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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

[redacted]

File: SRC-02-053-50066 Office: TEXAS SERVICE CENTER Date: JUL 21 2003

IN RE: Petitioner: [redacted]
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:

[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 and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides recruitment, placement, and consultation services for the health care industry. It has 14 employees and a projected gross annual income of $4 million. It seeks to employ the beneficiary as a critical care 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 that he had submitted on a parallel case.

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.

In the initial petition, counsel submitted a letter dated December 3, 2001, from the petitioner's chief executive officer who emphasized that the offered position "requires a person of distinguished merit and ability and one with a minimum of a Bachelor of Science in Nursing Degree or the equivalent thereof in terms of academic achievement and work experience." The chief executive officer also noted that the position requires "supervision and coordination of other nursing activities in a critical care environment where patients' lives are at imminent

risk."

In support of his claim that the proffered position required a degree, the petitioner's chief executive officer stated that the petitioner, [redacted] has a practice of hiring only registered nurses who hold a bachelor of science degree in nursing. The petitioner also submitted a letter from Diane Horner, Dean of the School of Nursing at the University of Miami, to evidence that the minimum qualification for an individual seeking the offered position would be a bachelor of science degree in nursing.

The director found the petitioner's initial evidence deficient and requested that the petitioner submit additional evidence to show that the offered position was a specialty occupation.

The record contains the following:

First, counsel submitted a letter from Liz Tonkin, Administrator of Kendall Medical Center, which contained a more detailed listing of the beneficiary's job duties.

Second, counsel submitted a letter from [redacted] Program Director of Critical Care at the University of Miami, and the director of the largest trauma center in the world (The Ryder Trauma Center). According to [redacted] his employer currently employs 17 critical care nurses, all of whom held a bachelor's degree or its equivalent on the date each was hired for employment with the Trauma Center. Counsel stated that [redacted] letter demonstrates that courses required in a bachelor of science degree nursing program are critical to the competence of a critical care nurse.

Third, counsel submitted a second letter from [redacted] Dean of the University of Miami, School of Nursing. According to counsel, [redacted] stated that the proffered position requires a bachelor's degree.

Fourth, counsel submitted a letter from [redacted] Director of the Surgical Intensive Care Unit at the VA Medical Center in Miami, Florida. In his letter, [redacted] stated, in part, that the nature of the specific duties for a Critical Care Specialist Nurse is so specialized and complex that a baccalaureate degree or an equivalent thereof is required to perform them.

Fifth, counsel submitted copies of curricula for an associate degree and a bachelor of science degree in nursing to show that the associate degree curriculum does not include courses in critical care.

Sixth, counsel submitted a letter from Stephen S. Nuell, the petitioner's president, who stated, in part, that the petitioner always requires that its critical care registered nurses hold a bachelor of science degree in nursing.

Seventh and finally, counsel referred to the U.S. Department of Labor's (DOL), *Occupational Outlook Handbook (Handbook)*, which indicated that administrative positions in nursing require a bachelor's degree. Counsel maintained that the proffered position was an administrative position, and also stated that the AAO has held that a team leader/registered nurse position is a specialty occupation.

On appeal, counsel reiterates the assertions that he made in response to the director's request for additional information and additionally refers to *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Counsel states that the facts in the *Defensor* case are not similar to the facts in the present petition.

Counsel's statements on appeal are not persuasive. 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 Bureau often looks to the DOL's *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In the 2002-2003 edition of the *Handbook* at page 269, the DOL states the following about the training and educational requirements for registered nurse positions:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

. . . .

> [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.

On appeal, counsel asserts that the above excerpt from the *Handbook* does not pertain to critical care nurses. According to counsel, the DOL recognizes that a BSN is a minimum requirement for a critical care nurse because "a bachelor's degree is usually required for administrative positions and is a prerequisite for admission to graduate nursing programs in teaching, or a clinical specialization." (Emphasis added by counsel).

However, the DOL does not state that a bachelor's degree is a minimum requirement for employment as a nurse in a clinical specialty. Instead, the DOL states simply that a bachelor's degree is a prerequisite for gaining admission to a graduate program in the areas of research, consulting, or teaching, or if an individual seeks to enroll in a graduate degree program in a clinical specialization.

The *Handbook* does not elaborate on administrative nursing positions within this 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.

The proffered position appears to resemble a nursing position beyond the entry level registered nurse, but it does not appear to be analogous to an administrative nursing position. A recent Bureau policy 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 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.

