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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: EAC 01 22252443 Office: VERMONT SERVICE CENTER Date: APR 02 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)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York health care facility with 200 employees and a gross annual income of $12 million dollars. It seeks to temporarily employ the beneficiary as a registered nurse for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the position of registered nurse in the instant petition is a specialized and complex position that can only be performed by a nurse with a minimum of a bachelor's degree.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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;
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> 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.

The issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the petition submitted to the Vermont Service Center on July 28, 2001, the petitioner described the proffered position as a registered nurse in a licensed nursing and rehabilitation facility. Counsel described the duties of the beneficiary as follows:

> The beneficiary will be assigned to the sub-acute skilled units providing patients with a variety of specialized care including medical/surgical cases, extensive rehabilitation, IV therapy and teaching, wound care, post cardiac patients for rehabilitation, insulin teaching, colostomy and tracheotomy care, surgical recovery, post radiation therapy care, respiratory nursing care, gastrostomy care and pain management.
>
> [The beneficiary] will also provide nursing care to patients who have undergone cardiac surgery, closed heart surgeries such as percutaneous transluminal coronary angioplasty, coronary angiograms, percutaneous transseptal mitral commisurotomy, temporary pacemaker insertions, and permanent pacemaker implantation.
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> [The beneficiary] will assess the actual and potential health nursing needs of patient. Keep accurate records of events related to patient's conditions, collaborate with physicians through patient's rounds, use of flowsheets and progress notes and give the right medication at the right time, route and dosage.
>
> [The beneficiary] will assume the supervisory and administrative responsibilities and duties of the head nurse (unit manager) and/or charge nurse in the absence of either or both.

The petitioner further stated that the position required a "bachelor's degree in nursing and at least two years of experience in nursing care. Training and seminars in any of the specialized care [areas] outlined above is likewise required." In a cover letter from the petitioner that accompanied counsel's letter and the I-129 petition, the beneficiary's duties were further described as follows:

- Administrating [sic] appropriate medical treatment and therapies to specialty patients with concentration on Renal/IV
- Reading and interpreting medical charts
- Reviewing patient progress with medical personnel
- Implementation of physicians' instructions relating to various medical treatments
- Specializing in orthopedic nursing and urology.

In addition, the petitioner submitted the following job announcement for the proffered position:

> Registered Nurse: Will perform nursing services either as registered nurse/supervising nurse and/or specialized duties including but not limited to pulmonary rehabilitation[,] [i]nfusion therapy, orthopedic rehabilitation[,] pain management, wound management, surgical recovery and oncology care and other specialized duties.

With regard to qualifications, the notice listed the following:

> Bachelor of science in nursing and certificates of specialty skills.
>
> Valid RN license or eligible for licensure.

With regard to the facility's patient and healthcare staff, the petitioner stated:

> [The petitioner] currently has the following care and rehabilitation operation in place:
>
> 1. 180 employees
> 2. 150 patients (with eventual 203 bed occupancy)
> 3. 4 registered nurses with bachelor of nursing degrees
> 4. 6 registered nurses without bachelor of nursing degrees
> 5. 20 LPNs
>
> [The petitioner]'s patient population incorporates the following:
>
> 1. 100 patients with long term care
> 2. 70 patients with Rehabilitative Gerontology
> 3. 30 patients with Alzheimer's Disease
> 4. 8 patients with Renal/IV

The petitioner also submitted the beneficiary's resume, university diploma, and certificates for various nursing training courses taken by the beneficiary in the Philippines.

On September 20, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested that the petitioner submit an explanation as to why a licensed registered nurse without a bachelor's degree in nursing could not perform the duties of the proffered position. In addition, the director requested a letter from the State of New York stating the minimum formal education requirements to obtain a registered nurse's license.

