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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, DC 20536

File: WAC 01 166 51922

Office: CALIFORNIA SERVICE CENTER

Date:

MAY 19 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:

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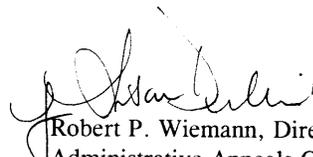
INSTRUCTIONS:

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

The petitioner is a California skilled nursing facility that specializes in sub-acute long-term care for adults and children. It has 372 employees and a gross annual income of \$19 million dollars. It seeks to temporarily employ the beneficiary as a shift charge nurse (supervisory registered nurse) for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation and also had not responded to a request for further evidence.

On appeal, counsel asserts that the proffered position is a supervisory nurse position and as such is a specialty occupation. Counsel submits additional documentation from the record.

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 position offered to the beneficiary is a specialty occupation. The petitioner described itself as a sub acute skilled nursing facility. It described long-term sub acute care as a comprehensive 24-hour inpatient level of care for patients who "have had an acute event resulting from birth, injury, illness or exacerbation of a disease process, have a determined course of treatment, and require diagnostics or invasive procedures". According to the petitioner, it has a 128-bed medical facility with 69 pediatric beds and 59 adult beds in separate wards. The petitioner identified the following conditions that are treated at its facility:

- Tracheostomy care
- The need for total parenteral nutrition
- Nasogastric disorders
- Gastrostomic disorders,
- Respiratory and pulmonary management
- Neuromuscular disorders
- Neurological disorders
- Paraplegic/quadriplegic care
- Multiple trauma care

In the initial I-129 petition filing received by the California Service Center on April 12, 2001, the petitioner described the duties of the offered position as follows:

As Shift Charge Nurse, the [beneficiary] will supervise and coordinate the activities of 15-20 Registered Nurses, Licensed Vocational Nurses, Certified Home Health Care Aides and other staff during the assigned shift in addition to highly complex nursing needs. Our facility requires three (3) Shift Charge Nurses in each ward (adult and pediatric) during each eight (8) hour shift. Because this is a professional position involving sophisticated knowledge of nursing and supervising practices, the person filling the position of any supervisory registered nurse position with our company is required to possess at least a Bachelor's degree in Nursing. All Saints is unlike most facilities because of our patients' needs and complex conditions.

The petitioner broke down the actual duties as follows:

1. [T]he supervision of patient care to ensure quality care is provided by coordinating, implementing and monitoring shift activities within assigned patient care unit
2. [S]upervision of personnel on the assigned shift
3. [A]ssigning duties/and/or activities to professional and ancillary staff based on a patient's acuity level within assigned shift in accordance with established policies and procedures for effective utilization of patient care givers, supplies and equipment
4. [A]ssuring appropriate documentation of care given on the shift and the census data is updated
5. [P]roviding highly complex nursing care to ventilator dependent patients
6. [P]erforming any other tasks and duties appropriate to his/her realm of knowledge, skills, capability and experience as required by the Nurse Manager or Director of Nurses
7. [R]eporting to the Nurse Manager, Shift Coordinator, Assistant manager of Nurses, and Director of Nurses
8. [S]erving as liaison between staff and administrative personnel
9. [D]eveloping standards and procedures for providing nursing care and for evaluating service
10. [P]roviding orientation, teaching, and guidance to staff to improve quality and quantity of service
11. [E]valuating performance of personnel and interpreting nursing standards to staff, advisory boards, nursing committees, and community groups.
12. [C]onsulting with the Head Nurse and All Saints' Administrators on nursing problems and interpretation of medical policies to ensure patient needs are met
13. [R]ecommending duty assignment of nursing personnel

14. [R]eviewing, evaluating, and interpreting nursing records, vital statistics, and other data affecting health service in order to assess patient needs and to plan and implement programs to meet these needs
15. [P]articipating in ongoing educational programs for staff to keep current with medical technology and treatment
16. [A]ssisting in preparation of agency budget, and will engage in studies and investigation related to improving nursing care.

