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

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



File: SRC 01 128 51867 Office: TEXAS SERVICE CENTER

Date: JUN 03 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:



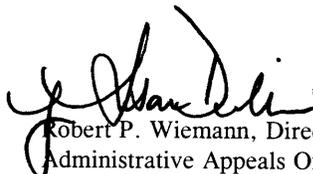
**INSTRUCTIONS:**

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

The petitioner is a Georgia hospital that has 300 employees and a gross annual income of \$46,079,439. It seeks to temporarily employ the beneficiary as a staff 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 meets all four criteria in 8 C.F.R. § 214.2 (h)(4)(iii)(A). Counsel submits additional evidence.

Section 214(i)(1) of the Immigration and Naturalization 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 further 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 Texas Service Center on March 19, 2001, the petitioner identified the position as a staff nurse, and described the duties of the proffered position as follows:

As a Staff Nurse, [the beneficiary] will provide nursing care for assigned patients in the Operating Room Department utilizing the nursing process of assessment, diagnosis, planning, intervention and evaluation, and according to professional standards and in keeping with the health center mission of providing quality health care.

The petitioner also commented on the beneficiary's prior experience in the operating room, intensive care and medical surgical units as well as his experience as a clinical instructor in the areas of operating room and delivery room nursing at a Philippines college of nursing.

On May 30, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested evidence that the position in the instant petition required a bachelor's degree. (Emphasis in original.) In addition, the director requested that the petitioner explain how the duties of the position were so specialized, complex or unique that they could be performed only by an individual with a baccalaureate degree.

In response, the petitioner submitted the following materials:

- A letter from [REDACTED] Chief Nursing Officer, Walton Medical Center.
- A job description/performance evaluation for the position of perioperative nurse educator.
- A letter from [REDACTED] RN, MSN, assistant professor of nursing at Gordon College Division of Nursing and Health Sciences, in Barnesville, Georgia. This letter stated: "it was essential that any nurse functioning in the role of educator have at a minimum a Bachelors of Science in Nursing."

- A series of newspaper articles from various locations in the United States that discussed the shortage of nurses and the consequences of such a shortage on patient care, among other issues.
- A memorandum of points and authorities in support of the H-1B petition. In this document, the petitioner stated that it had met all four criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A), and referred to *Matter of Gutierrez*, 12 I&N Dec. 418 (Dist. Dir. 1967).

The letter from [REDACTED] stated the following with regard to the proffered position:

In response to the increase in our patient volumes and the growing needs of the Operating Room Unit, we created a new position of Perioperative Nurse Educator. This new nurse educator must be quick to respond and able to think on his/her feet and must be thoroughly flexible enough to meet the unexpected and act in an efficient and rational manner in an emergency situation. The nurse in this role must be able to serve as a clinical resource to other nurses. He/she will educate staff in response to the Performance Improvement findings in the Perioperative area.

The Perioperative Nurse Educator will collaborate with affiliating faculty to plan clinical experiences for students in the Perioperative Unit. They [sic] will supervise the orientation program for all new hires and update unit manuals in keeping with current trends and advances in nursing. They [sic] will administer medication and manage fluid therapy. In addition to these specific skills, we expect the nurse to participate in the management of their [sic] respective nursing department by directing, supervising and educating professional personnel in providing patient care. This position requires the nurse to be able to apply scientific principles to problem solving, planning, providing and evaluating nursing care in the operating room. This nurse must have the capacity to understand and participate in the Performance Improvement process. In the operating room, this nurse serves as circulating nurse and/or a scrub nurse and will also serve as a preceptor for new nurses hired into the OR. The nurse works in collaborative relationship with the surgeons and anesthesiologists to determine the needs of the patient during the operation. The nurse is expected to work cooperatively with members of the nursing staff and other departments to promote continuity of patient care.

The job description for the nurse educator position indicated the following requirements: "Graduate of an accredited school of registered nursing. Minimum of Bachelor of Science Degree in Nursing required, plus three to five years recent clinical experience as a Registered Nurse in the Operating Room. BCLS certification required. ACLS certification required within 6 months of employment".

On October 31, 2001, the director denied the petition and stated that the petitioner had not established any of the four criteria contained in 8 C.F.R. § 214.2 (h) (4) (iii) (A).