The petitioner states that the beneficiary would be responsible for:

- Administration, coordination, and supervision of nursing activities and patient care in a critical care setting;
- Assisting physicians with procedures in the intensive care unit;
- Providing direct and indirect patient care in the critical care setting;
- Communicating with physicians about changes in patient's clinical condition, including hemodynamic monitoring, results of diagnostic studies and symptomatology;
- Responding quickly and accurately to changes in condition of patients or response to treatment by patients;
- Performing a head-to-toe assessment on all patients and reassessment as required;
- Assessing and reassessing pain and pain management techniques;
- Educating patients and their families in pain management;
- Formulating an individualized plan of care, revising such plan as indicated by the patient's response to

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[1] Memorandum from [redacted] 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).

treatment and evaluating overall plan daily for effectiveness;

- Cardiac monitoring, identifying dysrhythmias and treating appropriately based upon Advanced Life Support Certification protocol;
- Caring for patients with compromised nutritional/metabolic status;
- Caring for patients requiring extensive fluid and electrolyte management;
- Communicating appropriately and clearly with physicians and coworkers;
- Consulting other departments as appropriate to provide for an interdisciplinary approach to the patient's needs.

In the *Handbook*, the DOL states that job duties for a registered nurse or a head nurse/supervisor include directing nursing activities; observing, assessing and recording symptoms, reactions and progress of patients; administering medications; insuring records are maintained; and assisting physicians during treatment and examinations. The beneficiary's job description parallels the job description of any registered nurse. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. The proffered position, while in a particular unit of the medical center, does not entail more complex duties than the position of any registered nurse.

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)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau 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 attested that a baccalaureate or higher degree is a minimum entry requirement for this occupation.

Counsel had previously submitted an article from the American Journal of Critical Care, *January 2001, Volume 10, No. 1* entitled "Assessment of Professional Development of Critical Care Nurses: A Descriptive Study." On appeal, counsel states that from the results of the study, one may draw inferences about the educational requirements for critical care nurses, and highlights the portion of the article which states that 72% of the individuals surveyed had at least a bachelor's degree.

These statistics do not establish that a degree is an industry standard. A close review of the article reveals that the statistics noted above were gathered from 100 questionnaires that were returned by respondents who included both critical care nurses and advanced practiced nurses from Georgia, South Carolina and North Carolina. The results of the survey are not representative of the critical care nursing industry in the entire states of Georgia, South Carolina and North Carolina or the industry in general. More importantly, however, because the respondents included Advanced Practice Nurses, who typically hold baccalaureate or higher degrees and have advanced practice certification, the results of the survey are not representative of the registered nursing industry in a critical care setting. Accordingly, the information contained in the article does not persuade the Bureau that a baccalaureate degree, or its equivalent, is a common educational credential in the critical care nursing industry.

The record also contains two letters from professors who work for the University of Miami and one letter from the Director of the Surgical Intensive Care Unit at the Department of Veterans Affairs (DVA) Medical Center in Miami, Florida. The first letter is from [redacted] Program Director of Critical Care at the University of Miami, and the director of the largest trauma center in the world (The Ryder Trauma Center). According to Dr. McKenney, his

employer currently employs 17 critical care nurses, all of whom held a bachelor's degree or its equivalent on the date each was hired for employment with the Trauma Center. [redacted]tates that the duties of a critical care nurse are so complex and sophisticated that individuals who do not hold a bachelor's degree in nursing are not well-equipped to perform the duties of a critical care nurse. The second letter is from Diane Horner, the Dean of the University of Miami's School of Nursing. Ms. Horner states that the proffered position "is complex and can be best performed by a Registered Nurse with a Bachelor of Science Degree in Nursing." The third and final letter is from Juan Restrepo of the DVA Medical Center, who states that "all of our Critical Care Nurses possess at least a bachelor's degree in Nursing or its equivalent. . . ."

Two employers' hiring practices do not exemplify the industry standard. The University of Miami, while a reputable institution, is just one example of an organization that employs critical care nurses. In addition, the DVA, as the largest employer of registered nurses in the nation, has specific hiring requirements for its registered nurse positions that are not common throughout the industry.

There is no evidence that the University of Miami is a facility that is similar to the size and scope of Kendall Medical Center's operations. As the largest trauma center in the world, the Ryder Trauma Center is neither comparable in size or in scope to Kendall Medical Center. Additionally, the Bureau contends that the DVA also may not be considered a "similar organization" to Kendall Medical Center, as it employs approximately 36,000 registered nurses, whereas [redacted]r employs far less than that number of registered nurses. Instead of relying solely on the educational requirements for registered nurses within large hospitals and medical centers, 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. Such evidence would assist in a determination of whether similar organizations "routinely employ and recruit only degreed individuals" for the position of a registered nurse. *See Shanti, Inc. v. Reno, Supra* at 1165.

The Bureau also notes that [redacted] the Dean of Nursing at the University of Miami, states that the proffered position "can **best** be performed by a Registered Nurse with a Bachelor of Science Degree in Nursing." [redacted]statement indicates that a

bachelor's degree is a preference rather than a requirement for performing the duties of a critical care nurse. (Emphasis added.)

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.

