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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, D.C. 20536



JUL 21 2003

File: EAC-02-010-50291 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:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office 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 is a rehabilitation center and nursing home with 500 employees and an approximate gross annual income of \$10 million. It seeks to extend its authorization to employ the beneficiary as a specialty 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.

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.

The director denied the petition because the petitioner had not established that a baccalaureate degree is required for the proffered position. On appeal, counsel states, in part, that the requirement for a baccalaureate degree in nursing for specialty registered nurses is industry wide. Counsel also states that the Bureau has previously approved petitions for the petitioner's specialty nurse positions.

Counsel's statement on appeal is not persuasive. The Bureau does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Bureau

considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

1. Administrating appropriate medical treatment and therapies to specialty patients with concentration on Renal/IV[;]
2. Reading and interpreting medical charts;
3. [R]eviewing patient progress with medical personnel;
4. Implementation [sic] of physician's instructions relating to various medical treatments; [and]
5. Specializes [sic] in care of patients with respiratory/pulmonary problems.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Bureau does not agree with counsel's assertion that the proffered position would normally require a bachelor's degree in nursing or a related field. A review of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, at page 269, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a registered nurse. The three educational paths to nursing are as follows: Associate degree in nursing (A.D.N.), Bachelor of

Science degree in nursing (B.S.N.), and diploma. The *Handbook* further states:

[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 emphasizes the term "clinical specialization" cited above, and implies that the DOL affirmatively states that a bachelor's degree in nursing is required to work in a clinical specialization. However, a close review of the language in this section of the *Handbook* reveals that the DOL states simply that a bachelor's degree is usually required if an individual wants to enroll in a graduate program in the area of research, consulting, or teaching, or if an individual wants to enroll in a graduate program to obtain an advanced degree in a clinical specialization. The DOL does not state, as counsel claims, that a bachelor's degree is a minimum requirement for employment as a nurse in a clinical specialty. As the record does not demonstrate that the beneficiary's proffered position is an administrative position, or 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.

Second, although the record contains a job posting for the proffered position indicating that it requires a B.S.N. degree, and a statement from counsel and the petitioner asserting that all nurses who work in sub-acute and specialized clinical care practice hold B.S.N. degrees, the petitioner has not provided documentary evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty such as nursing, for the offered position. 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).

Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner.

Finally, on November 27, 2002, the Bureau 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

The Bureau 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 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), the Bureau maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The Bureau 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 has the title of "specialty registered nurse" 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. As previously stated, the duties ascribed to the position, which include administrating appropriate medical treatment and therapies to specialty patients with concentration

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).

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.

on Renal/IV, reading and interpreting medical charts, reviewing patient progress with medical personnel, and implementing physician's instructions relating to various medical treatments, are routine to many registered nurse positions. Just because the beneficiary would be assigned to patients with respiratory and pulmonary problems does not elevate the duties' complexity. As the record is presently constituted, the Bureau cannot find that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The record contains letters from four individuals involved in the nursing industry who state that a baccalaureate degree in nursing is normally the minimum requirement for entry into a nursing position such as the proffered position. The writers, however, do not provide proof in support of their assertions, nor do they indicate the percentage of "specialty registered nurses" who hold such degrees. 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*.

With respect to counsel's objection to the denial of this petition in view of the approval of a similar petition in the past, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. Mar. 15, 2000), aff'd 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered 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.

ORDER: The appeal is dismissed.