In response, the petitioner submitted the beneficiary's application for licensure and first registration as a registered nurse with the State of New York dated October 25, 2001 along with her application for the CGFNS verification services. The petitioner stated that the State of New York offers the H-1B beneficiary a limited permit that authorizes the beneficiary to practice as a professional registered nurse under the supervision of the Director of Nursing or qualified designee provided the beneficiary takes the next available State of New York Board Exam for professional registered nurses.

With regard to why the beneficiary should be required to have a bachelor's degree, counsel indicated that the beneficiary would be supervising other employees such as licensed practical nurses and nursing aides, and that the beneficiary would be responsible for patients in sub-acute care with serious medical illnesses. Finally counsel stated that since the beneficiary could be dealing with specialty patients with a concentration on Renal/IV, it is not possible to hire a licensed registered nurse without a bachelor's degree to perform her duties and that non-specialty residents are generally medically stable and do not require aggressive monitoring and/or treatments. The petitioner also submitted a letter from [redacted] president, Associated Geriatric Information Network, a New York firm that provides nursing consulting services to the petitioner.

On February 12, 2002, the director denied the petition. The director determined that the evidence on the record did not establish that the attainment of a bachelor's degree in nursing is the minimum requirement for entry into the proffered position.

On appeal, counsel resubmits the beneficiary's State of New York Education Department's application and initial registration for registered professional nurse dated October 25, 2001. He also resubmits the letter from [redacted] and states that the Bureau did not consider the points raised in her letter. In addition, counsel states that the Bureau did not consider the beneficiary's experience in medical-surgical nursing, including the specialties of critical care, intermediate care and minimal care nursing, and that the Bureau did not consider the various honors the beneficiary had received as well as the training seminars and conferences the beneficiary had attended in the Philippines. The remainder of the appeal is a four-page analysis of the beneficiary's nursing coursework in the Philippines as well

as how an associate degree in nursing or a bachelor's degree in nursing does or does not correlate to the proffered position.

Upon review of the record, the petitioner has not presented a persuasive argument for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position as 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 Bureau 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.

The basic duties of a nursing home nurse, which is analogous to the proffered position, are outlined in the registered nurse classification on page 268 of the *Handbook* as follows:

> Nursing home nurses manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head-injuries.

On page 269, the *Handbook* 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.
>
> . . . .
>
> . . . [S]ome 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.

To the extent that a two year associate's degree in nursing is

sufficient to perform the duties of a registered nurse, it does not appear that a bachelor's of science in nursing is the minimum requirement for entry into the nursing field. Accordingly, the *Handbook* does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for an entry level nursing position.

In its job vacancy, the petitioner used the title of registered nurse to describe the proffered position. In its description of the specific duties of the job, the title expanded to "registered nurse/supervising nurse and/or specialized duties" including but not limited to a series of medical or post-operative areas. Elsewhere the petitioner stated that it required a bachelor's degree in nursing and at least two years of experience in nursing care, along with training and seminars for this position. In addition, the petitioner stated that the beneficiary would "assume the supervisory and administrative responsibilities and duties of the head nurse (unit manager) and/or charge nurses in the absence of either or both."

The *Handbook* does not elaborate on administrative nursing positions within the registered nurse classification, although reference is made to two nursing positions within the classification of registered nurse that appear analogous to the proffered position. The *Handbook* states the following about head nurses or nurse supervisors:

> Head nurses or nurse supervisors direct nursing activities. They plan work schedules and assign duties to nurses and aides, provide or arrange for training, and visit patients to observe nurses and to ensure the proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered.

On November 27, 2002, the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Service,(Bureau) issued a policy memorandum on H-1B nurse petitions (nurse memo). This memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (*See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook* at 75.)" [1] The *Handbook* reference is to the classification of medical and health services managers. On page 75, the *Handbook* states:

> The term "medical and health services manager" encompasses

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[1] Memorandum from [redacted] Executive Associate Commissioner, INS Office of Field Operations. *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27,2002).

