

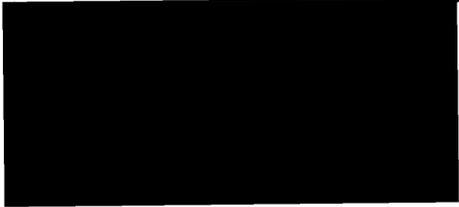


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U.S. Department of Justice
Immigration and Naturalization Service

Public Copy

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



JAN 29 2002

File: EAC 00 127 52984 Office: VERMONT SERVICE CENTER Date:

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:



identification data deleted to
prevent clearly unwarranted
invasion of personal privacy.

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 Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a hospital with approximately 1038 employees and a gross annual income of \$54,000,000. It seeks to employ the beneficiary as a registered nurse for a period of three years. The director denied the petition finding that the proffered position was not a specialty occupation.

On appeal, counsel submits a brief. Counsel states, in part, that the position of a registered nurse is a "professional level" nursing position that normally requires a baccalaureate degree.

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 are 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 for the petitioner emphasized that the offered position was for a "professional nurse," not for an entry-level nurse, as the beneficiary would be working within a particular unit.

The director requested the petitioner to submit additional evidence regarding the nature of the proffered position. Specifically, the director requested evidence to show that the petitioner, and the industry in general, required a baccalaureate degree in a specific field of study as a standard minimum for the job offered. The director also requested information regarding the number of individuals employed in a position similar to the proffered position, and the educational background of the holders of these positions.

In response, counsel for the petitioner repeated his assertion that the proffered position is a professional-level nurse, rather than an entry-level nurse. Counsel noted that the Department of Veterans Affairs (DVA) had recently endorsed a policy whereby all registered nurses employed in its medical facilities and hospitals would be required to hold a baccalaureate degree in nursing. Counsel asserted that the DVA's adoption of such a policy was setting the educational standards for the entire nursing industry.

Regarding the director's request for information about the petitioner's employment of individuals in positions similar to the proffered positions, as well as the educational backgrounds of the individuals who held these positions, counsel stated the following:

Almost every nurse in the hospital was taken as entry-level and trained, over a number of years, to fill the professional positions. They took courses, studied, were monitored and tutored. This is due, in large part, to the unavailability of baccalaureate nurses. The facility would have preferred nurses not needing the training, but they were not available. Instead the

facility trained its own professionals from associate degree stock.

The petitioner submitted a list of the nurses who were employed by its facility and their educational backgrounds. The petitioner listed its registered nurse positions and the employees' educational backgrounds as follows:

Nurse Managers

Master's degree in nursing	1
Master's degree in unspecified field	2
Bachelor's degree in nursing	1
"RN" ¹	8

Assistant Nurse Managers

Bachelor's degree in nursing	1
"RN"	7

Nurse Supervisors

Bachelor's degree in nursing	1
"RN"	4

Registered Nurses

Bachelor's degree in nursing	9
Bachelor's degree in unspecified field	1
"RN"	133

The director denied the petition on the basis that the petitioner did not establish that it is an industry-wide standard to hire only individuals with a bachelor's degree in a specific specialty for the proffered position and because the petitioner has not in the past hired only individuals with a bachelor's degree in a specific specialty for the proffered position.

On appeal, counsel raises the same issues that he previously addressed in his response to the director's request for additional information. Therefore, those issues will not be listed again. In addition, counsel states that the director recently approved several non-supervisory registered nurse positions for H-1B nonimmigrant visas, and lists the identifying receipt numbers. Although not explicitly stated, counsel suggests that the Service is bound to follow its prior decisions and approve the instant petition.

¹ The petitioner does not indicate the educational background of someone who is designated as "RN." Therefore, the Service can only assume that the individual does not hold a baccalaureate 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 CFR 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 U.S. 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 2000-2001 edition of the Handbook at pages 211-212, 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 specialized area 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, neither counsel nor the petitioner presents evidence that any nursing association has made a baccalaureate or higher degree a minimum entry requirement.