The petitioner also submitted a certificate from the Commission on Graduates of Foreign Nursing Schools as well as an educational equivalency document from the International Education Research Foundation, Inc., that indicated the beneficiary's baccalaureate degree from the Philippines is the equivalent of a U.S. bachelor of science in nursing degree.

On August 27, 2001, the director requested further evidence for the instant petition. For example the director wanted to know what was the complex nursing care involved in caring for ventilator dependent patients. He also requested a more specific explanation of the phrase "any other tasks and duties appropriate to his/her realms." In addition, the director requested a breakout of the percentage of time spent in each duty, the level of responsibility, hours per week of work, types of employees supervised and the minimum education, training, and experience necessary to perform the proffered position. Finally the director requested that the petitioner explain why the work to be done required an individual with a college degree or its equivalent in the occupational field.

With regard to the qualifications of the beneficiary to perform the job duties, the director also requested letters from the beneficiary's previous employers. Finally the director asked for evidence that the position was a temporary job and also requested the beneficiary's original degree and transcripts from Filamer Christian College in the Philippines.

On March 13, 2002, the director denied the petition. Her decision was based primarily on the fact that the minimum requirement to become a registered nurse was an associate's degree in nursing, as stated in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* examination of the employment category of nurses. In addition, the director noted that her decision was based on the merits of the documents submitted originally with the petitioner, as the petitioner had not submitted any additional information.

On appeal, counsel asserts that in November 2001 it requested additional time to submit the additional evidence requested by the

director. Counsel incorporates the evidence from the Request for Further Evidence into her appeal. Counsel bases her appeal on the following issues:

A) The offered position of Shift Charge Nurse is not for an ordinary registered nurse and does meet the criteria required to be classified as a specialty occupation. Counsel asserts that the bachelor's degree or its equivalent is increasingly the minimum requirement for many registered nurse positions and that a bachelor's degree is the normal minimum requirement for entry into supervisory registered nurse positions. Counsel submits a breakdown of the time spent by the beneficiary on prospective job duties, job vacancy announcements for supervisory nursing positions, a statement from the American Association of Colleges of Nursing (AACN), as well as a list of sixteen nurses employed by the petitioner and identified as having a bachelor of science in nursing degree.

B) The instant petition was erroneously characterized as a non-specialty occupation due to a misinterpretation of law and Bureau policy. Counsel submits a copy of *Matter of Gutierrez* 12 I&N Dec. 418, Interim Decision (Dist. Dir. 1967).

C) The determination that the proffered position is only an entry-level registered nurse fails to follow Bureau policy that actual duties to be performed are determinative of whether a position is a specialty occupation. Counsel asserts that nearly all of the job duties listed in the employer's letter in support of the petition are supervisory and administrative in nature.

D) An underlying Bureau policy of seeking consistency in adjudications should mandate the approval of the instant petition. Counsel submits I797 Notice of Action forms that document the approvals of three I-129 H-1B petitions for nurse positions that were submitted simultaneously with the instant petition. Counsel states that the Administrative Appeals Office recognized that health services managers and supervisors are H-1B caliber positions as documented by the previous AAO approval of a team leader/nurse position. Counsel also notes that the position of registered nurse is listed as a professional level occupation under the United State-Canada Free Trade Agreement at 8 C.F.R. § 214.6(c), Appendix 1603.D.1.

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) to the Act effectively supersedes the *Gutierrez* decision. In addition, *Gutierrez* examined an immigrant petition, as opposed to the present non-immigrant petition.

With regard to counsel's assertion that other H-1B petitions have been approved in the past, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does indicate that other Filipino nationals who were represented by counsel were granted H-1B visas. There is no further documentation with regard to the position offered to these individuals, or to the qualifications of the individuals for the positions. It is, therefore, not possible to determine definitely whether the approved petitions involved the same positions as the present position. Regardless of the approvals, the Administrative Appeals Office is not bound to follow the contradictory decisions of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 is a specialty occupation, each of the four criteria listed at 8 CFR § 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 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 that appear most analogous to the duties described by the petitioner are outlined in the 2002-2003 edition of the *Handbook* on page 268 are as follows:

Nursing home nurses manage nursing care for residents with conditions ranging from a fracture to Alzheimer's disease. Although they usually spend most of their time on administrative and supervisory tasks, R.N.s also assess residents' medical condition, develop treatment plans, supervise licensed practical nurses and nursing aides, and perform difficult procedures such as starting intravenous fluids.