> all individuals who plan, direct, coordinate and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

While the petitioner mentioned supervisory duties in the absence of a supervising nurse or charge nurse in its job description, the record does not support to what extent the beneficiary would be supervising other nurses, as opposed to licensed practical nurses or nurse's aides. The petitioner's mention that the beneficiary would substitute for the head or charge nurse also suggests that the beneficiary in her routine duties would not be at the most senior level of nursing personnel within the facility. While the proffered position does not appear to be an entry-level position, and does some contain administrative and supervisory elements, the position does not appear to be that of a nursing services administrator.

In conclusion, neither the *Handbook* excerpts, nor the petitioner's description of job duties establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

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. § 214.1(h)(4)(iii)(A)(2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau when determining the industry standard include: whether the Department of Labor's (DOL) *Occupation Outlook Handbook* (*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 *Handbook*'s conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. The *Handbook*'s conclusions about a degree requirement for a registered nurse position were discussed in the previous section, and shall not be repeated here. In the instant petition, the petitioner submitted six job vacancy announcements for various registered nurse positions. With regard to educational requirements for these positions, only three positions required a bachelor of science degree in nursing: a

nursing recruitment firm required a bachelor of science degree in nursing for a quality management/case management position, the Association for the Help of Retarded Children required a bachelor of science degree or a masters of science degree in nursing for a school nurse position, and Beth Abraham Health Services required a bachelor of science degree in nursing for positions in long term and sub-acute care nursing positions. Only the Beth Abraham Health Services advertisement appears to be analogous to the proffered position in the instant petition. Nevertheless this one advertisement does not establish an industry-wide standard.

The letter from [redacted] president of a nursing consulting firm that advises the petitioner on its medical program, contained information with regard to sub-acute nursing field practices. [redacted] stated: "[the petitioner's decision] to require registered nurses with a baccalaureate degree for [their] specialty program is appropriate." She also added: "We service over 200 nursing facilities in the United States and this is the recommended training requirement we suggest to any facility implementing a sub-acute medically complex program such as the one at [the petitioner]."

In considering the weight to give to the information contained in this letter, it should be noted that while the letter provides cogent arguments for why healthcare facilities should require their nursing staff to have bachelor of science degrees in nursing, the writer's recommendations to her clients do not necessarily establish that nursing facilities similar to the petitioner actually do require and primarily hire only nurses with baccalaureate degrees. While the record does not reflect how long [redacted] firm has been consulting with the petitioner, it does reflect that to date the petitioner's nursing staff primarily consists of registered nurses with associate's degrees. In addition, the remarks of one consulting firm are not sufficient to establish industry-wide standards.

In addition, the petitioner submitted no documentation that any professional nursing association has made a bachelor's degree a requirement for entry into the field. Without more persuasive evidence, the petitioner has not established this criterion.

B. <u>Complexity and Uniqueness of the Proffered Position</u>

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. In its nurse memo, the Bureau acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position. *Id* at 4. Based on this memo, a closer examination of any specialized or unique parts of the proffered position appears reasonable.

On appeal, the counsel submits four pages of assertions as to the differences between the duties of a nurse with a bachelor's degree

as opposed to the duties of a nurse with an associate's degree. Counsel then attempts to correlate these duties to the proffered position. For example, counsel states the following:

> As a senior staff member of nursing, one must have sufficient knowledge, experience, and therefore, credibility to lead and act as a resource person to insure the safety and well being of patients. . . . This position involves administrative functions, critical supervision and delivery of primary care, to include diagnosis, treatment of acute health problems as well as perform prescriptive privileges within the area of specialization- -which are key functions of the job.

Counsel also makes reference to the proffered position as a "registered nurse on an advanced practice level to engage in the expanded practice of nursing to include primary health care delivery and issuance of prescriptions upon completion of not less than three semesters hours at three units each or the equivalent in pharmacology." The assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). The record contains no evidence to corroborate counsel's claim regarding the alleged educational requirements for the proffered position.