Counsel's main argument against the denial of the petition concerns the DVA's hiring practices for its registered nurse positions. Counsel states the following about the impact of this hiring practice on whether a registered nurse position can be considered a specialty occupation:

A significant change in the position of the Government of the United States in how it views the position of "Registered Nurse" has now been recorded. **The Veteran's Administration, part of the Department of Veterans Affairs, has concluded that the position to be filled by a registered nurse is a specialty occupation that can only be filled by a registered nurse with a baccalaureate degree.**

. . . It is the citation of authority recognized by [the] Immigration & Naturalization Service that this position is true. The failure of the Immigration & Naturalization Service to follow the lead of another area of the Government, where the hospital-petitioner wishes to do so, should be viewed as grounds to reverse the decision of the Center Director.

(Emphasis in the original.) 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 petitioner 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.

The Service further contends that the DVA may not be considered a "similar organization," as it employs approximately 36,000 registered nurses, whereas the petitioner employs far less than this number of registered nurses. Instead of relying solely on the DVA's educational requirements, 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, in order to establish that a degree in a specific field of study is common to the industry in parallel positions within similar organizations.

Additionally, counsel has not presented any evidence that the offered position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree.

It is noted that while counsel has consistently stated that the proffered position requires an individual to deal with critically ill patients, the petitioner has never presented a comprehensive job description for the beneficiary. The only job description in the record comes from a position description for the general position of "registered nurse" that the petitioner's Human Resources Department utilizes to recruit and hire candidates for its registered nurse positions. The position description lists the "Primary Function" for a registered nurse as:

Responsible for providing professional nursing care to the Medical/Surgical patient. The nature of this care is directed toward the maintenance of health and/or recovery from injury or disease. Maintains responsibility for delivery of patient care through the nursing process. This nursing care is performed in a manner which provides for patient privacy and patient rights.

Nothing in this 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 presented evidence that it normally requires a degree or its equivalent for the proffered position of a registered nurse. As outlined in a previous section, the petitioner submitted evidence to the director regarding the educational backgrounds of its registered nurses. According to this evidence, none of the registered nurse positions, including positions in the managerial or supervisory hierarchy, require the attainment of a bachelor's degree in a specified area for the position.

Of the 12 employees who fill the managerial position of "nurse manager," 66% of them (8 of 12) have an educational background designation of "RN."² Of the 13 employees who hold the managerial/supervisory positions of "assistant nurse manager" and "nurse supervisor," 85% of them (11 of 13) also have an educational background designation of "RN." Finally, for the position of a "registered nurse" in varying units within the hospital, 93% of the employees (133 of 142) have an educational background designation of "RN." Such evidence indicates that the attainment of a baccalaureate degree is not required to successfully perform the duties of a registered nurse position.

Furthermore, in the position description for a registered nurse, the "Education/Experience" is listed as:

- a. Graduate of an accredited school of Professional Nursing
- b. Currently licensed by the State of New York
- c. Successful completion of BLS Course required.
- d. Must pass OGH Pharmacology examination.
- e. Knowledge of clinical nursing standards and practice.
- f. General nursing experience preferred.

According to the petitioner's own hiring practices, a candidate for a registered nurse position does not need a bachelor's degree in a specified field of study. It appears that graduation from an accredited school of nursing and proper licensure are the minimum requirements in order for the petitioner to hire an individual for a registered nurse position.

The evidence is clear that the petitioner does not normally require a degree or its equivalent for the proffered position. While it is understandable that the petitioner would prefer to hire individuals with at least a bachelor's degree, the petitioner has not shown that a degree has been, and continues to be, a requirement in its hiring practices.

² As previously stated, the petitioner does not indicate the educational background of someone who is designated as "RN." Therefore, the Service can only assume that the individual does not hold a baccalaureate degree.