. . . .

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.

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.

In the instant petition, the petitioner uses the title of shift charge nurse and states that the proffered position is both administrative and supervisory in nature. Counsel provides additional information on the duties of the position, types of employees to be supervised by the beneficiary, and the breakdown of time spent performing the actual duties. With regard to specific questions raised by the director in the request for further evidence on the treatment of ventilator-dependent patients and the phrase "any other task and duties appropriate to his/her realm of knowledge", the petitioner provided the following expanded description of these duties:

5. [P]roviding highly complex nursing care to respirator/ventilator dependent patients such as intensive monitoring of the patient's medical condition, breathing regularity, heart rate, ensuring correct feeding methods to reduce risk of breathing complications and choking, maintaining accurate medical charts for respirator/ventilator dependent patients and alerting the doctor if the patient's medical condition worsens
6. [P]erforming any other tasks and duties appropriate to his/her realm of knowledge, skill, capability and experience as required by the Nurse Manager or Director of Nurses such as holding staff meetings to evaluate the needs of the nursing staff and resolving personality conflicts between nursing staff.

With regard to the percentage of time to be spent by the beneficiary in her job duties, the petitioner, referring to the original list of job duties, stated that 45% of the beneficiary's time would be spent on job duties one through six, 30% would be spent on job duties seven through fourteen and 25% of the shift charge nurse's time would be spent on job duties 15 through 16.

With regard to the level of responsibility issue raised by the director, the petitioner states that the position is similar to a "specialized health services manager," and that the beneficiary is responsible for supervising and coordinating the activities of at least four to six registered nurses per shift, eight to ten other personnel such as licensed vocational nurses, and certified home health care aides, as well as reporting to persons senior to her such as the nurse manager, shift coordinator, assistant manager of nurses, and the director of nurses.

With regard to why the position would require an individual with a college degree, the petitioner stated that the shift charge nurse is a nurse supervisor. The petitioner stated that its facility requires three shift charge nurses in each ward (adult and pediatric) during each eight-hour shift.

While the *Handbook* classification does not specifically address nurse/supervisors or managers, a recent Bureau policy memo provides the following commentary on nurse managers and administrative nursing positions: "Certain other nursing occupations, such as an upper-level 'nurse manager' in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree." (See Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook* at 269.)¹ The nursing memo also states: "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.

Upon review of these categories, and the nature and duties of the proffered position, the position appears to be a nursing position beyond the entry level registered nurse with supervisory activity; however, it does not appear to be analogous to an administrative nursing position or to a nurse manager position. While it appears that the beneficiary will spend significant amounts of time supervising other healthcare personnel within a

¹ 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.)

specific patient care unit, and her involvement in direct patient care is limited, the extent of her supervisory duties does not appear as extensive as an individual in an administrative nursing position or in a nurse manager position. The fact that the beneficiary would report to several layers of authority over her also demonstrates that the proffered position is most analogous to a charge nurse.

Without more persuasive evidence, the petitioner has not established that a shift charge nurse with supervisory responsibilities would be required to possess a bachelor of science degree in nursing in order to enter on duty. Thus, the petitioner has not established this criterion.

