

PUBLIC COPY

12

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

File: EAC-01-066-51293

Office: VERMONT SERVICE CENTER

Date: DEC 15 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)

ON BEHALF OF PETITIONER:

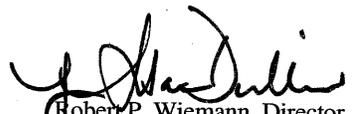
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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. A subsequent appeal was untimely filed and therefore accepted as a motion to reopen and reconsider. The director affirmed his previous decision. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing home with 160 employees and a gross annual income of \$8,357,147. It seeks to employ the beneficiary as a registered 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. Counsel states, in part, that the position of a registered nurse is a professional rather than "entry-level" nursing position and 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 nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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 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:

[W]e have virtually no BSN nurses to do the required work. In the past, it was possible for this facility

to employ associate degree nurses for these positions, **because** the facility always had a large cadre of well-trained and highly qualified RNs available to train the incoming nurses. . . . After this intensive training, they became qualified to handle these patients, and were able to meet the standard of treatment demanded by the facility. (Emphasis in the original.)

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.

On appeal, counsel raises the same issues that he previously addressed in his response to the director's April 5, 2001 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 Citizenship and Immigration Services (CIS) is bound to follow its prior decisions and approve the instant petition.

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 AAO 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 its *Handbook*, 2002-2003 edition, 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.

[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.

The petitioner is offering to the beneficiary the position of a registered nurse to care for patients in the Alzheimer Critical Care Unit. As the record does not demonstrate that the beneficiary's proffered position is primarily an administrative position, or that the beneficiary is enrolling in a graduate nursing program in research, consulting, teaching, or a clinical specialization, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position 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 AAO 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 position that can only be filled by a registered nurse with a baccalaureate degree.** (Emphasis in the original.)

. . . .

The government, by endorsing the policy of requiring in its hospitals that a candidate have a minimum of a baccalaureate degree in nursing to qualify to fill any registered nurse position, except entry-level positions, is setting the standard for the industry.

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 AAO, 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 AAO 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 AAO/Citizenship and Immigration Services

(CIS). 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 AAO 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 AAO 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 the following position description on the petition:

Professional nursing care of ill or infirm patients utilizing the skills of a registered nurse with a bachelors [sic] degree.

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 noted previously, counsel stated that the petitioner had no BSN nurses to perform the proposed duties. The petitioner previously 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.

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.

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)

On November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and 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.¹ However, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.²

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a

¹ Memorandum from Johnny N. Williams, 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).

² It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may ^{work} in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

Here, although the proffered position is that of a registered nurse to care for patients in the Alzheimer Critical Care Unit, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. Just because the beneficiary would perform nursing duties in the Alzheimer Critical Care Unit does not elevate the duties' complexity.

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 maintains that the knowledge required to perform the duties aimed at treating the aged population can be obtained only in the last years of a baccalaureate program. 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.

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 AAO 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. 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 AAO to approve the instant petition.

The AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (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 AAO is not bound to follow such errors.

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.