In addition, although the Bureau's nurse memo also mentions positions that require nurses who are certified advanced practice registered nurses (APRN), it also goes on to identify these certified positions as clinical nurse specialist (CNS), certified registered nurse anaesthetist (CRNA), certified nurse-midwife (CNM), or certified nurse practitioner (APRN-certified). Among the clinical nurse specialists, many areas of advanced practice certification are listed. *Id* at 3. The record does not establish any connection between the positions listed in the memo and the educational requirements for the proffered position. The training and seminars requirement listed on the petitioner's job description do not appear to be the equivalent of advanced practice certification.

Without more persuasive evidence, the petitioner has not established that the proffered position, in its uniqueness or complexity, should be considered a specialty occupation.

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

In the job listing posted for the instant petition, the petitioner required a bachelor of science degree in nursing for any potential candidates. It is not clear from the record if this is a recent policy change by the petitioner. The breakout of staff provided by the petitioner in the instant petition indicated that the nursing care staff consisted of four registered nurses with bachelor of

science in nursing degrees, six registered nurses without bachelor of science in nursing degrees, and 20 licensed practical nurses. To the extent that some sixty percent of the nurses employed by the petitioner do not have a bachelor of science in nursing degree, it does not appear that the petitioner normally requires a degree or its equivalent for the position. Without more persuasive evidence, the petitioner has not established this criterion.

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)

[redacted] president, Associated Geriatric Information Network, provided the following explanation of the petitioner's sub-acute skilled nursing units:

> [The petitioner] has developed and implemented sub-acute medically complex programs. These programs provide highly skilled nursing care to short term and long term residents that require one or more of the following services: IV therapy, complex wound care, specialized rehabilitative services, respiratory care and treatments and extensive monitoring of effectiveness of treatments and high risk medications.

As previously stated in this decision, counsel makes numerous assertions with regard to the specialized and complex nature of the duties of the proffered position as opposed to the duties of a nurse with an associate's degree. For example, counsel states:

> The job as registered nurse is a senior level nurse. One must have knowledge and experience in order to wield authority, respect, and leadership among his/her peers. A nurse who has only an associate's degree cannot command this level of authority and/or respect from his/her peers regardless as to the length of experience. . . .

On appeal, counsel also makes reference to nurses on an "advanced practice level" and to nurses with bachelor's degree coursework who can prescribe drugs. As previously stated in this proceeding, no documentation was placed on the record to substantiate any of these assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena, supra*. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record remains unclear as to whether there is any division of labor between the registered nurses with bachelor's degrees and the registered nurses with associate's degrees who work for the petitioner, based on their educational levels.

(Emphasis added.) This type of evidence would be more probative of the specialized or complex nature of the work performed by the petitioner's nurses with bachelor's of science in nursing degrees.

Furthermore counsel provides no documentation or evidence as to the specific nursing duties mentioned by the petitioner in its petition, namely, renal/IV, orthopedic surgery and urology, and their specialized or unique nature. Since the petitioner has only identified eight patients in need of renal/iv nursing care in its patient population, this description of the beneficiary's job duties appears to be a generic description rather than a listing of actual duties.

Without more persuasive evidence, the petitioner has not established that the nature of the specific duties in the proffered position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the evidence on the record has not established that the beneficiary is qualified to perform the duties of the proffered position. On appeal, counsel resubmits the beneficiary's application for a limited permit to practice as a registered nurse in the State of New York. According to the New York State Education Department's (NYSED) website, foreign-educated applicants seeking a limited permit as a registered professional nurse must also **have their credentials verified by an independent credentials verification organization** in addition to documenting the successful completion of the Commission on Graduates of Foreign Nursing Schools (CGFNS) Certification program. (Emphasis added.) According to the NYSED, the verification of an individual's credentials is different from CGFNS certification.[2] Based upon this information, the beneficiary's lack of a credentials evaluation appears to make the beneficiary ineligible to receive a limited permit in the State of New York. As the appeal will be dismissed on other grounds, this issue will not be discussed further.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

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[2] http://www.op.nysed.gov/nursing.htm#1limited