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 registered nurse position were discussed in the previous section, and shall not be repeated here. On appeal, the petitioner submitted numerous job vacancy announcements that ranged from school nurses to pediatric intensive care unit nurse managers to charge nurses. The announcements were from a wide geographic area throughout the United States. For purposes of this proceeding, only the vacancy announcements for charge nurses will be examined, since this classification appears most analogous to the proffered position. Two job vacancies are listed for charge nurses. One such position is for a charge nurse in a obstetrics/gynecology unit in Temple, Texas. The position appears to be posted by a job contractor, Scott and White, and indicates the following educational, training and licensing requirements:

Licensed and currently registered as a professional nurse in the State of Texas
Minimum 2 years full-time experience required

Staff Nurse II status or 1 year of similar experience
for new Scott and Whit hire
BSN or certification within 2 years required
Must meet Unit Specific Criteria within 6 months
Must complete Charge Nurse orientation within 6 months

The second charge nurse job description is for a mental health charge nurse in acute services in an unidentified location that requires a bachelor's of science in nursing degree with three to five years of experience. Based on these job vacancies, the petitioner has not established that the industry standard for entry into a nursing job is a bachelor of science degree in nursing. The first announcement clearly establishes that a nurse with an associate degree who is in the process of getting a baccalaureate degree is an acceptable candidate if other criteria are met, while the second announcement in an acute care unit within a facility does not appear analogous to the proffered position in a sub acute long-term facility.

The petitioner also submitted an article from the American Association of Colleges of Nursing that contains the following position statement: "Accordingly, the American Association of Colleges of Nursing (AACN) recognizes the Bachelor of Science degree in nursing 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 AACN'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. On appeal, the petitioner states that "the KEY DIFFERENCE between All Saints Healthcare and other facilities is that the petitioner is a sub-acute care facility contracted with the State of California. Thus, the petitioner is responsible for patients whose needs and care are at a much higher need than an average facility." (Emphasis in original.) The petitioner provided descriptions of the nursing care provided to its long-term sub acute care patients, as well as a further expanded description of the beneficiary's nursing duties with regard to care for ventilator dependent patients. With regard to the petitioner's description of the nursing care for ventilator dependent patients, the record is not clear as to whether the actual nursing care is complex or unique as opposed to routine and necessary. In addition, the petitioner's expanded description of other duties which primarily concerned holding staff meetings to resolve staffing personality conflicts does not establish that the proffered position is either unique or complex. Without more persuasive evidence, the petitioner has not established this criterion.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)

With regard to the instant petition, the petitioner submitted a list of sixteen employees identified as having a minimum of a bachelor of science degree in nursing. Of these sixteen individuals, twelve are identified as charge nurses, with five having differentiated titles, such as "Charge Nurse, Sup Peds Unit", or "Charge Nurse-Subacute Unit". This list of hospital staff is unpersuasive for purposes of establishing this criterion for two reasons. First, the petitioner previously stated that it required three BSNs for each eight-hour shift for each ward. At a minimum of one adult ward and one pediatric ward and three eight hour shifts, it would appear that the petitioner would have at least eighteen charge nurses. It is unclear whether the submitted list identifies all the charge nurses on staff, or whether other nurses without bachelor of science degrees in nursing degrees or its equivalent are also employed as charge nurses.

Second, the petitioner provided no documentation, such as copies of diplomas, to substantively establish the petitioner's assertion with regard to its charge nurses being required to have baccalaureate 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, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, the petitioner could have provided more probative evidence if it had submitted its job advertisement for the proffered position with the requisite educational background or training listed. Without more persuasive evidence, the petitioner 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 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)

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 for other nursing positions are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree or higher degree (or its equivalent.) The petitioner submitted no additional documentation or affidavits to demonstrate that the nursing care provided at the All Saints Healthcare is any more specialized or complex than nursing care provided at any other sub acute health care facility.

The petitioner stated that its facility offers a diversity of medical, rehabilitative, and therapeutic services at a much higher level than a traditional nursing home. It also stated that All Saints Healthcare is "unlike most facilities because of our patients' needs and complex conditions" and that the California Department of Health and Services mandated that it provides 24 hour nursing care to its patients by registered nurses. However, the petitioner provided no documentation that the State of California made any distinction between the employment at sub acute facilities of registered nurses with bachelor of science degrees in nursing as opposed to registered nurses with associate's degrees. In addition, the record is not clear that this mandate by the State of California is unique to the petitioner's facility. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). 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*. Without more persuasive evidence, the petitioner has not established this criterion or any other criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

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.