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)

Counsel contends that the proffered position is a "professional level" nursing position and, therefore, encompasses specialized and complex duties that can only be performed by an individual who has attained a baccalaureate or higher degree.

Counsel strenuously maintains that the knowledge required to perform the duties of a registered nurse can be obtained only in the last years of a baccalaureate program. Counsel states that "[t]ruly deep knowledge comes with experience layered on top of school learning, which also adds to professionalism, as demonstrated by this nurse." Counsel argues that the position of a registered nurse is a "professional level" position. Counsel maintains that the main difference between a professional nurse and an entry-level nurse is the requirement that the professional nurse is expected to, and must actually perform, functions beyond the skill and knowledge of the entry-level nurse.

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). Although counsel contends that the position of a registered nurse requires the attainment of a baccalaureate or higher degree due to the complex and sophisticated nature of the position's specific duties, counsel does not present any evidence in support of his assertions. Furthermore, although counsel refers to a registered nurse position as a "professional level" position, counsel does not demonstrate that the nursing industry is comprised of "professional level" and "entry-level" positions. It is noted that the majority of registered nurses who are listed by the petitioner as being employed in the same unit as the beneficiary's proposed unit of employment do not hold at least a bachelor's degree. Assuming that the individuals who are employed in the same position and in the same area as that of the beneficiary's intended employment are performing their duties successfully, it is reasonable for the Service to conclude that the duties are not so complex and sophisticated that the individual performing the duties must hold at least a bachelor's degree in a specific field of study.

Based upon the evidence in the record, the petitioner has not established that the proffered position is 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, 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.³ In this case, the petitioner has not shown that the practice of the proffered registered nurse position requires the attainment of a bachelor's degree in a specific specialty.

Finally, counsel notes on appeal that the director had approved other H-1B petitions for registered nurses in rural areas of New York and Pennsylvania. Counsel suggests that the director's prior approvals are binding on the Service to approve the instant petition.

The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (U.S. 2001). If the nonimmigrant petitions cited by counsel were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of the director. The Administrative Appeals Office is not bound to follow such errors.

Beyond the decision of the director, evidence in the record does not indicate that the beneficiary possesses the proper credentials to practice the proffered position. 8 C.F.R. 214.2(h)(4)(v)(B) states that:

If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The record contains information from the New York State Department of Education (NYSED), Office of the Professions, regarding the requirements for licensure in that state as a registered nurse. Information from NYSED states the following about receiving a

³ 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.

limited permit (temporary license) for an individual whose education was obtained outside of the United States:

Limited Permits

Foreign-educated applicants seeking a limited permit as a registered professional nurse must also **have their credentials verified by an independent credentials verification organization** and document successful completion of the Commission on Graduates of Foreign Nursing Schools (CGFNS) Certification program (the CGFNS examination and the Test of English as a Foreign Language); or a score of not less than 400 on the Canadian Nurses Association Test (CNATS). This does not apply to LPN limited permit applicants.

(Emphasis added.) The record contains a copy of the beneficiary's CGFNS certificate, which indicates that the beneficiary successfully completed both the CGFNS qualifying examination and the Test of English as Foreign Language (TOEFL). However, the record does not contain evidence that the beneficiary's credentials have been verified by an independent credentials verification organization, as required by NYSED. According to NYSED, the verification of an individual's credentials is different from CGFNS certification:

If you seek to meet the education requirements for Registered Nurse or Licensed Practical Nurse through a program you completed outside the United States, your educational credentials must be verified by an independent credentials verification organization.

. . . **Please Note:** This verification process is not the same as CGFNS certification (which is required for Registered Nurse limited permit applicants only). The CGFNS credentials verification process for New York State licensure applicants is a process for verifying the authenticity of your education credentials. It is not an evaluation or certification process.

(Emphasis in the original.) Based upon this information, even if the Service were to conclude that the beneficiary could practice as a registered nurse with a temporary license, the beneficiary's lack of a credentials evaluation makes the beneficiary ineligible to receive a limited permit in the State of New York.

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.