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U.S. Department of Justice

Immigration and Naturalization Service

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

File: EAC-01-138-54675 Office: Vermont Service Center Date: JAN 16 2003

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an acute care hospital with 1100 employees and a projected gross annual income of $268,194,000. It seeks to employ the beneficiary as a registered nurse/charge nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits a brief.

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, the petitioner's chief executive officer emphasized that the duties of the offered position were so specialized that they could be performed only by a person with a baccalaureate degree.

The director found the petitioner's initial evidence deficient and requested that the petitioner submit additional evidence to show that the proffered position was a specialty occupation. Specifically, the director requested documentary evidence that [redacted] employs individuals in similar positions who hold a baccalaureate or equivalent combination of education, training, and professional experience. The director also requested evidence that such degree for a registered nurse is required in Washington, D.C.

In response, the petitioner's medical data analyst/quality specialist states, in part, that 92% of the petitioner's nurses have at least a baccalaureate degree in nursing.

The director denied the petition, stating that the evidence in the record did not establish that the proffered position qualified as a specialty occupation.

On appeal, the petitioner's medical data analyst/quality specialist reiterates the arguments that she made in response to the director's request for additional information. She also submits expert opinions in support of her claim that the proffered position is a specialty occupation.

The petitioner does not present persuasive evidence to overcome the director's decision to deny 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 Department of Labor's (DOL) Occupational Outlook Handbook (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, at page 269, 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.

Upon review of the proposed duties, it appears that the proffered position is primarily that of a registered nurse. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

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:

> Leads a team of multi-skilled patient care providers in the delivery of outcome oriented, safe, therapeutic and cost effective care. Identifies patient needs based on professional knowledge and medical plan of care. Establishes individualized outcome measures for each patient's care, delegates interventions based on critical thinking skills and an understanding of the competencies of the team members. Coordinates care to maximize

> desirable outcomes, customer satisfaction, and cost effective utilization of available personnel and resources. Serves as a representative of the hospital and as a clinical role model in all interactions with customers and other staff members.

In the Handbook, the DOL states that job duties for a registered nurse or a head nurse/supervisor include directing nursing activities; planning work schedules and assigning duties to nurses and aides, providing or arranging for training, and visiting patients to ensure the proper delivery of care. 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 does not entail more complex duties than the position of any registered nurse. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for any registered nurse position, including the type being offered to the beneficiary.

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.

The petitioner has provided three letters from industry experts. Two writers state, in part, that they strongly support the minimum requirement of a baccalaureate degree in nursing for positions such as the proffered one. The third writer states, in part, that "current literature and latest nursing administration books strongly support the nurse manager and charge nurse as having a BSN degree in the minimum." Such letters indicate that a baccalaureate degree in nursing is preferred for positions such as the required one, though not required.

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 reasons why a baccalaureate degree in nursing should be the minimum requirement for the proffered position. The petitioner states, in part, that:

> In order to become a Charge RN, based on our job description at [redacted] you have to have at least a BSN degree and two years clinical nursing experience...

Although the petitioner states that a baccalaureate degree is the usual minimum requirement for the proffered position, the Service cannot assume that the additional training is solely related to the alleged complexity of the position. Similarly, there is no evidence that someone who does not possess a bachelor's degree would be unable to successfully handle the proposed duties. As stated in a previous section, nothing in the job description for the proffered position indicates that the position of a charge nurse at [redacted] 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)

On appeal, the petitioner's medical data analyst/quality specialist indicates that 92% of the petitioner's nurses hold baccalaureate degrees. Although the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree in nursing for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. 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. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). 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.[1] 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.

In this case, although the petitioner claims that 92% of its nursing staff hold bachelor's degrees in nursing, the proffered position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty. It is also noted that the record contains no information about the remaining 8% of the petitioner's nursing staff. If they perform the same duties as the proffered position, then the petitioner has not established that a bachelor's degree in nursing is required.

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)

Although the petitioner's medical data analyst/quality specialist contends that the position of a charge nurse requires the attainment of a baccalaureate or higher degree, she does not present any evidence in support of her assertions.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation.

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[1] 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." Supra at 387.

As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. See Cf. Defensor v. Meissner, id. The critical element is not the title of the position, 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.

In this case, the petitioner has not shown that the practice of the proffered charge nurse position requires the attainment of a bachelor's degree in a specific specialty. 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.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.