The petitioner had previously submitted a November 2, 2001 letter from [redacted] Administrator of Kendall Medical Center, as evidence that the proffered position was complex or unique. In this letter, [redacted] states that "KMC considers an individual working as a critical care nurse to be working in a specialty occupation due to the specialized and complex nature of the position." [redacted] elaborates that the position of a critical care nurse is different from a medical/surgical nurse because:

(1) the patients for which a critical care nurse is responsible are more acutely ill than patients cared for by a medical/surgical nurse;
(2) the critical care setting is a highly-charged environment due to the fact that most patients in this setting are in "life or death" situations;
(3) a critical care nurse is required to have six weeks of classroom orientation in addition to the one and [one] half days of classroom orientation required for a medical/surgical nurse;
(4) a critical care nurse is required to have at least six weeks [of] clinical orientation with an experienced critical car[e] nurse as compared to two weeks of clinical orientation required for medical/surgical nurses;
(5) a critical care nurse is required to obtain Advanced Cardiac Life Support (ACLS) in addition to a Basic Life Support (BLS), while a medical/surgical nurse is required to obtain a BLS;
(6) a medical/surgical nurse is not required to titrate drips, monitor the hemodynamic status of patients, nor evaluate electrocardiographic rhythm strips; and

(7) a medical/surgical nurse is not required to possess the in-depth knowledge of anatomy and physiology that a critical care nurse is required to possess.

[redacted] incorrectly focuses on the training required to perform the duties of a critical care nurse, rather than on the nature of the duties of the proffered position. For example, [redacted] states that a critical care nurse must have six weeks of classroom orientation; yet, she fails to explain why the extra orientation is required. The Bureau cannot assume that the additional training is solely related to the alleged complexity of the position. [redacted] could require the additional training because the duties of a critical care nurse are more numerous, not more complex or sophisticated, than the duties of a medical/surgical nurse. Similarly, there is no evidence that someone who does not possess a bachelor's degree would be unable to successfully handle the "life and death" situations that Ms. Tonkin states are present in a critical care unit. As stated in a previous section, nothing in the job description for the proffered position indicates that the position of a critical care nurse at Kendall Medical Center 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*)

Counsel notes in his brief that the petitioner currently employs 11 registered critical care nurses, all of whom hold bachelor degrees in nursing. Counsel makes this statement to show that the employer normally requires a degree or its equivalent for the proffered position.

In his brief, counsel discusses *Defensor v. Meissner, supra*, and states that the facts in the *Defensor* case are not similar to the facts in the instant petition. The Bureau, however, disagrees with this conclusion and notes that the holding in the *Defensor* case is entirely relevant to the issues in the present proceeding.

In *Defensor v. Meissner, id.*, the court held that the Bureau reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree

requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients. As in the *Defensor* case, the petitioner is an employment agency and would not be the beneficiary's actual employer, which is [redacted]

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. The Bureau must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner, id.* The critical element is not the title of the position or an employer's self-imposed standards, 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.[2] To interpret the regulations any other way would lead to absurd results: if the Bureau was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *See id.* at 388.

Counsel states on appeal that the petitioner requires a bachelor of science degree in nursing for the proffered position and for all of its registered nurse positions. While this assertion may be true, it is not the employment agency's (the petitioner's) educational requirements for the proffered position that are relevant. Rather, the beneficiary's actual employer must demonstrate that it normally requires at least a baccalaureate degree in a specific specialty for the position at its facility. As the record is presently constituted, there is no evidence to establish that Kendall Medical Center has such a requirement.

The record contains a November 2, 2001 letter from [redacted] the Administrator of [redacted] states that "[f]or the Critical Care Nurse Position, at the time of hiring, we require a Bachelor of Science Degree or its equivalent in terms of education and experience." Kendall Medical Center Shore has not,

[2] 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." *See id.* at 387.

however, submitted any documentary evidence to support [redacted] claim.

There is nothing in the record to demonstrate that [redacted] requires, rather than prefers, a bachelor's degree as part of the hiring process.

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). While the petitioner submits evidence that it recruits individuals with a bachelor's degree, nothing in the record supports a finding that Kendall Medical Center, the beneficiary's actual employer, has such a requirement.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

As discussed in a previous section, the Bureau is not persuaded to find that the proffered position at [redacted] is so complex or unique that it can be performed only by an individual with a degree. Regarding whether the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, counsel maintains that the curriculum for a bachelor of science degree in nursing is evidence that critical care nursing requires individuals with bachelor's degrees.

Counsel submits the curriculum for a bachelor of science degree in nursing from Florida International University School of Nursing, and the curriculum for an associate degree in nursing from Broward Community Junior College. Counsel states that Florida International University offers three critical care nursing courses as part of its curriculum, while the curriculum from Broward Community Junior College "does not contain a single course in critical care."

Counsel's statements are again misleading. Counsel merely presents a copy of the curriculum from Broward Community Junior College, which lists the titles of the courses that it offers for an associate degree in nursing. There is no accompanying documentation that provides a description of the content of each course. Therefore, a course such as "Nursing Process II" may

involve issues that are connected to critical care; however, without a complete course description, there is little evidence to support counsel's conclusion that Broward Community Junior College does not offer "a single course in critical care." 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). Additionally, 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*.

Based upon the evidence in the record, the petitioner has not established that the proffered position meets the requirements for classification as a specialty occupation.

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.