief executive officer who emphasized that the offered position "requires a person of distinguished merit and ability and one with a minimum of a Bachelor of Science in Nursing Degree or the equivalent thereof in terms of academic achievement and work experience." The chief executive officer noted that the position required "supervision and coordination of other nursing activities in a critical care environment where patients' lives are at imminent risk."

In support of his claim that the proffered position required a degree, the petitioner's chief executive officer stated that the petitioner, Jobs2career.com, has a practice of hiring only registered nurses who hold a bachelor of science degree in nursing. The petitioner also submitted a letter from Diane Horner, Dean of the School of Nursing at the University of Miami, to evidence that the minimum qualification for an individual seeking the offered position would be a bachelor of science degree in nursing.

The director found the petitioner's initial evidence deficient and requested that the petitioner submit additional evidence to show that the offered position was a specialty occupation.

In response, counsel submitted additional evidence for the record.

First, counsel submitted a letter from [redacted] Chief Nursing Officer of Palmetto General Hospital, which contained a more detailed listing of the beneficiary's job duties.

Second, counsel submitted a letter from [redacted] Program Director of Critical Care at the University of Miami, and the director of the largest trauma center in the world (The Ryder Trauma Center). According to Dr. McKenney, his employer currently

employs 17 critical care nurses, all of whom held a bachelor's degree or its equivalent on the date each was hired for employment with the Trauma Center. Counsel stated that [redacted] letter demonstrates that courses required in a bachelor of science degree nursing program are critical to the competence of a critical care nurse.

Third, counsel submitted an article from the American Journal of Critical Care, *January 2001, Volume 10, No. 1* entitled "Assessment of Professional Development of Critical Care Nurses: A Descriptive Study." Counsel maintained that "from a regulatory standpoint, one can infer from this article that virtually 100% of critical care nurses have Bachelor of Science in Nursing degrees or their equivalent."

Fourth, counsel submitted copies of curricula for an associate degree and a bachelor of science degree in nursing to show that the associate degree curriculum does not include courses in critical care.

Fifth, counsel submitted a second letter from [redacted] of the University of Miami, School of Nursing. According to counsel, [redacted] stated that the proffered position requires a bachelor's degree.

Sixth, counsel referred to the U.S. Department of Labor's (DOL), Occupational Outlook Handbook ("Handbook"), which indicated that administrative positions in nursing require a bachelor's degree. Counsel maintained that the proffered position was an administrative position, and also stated that the Administrative Appeals Office (AAO) has held that a team leader/registered nurse position is a specialty occupation.

Seventh and finally, counsel stated that the petitioner would not be submitting detailed information regarding the educational backgrounds of other Palmetto registered nurses, as Palmetto considered its personnel records to be confidential.

In support of the director's decision approving the petition, counsel reiterates the arguments that he made in response to the director's request for additional information and additionally refers to Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). Counsel states that the facts in the Defensor case are not similar to the facts in the present petition.

Counsel does not present persuasive evidence to support the director's decision to approve the petition. In evaluating whether the offered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. 214.2(h)(4)(iii)(A)(*1*)

The Service often looks to the DOL's Handbook when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2002-2003 edition of the Handbook, the DOL states the following about the training and educational requirements for registered nurse/supervisory nurse positions:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma.
>
> . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
>
> . . . some career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

The Handbook notes that a bachelor's degree is often necessary for administrative positions. However, despite counsel's claims to the contrary, there is scant evidence to conclude that the proffered position is an administrative position. According to the beneficiary's job description, the proffered position involves the "[s]upervision & coordination of nursing activities in a critical care environment." This job duty is rather broad; it does not provide any insight into the specific tasks that the beneficiary would be expected to perform. Additionally, there is no indication that such supervision and coordination activities would be the primary focus of the beneficiary's job responsibilities.

The petitioner is offering to the beneficiary the position of a registered nurse in a critical care unit. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specialized area is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

Counsel notes that the DOL does not specifically address the educational requirements for a critical care nurse; therefore, the Service should not rely upon the Handbook to determine the minimum educational requirement for the proffered position. However, in comparing the duties of the proffered position to the duties of a

registered nurse or head nurse/supervisor in the Handbook, the Service contends that the proffered position is no more complex or sophisticated than a general registered nurse position.

The petitioner states that the beneficiary would be responsible for:

* Supervision & Coordination of nursing activities in a critical care environment
* Monitoring of critically unstable patients
* Evaluation of Electrocardiographic (EKG) rhythm strips
* Monitoring of vital functions including hemodynamic monitoring
* Maintaining and titrating drips
* Direction of the preparation and maintenance of patients' clinical records
* Accompanying of attending physicians and surgeons on rounds and keeping informed of special orders concerning patients

In the Handbook, the DOL states that job duties for a registered nurse or a head nurse/supervisor include directing nursing activities; observing, assessing and recording symptoms, reactions and progress of patients; administering medications; insuring records are maintained; and assisting physicians during treatment and examinations. The beneficiary's job description parallels the job description of any registered nurse. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The proffered position, while in a particular unit of the medical center, does not entail more complex duties than the position of any registered nurse.