On appeal, counsel resubmits the job description/performance evaluation for the position along with a copy of *Matter of Gutierrez*. Counsel asserts that the petitioner has satisfied all four prongs of 8 C.F.R. § 214.2 (h) (4) (iii) (A) even though only one criterion had to be established.

With regard to counsel's reference to *Matter of Gutierrez*, the Act at section 214(i) provides that 'the term "specialty occupation" means an occupation which requires ... (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 H-1B classification is no longer concerned with "membership in the professions" which was the standard examined by the court in *Gutierrez*. The language of section 214(i) of the Act effectively supersedes the *Gutierrez* decision. In addition, *Gutierrez* examined an immigrant petition, as opposed to the present non-immigrant petition.

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 Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (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.

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire*

*Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

A review of the record reveals that the director requested additional evidence because there was insufficient evidence that the proffered position was a specialty occupation. In response, the petitioner associated the perioperative nurse educator job title with the position and assigned job responsibilities that had previously not been submitted for the record. Although the petitioner's cover letter still referred to scrub or circulating nurse job responsibilities, the job description/performance evaluation document submitted in response to the director's request for evidence contained no direct patient care nursing responsibilities for the beneficiary.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire, id.* If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the analysis of this criterion will be based on the initial job title of staff nurse.

On page 269, the *Handbook* states the following about the training and educational requirements for entry level 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 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.

Upon review of the record, although the initial job description appears to be beyond an entry level staff position, there is no substantive information on the record with regard to any specialized duties of the petitioner's operating room nurses, or of nurses handling patients either before or after surgery that would establish the proffered position to be beyond that of a staff nurse. Nor does it appear that the position is analogous to an administrative nursing position.

Recent Bureau policy guidance on H-1B petitions does look at nurses in administrative positions, or in specialized nursing occupations such as certified advanced practice registered nurses in areas such as clinical nurse specialist (CNS), nurse practitioner (NP) or certified nurse-midwife (CNM). According to current Bureau policy guidance, these occupations would generally be H-1B equivalent if the position requires, and the beneficiary had obtained, advanced practice certification.<sup>1</sup> Nevertheless the beneficiary does not appear to fall into any such categories.

**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 staff nurse position were discussed in the previous section, and shall not be repeated here. In the instant petition, the petitioner submitted letters from the petitioner's chief nursing officer, and from Joan S. Cranford, an assistant professor of nursing at Gordon

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<sup>1</sup> Memorandum from [REDACTED] Executive Associate Commissioner, 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.)

College, Barnesville, Georgia. Both letters address issues such as the need for the perioperative nurse educator position or the importance of utilizing nurses with bachelor of science degrees in nursing in educator or preceptor roles. As such, these letters do not provide substantive weight to the industry standards for staff nurses. The petitioner submitted no further evidence, such as job listings for parallel positions in medical facilities of similar size or scope. In addition, the petitioner submitted no documentation that any professional nursing association has made a bachelor of science degree in nursing a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." 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. In the instant petition, the petitioner has submitted no documentation that the position of a circulating or scrub nurse within the petitioner's operating room would involve duties seen as either unique or complex that only an individual with a degree in a specific specialty could perform them.

**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 placed no evidence on the record as to its hiring practices for staff nurses hired to work with the operating room team. Without more persuasive evidence, the petitioner has not established this criterion.

**IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)**

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position at Walton Medical Center. Although counsel asserts that the letters submitted by [REDACTED] and [REDACTED] provided documentation with regard to the specialized and complex nature of the duties of the proffered position, these letters examined the second job description submitted by the petitioner. They did not address the specialized and complex nature of the duties of a scrub or circulating nurse on the petitioner's operation room team. Without more persuasive evidence as to the specialized or complex nature of the proffered position, the petitioner has not met the fourth criterion of 8 C.F.R.

§ 214.2(h)(4)(iii)(A).

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 offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the evidence on the record is not persuasive that the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R.

§ 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Upon review of the record, the petitioner did not submit an educational equivalency document to demonstrate that the beneficiary's foreign studies in nursing are the equivalent of a baccalaureate degree in nursing from an accredited U.S. university. It is also not clear that a verification of the beneficiary's current registered nurse licensure in the Philippines was provided directly to the State of Georgia from the Philippines nurses licensing board. See Chapter 410, Rules and Regulations of the State of Georgia, available at <http://www.ganet.org/rules/index.cgi?base=410/6/02>. 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.