

02

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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

PUBLIC COPY



File: EAC-01-222-52408 Office: Vermont Service Center Date: **MAR 11 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:

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 health care facility with 200 employees and a stated gross annual income of \$35 million. 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 and additional documentation.

The term "specialty occupation" is defined at 8 C.F.R. § 214.2(h)(4)(ii), as follows:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

The director denied the petition because the petitioner had not submitted sufficient evidence to establish that the position of registered nurse requires a bachelor of science degree in nursing. On appeal, counsel argues that the duties of the proffered position are so specialized and complex that the attainment of a bachelor of science degree in nursing is required for entry into the occupation.

Counsel's arguments on appeal are noted. 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 a separate letter that accompanied the initial I-129 petition, the petitioner described the duties of the beneficiary in the offered position as follows:

1. Administering appropriate medical treatment and therapies to specialty patients with concentration on Renal/IV
2. Reading and interpreting medical charts

3. Reviewing patient progress with medical personnel
4. Implementation of physician's instructions relating to various medical treatments
5. Specializing in orthopedic nursing and urology.

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.

The Bureau does not agree with counsel's argument that the proffered position of registered nurse working in a nursing home environment requires a bachelor of science degree in nursing. In its *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, at page 268, the Department of Labor (DOL) states the following:

Nursing home nurses manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they often spend much of their time on administrative and supervisory tasks, RNs also assess residents' health condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids. They also work in specialty-care departments, such as long-term rehabilitation units for patients with strokes and head-injuries.

A review of the *Handbook* at pages 268-270 finds no requirement of a bachelor of science degree in nursing for employment as a registered nurse. The *Handbook* specifically notes:

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. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000 were at the A.D.N.

...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.

Counsel asserts that the proffered position is a specialty occupation in that the beneficiary would supervise licensed practical nurses and nursing aides. However, the duties of the position are not exclusively administrative in nature as the job includes elements involving direct patient care. According to the *Handbook*, the supervision of licensed practical nurses and nurses' aides is one of the duties normally expected of registered nurses working in a nursing home setting. As the record does not demonstrate that the proffered position is an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, the petitioner has not shown that a bachelor's degree in a specific specialty or its equivalent is required for the position being offered to the beneficiary.

The petitioner has failed to submit any evidence establishing that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. The record contains a letter dated May 2, 2001, that is signed by the petitioner's chief executive officer, Chaim Sieger. In his letter, [REDACTED] indicates that ten registered nurses are currently employed by the petitioner. However, [REDACTED] specifically acknowledges that only four of these individuals hold bachelor of science degrees in nursing, while the remaining six registered nurses do not possess such a degree. The fact that a majority of the petitioner's staff of registered nurses do not hold bachelor of science degrees in nursing clearly reflects

that the petitioner does not require this degree for employment as a registered nurse.

Counsel argues that the degree requirement is common to the industry in parallel positions among similar organizations. In an attempt to provide evidence of an industry standard, counsel submits job listings from the Yahoo.Com internet site for registered nurse positions. However, only three of the job listings reflect that the particular nurse positions being offered therein require a bachelor of science degree in nursing. The two remaining job listings show that an associate degree in nursing or a diploma from a nursing school, as well as a bachelor of science degree in nursing for employment in these two nursing positions. Three job listings cannot be accepted as sufficient evidence of an industry standard. Therefore, it cannot be concluded that the evidence demonstrates that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals with bachelor's degrees in a specific specialty in parallel positions.

Counsel asserts that the proffered position is a specialty occupation because the beneficiary would be responsible for patients in sub-acute care and patients who have serious medical illnesses. Counsel contends that the changing demographics of aging in the United States; changing federal regulations with regard to Medicare payments for elderly or chronically ill patients; and the emergence of health maintenance organizations have all resulted in a shift in the population of nursing homes from elderly or disabled patients who need primarily maintenance care to patients who need medically complex short term care which can only be provided registered nurses with a bachelor of science degree in nursing.

In support of these arguments, counsel submits a letter signed by [REDACTED] president of the Associated Geriatric Information Network, Inc., in New Rochelle, New York. [REDACTED] states that the petitioner needs more nurses who possess bachelor of science degrees in nursing because it accepts patients with very complex medical conditions who require a high level of nursing. However, the *Handbook* clearly indicates that registered nurses working in a nursing home setting commonly work in specialty-care departments of such institutions. The *Handbook* notes that individuals possessing either an associate degree in nursing or a diploma from a nursing school, as well as those holding a bachelor of science degree in nursing, are regularly employed in registered nurse positions such as the offered job. As such, it has not been persuasively established that the duties of the proffered position are so complex and specialized that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

Counsel argues that there is a critical shortage of qualified registered nurses in the nursing home industry in the United States. Nevertheless, the Bureau cannot remedy that situation by approving petitions for H-1B registered nurse positions where the petitioner has not shown that the position meets the statutory definition of a "specialty occupation." The fact remains that 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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.