II. 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 - 8 C.F.R. 214.2(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999)(quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The DOL's conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. Regarding information from professional nursing associations, neither counsel nor the petitioner presents evidence that any nursing association has attested that a baccalaureate or higher degree is a minimum entry requirement for this occupation.

Counsel had previously submitted an article from the American Journal of Critical Care, *January 2001, Volume 10, No. 1* entitled "Assessment of Professional Development of Critical Care Nurses: A Descriptive Study." On appeal, counsel states that from the results of the study, one may draw inferences about the educational requirements for critical care nurses, and highlights the portion of the article which states that 72% of the individuals surveyed had at least a bachelor's degree.

These statistics do not establish that a degree is an industry standard. A close review of the article reveals that the statistics noted above were gathered from 100 questionnaires that were returned by respondents who included both critical care nurses and advanced practiced nurses from Georgia, South Carolina and North Carolina. Certainly, the results of the questionnaire are not representative of the critical care nursing industry nationwide. Additionally, with only 100 respondents, one could also argue that the results are not representative of the critical care nursing industry in the entire states of Georgia, South Carolina and North Carolina. Therefore, this article is not persuasive evidence that a degree is common to the industry.

The record also contains two letters from professors who work for the University of Miami and one letter from the Director of the Surgical Intensive Care Unit at the Department of Veterans Affairs (DVA) Medical Center in Miami, Florida. The first letter is from Mark McKenney, Program Director of Critical Care at the University of Miami, and the director of the largest trauma center in the world (The Ryder Trauma Center). According to [redacted] his employer currently employs 17 critical care nurses, all of whom held a bachelor's degree or its equivalent on the date each was hired for employment with the Trauma Center. [redacted] states that the duties of a critical care nurse are so complex and sophisticated that individuals who do not hold a bachelor's degree in nursing are not well-equipped to perform the duties of a critical care nurse. The second letter is from [redacted] the Dean of the University of Miami's School of Nursing. [redacted] states that the proffered position "is complex and can be best performed by a Registered Nurse with a Bachelor of Science Degree in Nursing." The third and final letter is from [redacted] of the DVA Medical Center, who states that "all of our Critical Care Nurses possess at least a bachelor's degree in Nursing or its equivalent. . . ."

Two employers' hiring practices do not exemplify the industry standard. The University of Miami, while a reputable institution, is just one example of an organization that employs critical care nurses. In addition, the DVA, as the largest employer of registered nurses in the nation, has specific hiring requirements for its registered nurse positions that are not common throughout the industry.

There is no evidence that the University of Miami is a facility that is similar to the size and scope of Palmetto's operations. As the largest trauma center in the world, the [redacted] is neither comparable in size or in scope to Palmetto. Additionally, the Service contends that the DVA also may not be considered a "similar organization" to Palmetto, as it employs approximately 36,000 registered nurses, whereas Palmetto employs far less than that number of registered nurses. Instead of relying solely on the educational requirements for registered nurses within large hospitals and medical centers, the petitioner should have presented information regarding the educational requirements for registered nurses in facilities that are similar to the size and scope of its operations. Such evidence would assist in a determination of whether similar organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. See Shanti, Inc. v. Reno, id. at 1165.

The Service also notes that [redacted] the Dean of Nursing at the University of Miami, states that the proffered position "can **best** be performed by a Registered Nurse with a Bachelor of Science Degree in Nursing." [redacted] statement indicates that a bachelor's degree is a preference rather than a requirement for performing the duties of a critical care nurse. (Emphasis added.)

Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The petitioner had previously submitted an August 20, 2001 letter from [redacted] Chief Nursing Officer of Hialeah Hospital, as evidence that the proffered position was complex or unique[1]. In

[1] It is noted that [redacted] states on two occasions that the beneficiary would be employed by Hialeah Hospital, not Palmetto Hospital, as the petitioner claims.

this letter [redacted] states that "Hialeah Hospital considers an individual working as a critical care nurse to be working in a specialty occupation due to the specialized and complex nature of the position [redacted] elaborates that the position of a critical care nurse is different from a medical/surgical nurse because:

* The patients are more acutely ill
* The critical care setting is a highly-charged environment due to the "life or death" situations
* A critical care nurse is required to have six weeks of classroom orientation in addition to the one and [one] half days of classroom orientation required for a medical/surgical nurse
* A critical care nurse is required to have six weeks of clinical orientation with an experienced critical care nurse as compared to two weeks of clinical orientation for a medical/surgical nurse
* A critical care nurse must have Advanced Life Support Certification in addition to Basic Life Support Certification
* A medical/surgical nurse does not titrate drips, monitor the hemodynamic status of patients or evaluate electrocardiographic rhythm strips
* A medical/surgical nurse is not required to possess the in-depth knowledge of anatomy and physiology that a critical care nurse must possess.

