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

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



DEC 22 2003
ULU 10 1000

File: EAC 02 073 50012 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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:



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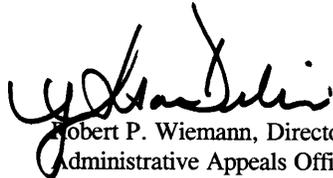
INSTRUCTIONS:

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

The petitioner is a New York university hospital with 4,478 employees and a gross annual income of \$630,126,517. It seeks to temporarily employ the beneficiary as an intensive care unit 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, among university hospitals in the area, critical care nurses need to possess a baccalaureate degree in nursing. Counsel also asserts that the duties of such critical care nurses are complex and involve administrative duties. Counsel submits no further documentation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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;
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 proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on December 20, 2001, the petitioner described the general work done by a nurse in an intensive care unit as follows:

The Intensive Care Unit (ICU) position being filled in this case is [a] highly specialized critical care position, a position in which the beneficiary will be responsible to care for patients in very serious condition. Patients who have gone through any type of medical or surgical procedure, including surgery for trauma, burn, pediatrics, neonatal, general medicine, cardiology and cardiac surgery patients, are cared for by these specially trained registered nurses, under the aegis of a cadre of specially trained doctors and surgeons. The Intensive Care Unit specializes in patients who have had major medical problems from disease or accident, including all types of neurosurgery, trauma, thoracic, vascular, major gastrointestinal and other complicated surgery, or who are complicated post surgical patients. The ICU utilizes high technology, advanced instrumentation and full computerization with sophisticated, specially designed software.

With regard to the specific proffered position, the petitioner stated:

The beneficiary is a registered nurse, who will, except for attending meetings, education classes and doing preparatory work, spends [sic] virtually all of her time in the surgical intensive care unit. She will not have any supervisory duties at all, although she will, because of her education and experience, be a deep resource for the other nurses in the facility. At least 90 [percent] to 95 [percent] of her time will be taken up in this manner, assisting the intensive care patients to try to stay alive and mend.

The petitioner also submitted a list of thirty-one I-797 approval notices for nurse petitions for rural areas that it stated had

been approved by the Vermont Service Center. The petitioner also submitted to the record a U.S. Department of Veterans Affairs directive, dated 1999, that outlined the department's new required qualifications for its nursing staff, and a press release from the American Association of Colleges of Nursing with regard to the Veteran's Administration's efforts to help its nursing staff obtain baccalaureate and advanced degrees in nursing.

On February 8, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested an organizational chart for the hospital that showed the number of advanced level nursing positions requiring a four-year baccalaureate degree, along with the number of current staff vacancies. The director requested a copy of the job position for the proffered position. In addition, the director asked the petitioner to identify how many other individuals were employed in similar positions in the hospital, and among these employees, how many of them held at least a baccalaureate degree, and in what field of study. Finally the director requested evidence that the petitioner currently had at least eight openings for advanced level registered nurses.

On May 4, 2002, counsel submitted the following evidence:

- o An organizational chart of Winthrop University Hospital. Counsel stated that the beneficiary would be assigned to the Neurological Intensive Care Unit.
- o An organizational table for the Winthrop University Hospital nursing department.
- o A two-page document, dated May 3, 2002, that counsel identified as listing Winthrop University Hospital departments, budgeted registered nurse positions, and current vacancies. Counsel stated that the various ICUs had over 188 registered nurses authorized in six separate departments, and identified the six departments. Counsel stated that there were vacancies for 29 registered nurses, and that all the registered nurses in the intensive care units had a baccalaureate degree in nursing or its equivalent.
- o A three-page document entitled "In House Job Postings-RN Positions" dated May 3, 2002.
- o A one page job description for a staff nurse position. The academic requirements for the position are identified as graduate of accredited school of nursing; current New York State license, and BSN preferred.

Counsel also stated that the preferred educational requirement for medical facilities employing registered nurses in units such as ICU, CCU, Step-Down, Emergency Room, or operating room, was a baccalaureate degree in nursing. Although counsel stated that letters from various medical facilities attesting to counsel's assertion were attached to his letter, no such letters are found in the record.

On June 17, 2002, the director denied the petition. The director determined that the petitioner had not established that the proffered position was a specialty occupation. The director did not find the petitioner's evidence with regard to numbers of nursing positions and vacancies dispositive of whether the petitioner required a baccalaureate degree in nursing for its nursing employees in its intensive care units and also determined that the I-797 approval notices for other H-1B petitions were not dispositive that the instant petition should be approved. The director also questioned whether the number of positions identified on the Labor Condition Application (LCA) were actually needed by the petitioner in highly skilled nursing areas.

On appeal, counsel states that the duties of critical care units in a university hospital are so complex that a nurse without a baccalaureate degree could not fill them. Counsel states that the duties involve administrative duties and the position is made much more complicated because student doctors may be providing the medical care. Counsel states that the number of positions identified on the LCA were all for critical care nurses, and that the number sought was a small fraction of all the registered nurses employed in the hospital. In addition, counsel examines the differences in curricula between four-year nursing programs and programs with only two or three years of instruction. Counsel draws attention to the coursework in four-year programs that teach care of the aged in depth, which is not taught in any great depth in an associate degree in nursing program. Counsel submits no further documentation.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered 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)

Citizenship and Immigration Services (CIS) 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 registered nurses as outlined in the 2002-2003 edition of the *Handbook* on page 268 are as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. . . . When providing direct patient care, they observe, assess, and record symptoms, reactions, and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. . . . While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

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.

