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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

[redacted]

File: WAC-01-288-53550 Office: California Service Center Date: JAN 22 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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

IN BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 a provider of healthcare therapy services with approximately 50,000 employees and a gross annual income of $2,888,542,000. It seeks to employ the beneficiary as a 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, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) 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.

The director denied the petition because the position of a registered nurse does not require a baccalaureate degree. On appeal, counsel states, in part, that the profession of registered nursing is gravitating toward the minimum of a bachelor's level standard within the healthcare industry and therefore qualifies as a specialty occupation. Counsel cites various decisions including Matter of Caron in support of his claim. Counsel also claims that the Department of Labor (DOL) in its Occupational Outlook Handbook (Handbook) and the Department of Health and Human Services (HHS) have acknowledged the reality of the growing complexity of registered nursing. Counsel additionally states that over 550 U.S. colleges and universities offer bachelor level educations as a minimum for registered nursing, and that the American Association of Colleges of Nursing (AACN) recognizes the bachelor of science degree in nursing as the minimum educational requirement for professional nursing practice. Counsel also states that many hospitals not already requiring the bachelor of science degree in nursing have established "BSN-preferred" policies for new hires, and that the Veteran's Administration, the nation's largest employer of registered nurses, has established the baccalaureate degree as the minimum preparation its nurses must have for promotion beyond entry-level beginning in 2005.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> a) Administer prescribed medications and treatments in accordance with approved nursing techniques.
>
> b) Prepare equipment and aid physician during treatments and examination of patients.
>
> c) Observes patients, records significant conditions and reactions, and notifies supervisor or physician of patient's condition and reaction to drugs, treatments, and significant incidents.
>
> d) Takes temperature, pulse, blood pressure, and other vital signs to detect deviations from normal and assess condition of patient.
>
> e) May prepare rooms, sterile instruments, equipment and supplies.

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.

Counsel does not present a persuasive argument for classifying the offered position as a specialty occupation. 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 at page 269, the DOL states the following about the training and educational requirements for registered 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 petitioner is offering to the beneficiary the position of a registered nurse. The offered position is not an administrative position which, depending upon the duties of the position, may require the attainment of a bachelor's or higher degree for the position. 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*)

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, although counsel argues that the (AACN) recognizes the bachelor of science degree in nursing as the minimum educational requirement for professional nursing practice, neither counsel nor the petitioner presents evidence that any nursing association has made a baccalaureate or higher degree a minimum entry requirement.

Counsel submits notes from a sample survey by HHS to demonstrate the growing complexity of registered nursing. Counsel contends the results of the survey, which indicated, in part, that by 1992, the percentage of nurses who received their basic nursing preparation in a diploma program dropped to 34 percent, demonstrate that the registered nurse position is "clearly beyond an initial evolutionary stage toward formalization of the Bachelor's Degree in Nursing a *bona fide* minimum criterion in the U.S." The Service, however, does not find counsel's statement persuasive. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

It is noted that in its February 1998 bulletin, the American Association of Colleges of Nursing (AACN) states, in part, as follows:

> Although 32 percent of RNs employed in nursing in 1996 held bachelor's degrees as their highest academic credential, an even larger 34 percent held associate degrees, 24 percent had hospital diplomas, 9 percent had obtained master's degrees, and fewer than 1 percent held the doctoral degree, according to the Division of Nursing.

The information from the AACN indicates that the majority of registered nurses hold associate degrees. As such, counsel's argument that the registered nursing position is "clearly beyond an initial evolutionary stage toward the formalization of the Bachelor's Degree in Nursing a *bona fide* minimum criterion in the U.S." is not persuasive.

Counsel's argument that the DVA has established the baccalaureate degree as the minimum preparation its nurses must have for promotion beyond entry-level, is noted.

Counsel contends that the DVA's enactment of a policy that mandates its registered nurses to have baccalaureate degrees indicates that a degree requirement is common to the industry in parallel positions. The Service, however, does not find counsel's statement persuasive.

Although the DVA is the largest employer of registered nurses, it is just one example of an organization that employs registered nurses. The newspaper advertisements from other health care facilities are noted. The petitioner, however, has not presented any other evidence, such as letters or affidavits from hospitals or other employers of registered nurses, that such organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. See Shanti, Inc. v. Reno, supra at 1165. One employer's hiring practices does not exemplify the industry standard.

The Service strongly disagrees with counsel that the policy enacted by the DVA is the "position of the government." The DVA is merely one government agency among many, and its policies are not binding on the Service. As previously stated, the DVA's stipulated educational requirements for its registered nurses do not represent the nursing industry or all employers of registered nurses. Therefore, the Service is not bound to find that the position of a registered nurse is a specialty occupation simply because the DVA has determined that it, alone, shall require its registered nurses to hold a baccalaureate degree.

Additionally, nothing in the beneficiary's job description indicates that the position of a registered nurse at the petitioning organization 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)

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty such as nursing, for the offered position.

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 Kindred Healthcare Operating, Inc. 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, the petitioner maintains that over 550 U.S. colleges and universities offer bachelor degree level educations as a minimum for registered nursing.

The Service cannot assume, however, that the additional training that the baccalaureate program provides is solely related to the alleged complexity of the proffered position. 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).

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.