[redacted] incorrectly focuses on the training required to perform the duties of a critical care nurse, rather than on the nature of the duties of the proffered position. For example, [redacted] states that a critical care nurse must have six weeks of classroom orientation; yet, she fails to explain why the extra orientation is required. The Service cannot assume that the additional training is solely related to the alleged complexity of the position. Palmetto could require the additional training because the duties of a critical care nurse are more numerous, not more complex or sophisticated, than the duties of a medical/surgical nurse. Similarly, there is no evidence that someone who does not possess a bachelor's degree would be unable to successfully handle the "life and death" situations that [redacted] states are present in a critical care unit. As stated in a previous section, nothing in the job description for the proffered position indicates that the position of a critical care nurse at Palmetto is either complex or unique, which would require the holder of the position to have a baccalaureate degree in a specialized field of study.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. 214.2(h)(4)(iii)(A)(3)

Counsel notes in his brief that the petitioner currently employs eleven registered critical care nurses, all of whom hold bachelor degrees in nursing. Counsel makes this statement to show that the

employer normally requires a degree or its equivalent for the proffered position.

In his brief, counsel discusses Defensor v. Meissner, supra, and states that the facts in the Defensor case are not similar to the facts in the instant petition. The Service, however, disagrees with this conclusion and notes that the holding in the Defensor case is entirely relevant to the issues in the present proceeding.

In Defensor v. Meissner, id., the court held that the Service reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. As in the Defensor case, the petitioner is an employment agency and would not be the beneficiary's actual employer, which is Palmetto.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. The Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Defensor v. Meissner, id. The critical element is not the title of the position or 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[2] To interpret the regulations any other way would lead to absurd results: if the Service was 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

Counsel states on appeal that the petitioner requires a bachelor of science degree in nursing for the proffered position and for all of

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[2] The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See id. at 387.

its registered nurse positions. While this assertion may be true, it is not the employment agency's (the petitioner's) educational requirements for the proffered position that are relevant. Rather, the beneficiary's actual employer must demonstrate that it normally requires at least a baccalaureate degree in a specialized area for the position at its facility. As the record is presently constituted, there is no evidence to establish that Palmetto has such a requirement.

The record contains a January 5, 2001 letter from [redacted] the Chief Nursing Officer of Palmetto. [redacted] states that "[o]ur institution requires for the Critical Care Specialist position, a Bachelor of Science Degree in Nursing or the equivalent thereof in terms of academic achievement and work experience." Palmetto has not, however, submitted any documentary evidence to support Ms. Shannon's claim.

There is nothing in the record to demonstrate that Palmetto requires, rather than prefers, a bachelor's degree as part of the hiring process.

Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). While the petitioner submits evidence that it recruits individuals with a bachelor's degree, nothing in the record supports a finding that Palmetto, the beneficiary's actual employer, has such a requirement.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - 8 C.F.R. 214.2(h)(4)(iii)(A)(4)

As discussed in a previous section, the Service is not persuaded to find that the proffered position at Palmetto is so complex or unique that it can be performed only by an individual with a degree. Regarding whether the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, counsel maintains that the curriculum for a bachelor of science degree in nursing is evidence that critical care nursing requires individuals with bachelor's degrees.

Counsel submits the curriculum for a bachelor of science degree in nursing from Florida International University School of Nursing, and the curriculum for an associate degree in nursing from Broward Community Junior College. Counsel states that Florida International University offers three critical care nursing courses as part of its curriculum, while the curriculum from Broward Community Junior College "does not contain a single course in critical care."

Counsel's statements are again misleading. Counsel merely presents a copy of the curriculum from Broward Community Junior College, which lists the titles of the courses that it offers for an associate degree in nursing. There is no accompanying documentation that provides a description of the content of each course. Therefore, a course such as "Nursing Process II" may involve issues that are connected to critical care; however, without a complete course description, there is little evidence to support counsel's conclusion that Broward Community Junior College does not offer "a single course in critical care." The unproven assertions of counsel are not evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 note (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, supra.

Based upon the evidence in the record, the petitioner has not established that the proffered position meets the requirements for classification as a specialty occupation. Accordingly, the director's decision must be reversed.

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 decision of the director is reversed. The petition is denied.