The *Handbook* does not elaborate on administrative nursing positions within the registered nurse classification, although 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.

To the extent that a two-year associate's degree in nursing is sufficient to perform the duties of an entry level registered nurse, it does not appear that a bachelor of science degree 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.

On appeal, counsel states that the position will involve administrative duties, but does not provide any more details on this job duty. The initial petition and explanation of the proffered position did not mention any major administrative duties. With regard to administrative positions, on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo)¹. 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.)" 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 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.

With regard to the intensive care unit nursing position outlined by the petitioner, the nurse memo previously identified in this proceeding, also comments on nursing positions that are beyond entry-level positions. On page two, the memo refers to certified advanced practice registered nurses (APRNs) and contrasts the educational requirements for APRNs with those of general registered nurse positions. The policy memo also acknowledges that an increasing number of nursing specialties, such as critical care and operation room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.

With regard to these non-APRN nurses working in specialty areas, the memo states that certification examinations are available to registered nurses who are not advanced practice nurses, but who may possess additional clinical experience. Areas such as rehabilitation nursing, and critical care nursing are mentioned. *Id* at 3. To date the petitioner has not indicated any need for certification examinations in a specific area such as intensive care for the proffered position. The record is not sufficient to establish that the proffered position would fall under the general guidance provided in the nurse memo with regard to positions employing non-APRN nurses that may be H-1B eligible.

To the extent that the petitioner has not established any administrative component to the proffered position for the record,

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).

and that the position as described does not appear analogous to either a nursing administrator job with regard to its higher educational requirements or to the non-APRN nursing positions, the petitioner has not established that the position requires a baccalaureate degree as a minimum requirement for entry into the job.

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 CIS 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. In the instant petition, to establish the industry standard, counsel stated that it had attached letters from similar medical facilities to the record; however no such letters are found in the record. 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).

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 of intensive care nursing. The petitioner did submit a press release from the American Association of Colleges of Nursing (AACN) that mentioned an AACN position statement that called for the Bachelor of Science as the minimum educational requirement for professional nursing practice. With regard to the AACN, it should be noted that it is a national association that advocates for nursing education at the four-year university program level and higher. According to its website, it is "the national voice for America's baccalaureate- and higher-degree nursing education programs." <http://www.aacn.nche.edu/ContactUs/index.htm>). As such, it is logical that the organization would advocate that entry-level nurses should have, at a minimum, a baccalaureate degree in nursing. The AACN also made the following comments in a fact sheet entitled "Associate Degree in Nursing Programs and Acne's

Support for Articulation":

Support for the BSN does not mean that we seek to bar ADN [Associate Degree in Nursing] graduates from practicing nursing to the full extent of their skills and abilities. AACN maintains this position [of supporting nursing education at a baccalaureate level for professional nursing practice] while recognizing the vital role ADN-prepared nurses play, and must continue to play, in the delivery of health care."

It should also be noted that other associations such as the American Nursing Association (ANA) support a change in the nursing industry that would require a bachelor of science degree in nursing as the minimum credential for an entry-level position. However, the reality is, at the present time, neither the ANA nor any other nursing association has made such a degree a minimum requirement. A nurse with an associate's degree can still work as a nurse, can join the ANA, and can have the ANA represent her/his interests. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Although the petitioner submitted an extensive description of the working environment of an intensive care unit, the documentary evidence in the record does not specifically identify the unique or complex nature of the specific nursing duties, and why these duties could not be performed by an experienced registered nurse with an associate degree in nursing. Without more persuasive evidence, the petitioner has not established either the industry standard or that the position is so unique or complex that it can only be performed by a person with a baccalaureate degree.

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 evidence submitted by counsel with regard to the hospital's staffing and nursing vacancies is not found to be dispositive with regard to the instant petition. For example, the petitioner asserted that all the nurses employed in the intensive care units had a baccalaureate degree in nursing or its equivalent, and identified six departments with authorized intensive care nursing slots. Nevertheless, the petitioner provided no substantive evidence, such as academic diplomas, to establish the educational requirements for nurses working in any of the hospital's intensive care units, or in the neurological intensive care unit, to which the beneficiary would be assigned. 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, supra.* In addition, the one page job description for staff nurses clearly states that a bachelor of science degree in nursing is preferred, rather than required. Without more persuasive evidence, the petitioner employer has not established that it requires a baccalaureate degree or higher or its equivalent for entry into the proffered 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 CFR § 214.2(h)(4)(iii)(A)(4)

The nurse memo previously mentioned also states that petitioners, through affidavits from independent experts or other means, could demonstrate that the nature of the duties of certain nursing positions 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.) The petitioner has submitted no such affidavits from independent experts with regard to the proffered position. With regard to the specialized or complex nature of the proffered position, the petitioner provided a narrative description of numerous medical or surgical situations that would require prompt nursing and physician care. The promptness of nursing care in intensive care units does not necessarily establish that such care is either specialized or complex. Without more persuasive evidence, the petitioner has not established this criterion. Accordingly, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

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.