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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, D.C. 20536



File: SRC 01 135 51223

Office: TEXAS 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:



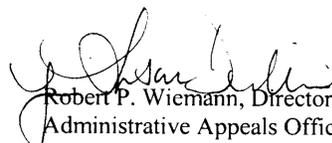
INSTRUCTIONS:

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 of the Texas Service Center approved the petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be reversed. The petition will be denied.

The petitioner is a recruiter, placement firm, and consulting service for the health care field. It employs two persons and has a projected gross annual income of \$4 million. It seeks to place the beneficiary as a critical care specialist nurse at North Shore Medical Center ("North Shore") for a period of three years. The director approved the petition finding that the proffered position is a specialty occupation.

In response to the notice of certification, counsel submits a brief and additional documentation. Counsel states, in part, that both the petitioner and North Shore require that their critical care specialist nurses hold a Bachelor of Science degree in Nursing (BSN).

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 the classification of qualified nonimmigrant 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 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 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.

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.

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

- Supervision & coordination of nursing activities in a critical care environment
- Monitoring of critically unstable patients
- Evaluation of [e]lectrocardiographic (EKG) rhythm strips
- Monitoring of vital functions including hemodynamic monitoring

- Maintaining and titrating drips
- Direction of the preparation and maintenance of patients' clinical records
- Accompanying of [sic] attending physicians and surgeons on rounds and keeping informed of special orders concerning patients.

In response to the director's request for additional evidence, counsel submitted the following, expanded description of the job's duties:

- Coordinating and supervising patient care;
- 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 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.

With the initial petition, counsel submitted a letter dated March 12, 2001 from [REDACTED] Chief Executive Officer of Job2Career, who stated 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 (BSN) or the equivalent thereof in terms of academic achievement and work experience." Mr. [REDACTED] 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 requires a BSN, Mr. [REDACTED] stated that the petitioner, Job2Career, has a practice of hiring only registered nurses who hold a BSN.

The record also contains the following relevant evidence:

1. A January 2, 2000 letter from [REDACTED] Chief Nursing Officer at North Shore, which contains a listing of the proposed duties. Ms. [REDACTED] states that North Shore requires a BSN or its equivalent in terms of academic achievement and work experience. Ms. [REDACTED] further states that the degree requirement is common to the health care industry in the State of Florida for critical care nurse positions.
2. An August 8, 2001 letter from [REDACTED] in which she provides an expanded listing of the job's duties. Ms. [REDACTED] states that North Shore considers its

critical care nurse position to be a specialty occupation based on the specialized and complex nature of the duties.

3. A letter from [REDACTED] Administrator at Westside Regional Medical Center ("Westside"), in which she states that Westside 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.¹
4. A letter from [REDACTED] Medical Director of the Intensive Care Unit at the University of Miami Jackson Memorial Hospital and The Ryder Trauma Center, and Program Director of the Surgical Critical Care Fellowship Training Program. Mr. [REDACTED] states that Ryder Trauma Center currently employs 17 critical care nurses, all of whom held a BSN or its equivalent on the date each was hired for employment with the Trauma Center.
4. 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." The article states that a survey of 100 critical care nurses found that 72 percent had at least a bachelor's degree and 38 percent had a master's or higher degree.
5. Copies of the curriculum for an associate degree in nursing (A.A.) at Broward Community Junior College and the curriculum for a bachelor of science degree at Florida International University School of Nursing. Counsel states that the BSN curriculum offers three separate courses in critical care whereas the Broward Community Junior College A.A. nursing program offers none.

¹ It is noted that Ms. [REDACTED] letter was written in support of another H-1B petition filed by Job2Career on behalf of a different beneficiary.

6. A letter from [REDACTED] Dean of the University of Miami, School of Nursing, who states that, in her opinion, the proffered position requires a BSN.
7. A letter from [REDACTED] Director of the Surgical Intensive Care Unit at the VA Medical Center, University of Miami School of Medicine. Mr. [REDACTED] states that "all of our Critical Care Nurses possess at least a bachelor's degree in Nursing or its equivalent - as would any reputable Critical Care Unit."
8. A copy of the section of the Department of Labor's (DOL), *Occupational Outlook Handbook (Handbook)*, 2000-2001 edition relating to the occupation of registered nurse. Counsel refers to the DOL's statement in the *Handbook* that administrative positions in nursing often require a BSN. Counsel maintains that the proffered position is an administrative nursing position, and as such requires a BSN.
9. Copies of twenty approval notices relating to H-1B visa petitions filed by Job2Career on behalf of other alien beneficiaries and the bachelor of science diplomas attained by those individuals at Indian institutions of higher education.
10. A newspaper article from the July 2, 2001 edition of the *South Florida Sun-Sentinel* regarding a nursing shortage in Florida;
11. The petitioner's Florida Department of Revenue Employer Quarterly Report listing the names of the petitioner's current employees; and
12. A letter from [REDACTED] President of Job2Career, stating that Job2Career requires that all nurses hired by it have a minimum of a Bachelor of Science degree in Nursing. Mr. [REDACTED] further states that Job2Career has never hired a nurse with less than a bachelor's degree.

The director found the evidence of record persuasive in establishing that the proffered position was a specialty occupation. Specifically, the director determined the petitioner had shown that the duties of the position are so

specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty and also that Job2Career requires a BSN for its critical care nurse positions.

On notice of certification, counsel agrees with the director's decision and supplements the record with additional evidence, which was listed in the preceding part of this decision.

First, counsel states that the AAO has held that a team leader/registered nurse position is a specialty occupation, even though direct patient care may be involved along with training and supervision of personnel. Counsel cites an unpublished AAO decision in support of his claim.

Second, counsel refers to *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), and states that the facts of the *Defensor* case are not similar to the facts in the present petition.

Third, counsel claims that the *Handbook* should not be relied upon exclusively in a determination of whether a degree requirement is an industry standard. Counsel maintains that the *Handbook* does not specifically refer to critical care nurses, but it does recognize that some positions may require a bachelor's degree in nursing, including nursing positions in a clinical specialization.

Finally, counsel states that the petitioner has "assembled an impressive array of experts in both the nursing profession and the critical care area of medicine, all of whom portray the position of critical care nurse as being one which is highly specialized and complex." Counsel refers to several letters in the record from medical professionals in the Miami, Florida area who provide their opinions about the qualifications necessary for the proffered position.

Based upon a review of the record, it is determined that the director's reasoning in approving the petition was flawed. As shall be discussed in detail, neither the director nor counsel presents a persuasive argument for classifying the offered position as a specialty occupation. 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)

On November 27, 2002, the Bureau issued a policy memorandum on H-1B nurse petitions (nurse memo). In the memo, the Bureau 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.² 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.³

The Bureau often looks to the *Handbook* when determining whether a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into a particular position. The DOL describes the general duties of registered nurses at page 268 of the *Handbook*, 2002-2003 edition, as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. They are advocates and health educators for patients, families, and communities. When providing direct patient care, they observe, assess, and record symptoms, reactions, and progress; assist physicians during treatments and examinations; administer medications; and assist in convalescence and rehabilitation. RNs also develop and manage nursing care plans; instruct patients and their families in proper care; and help individuals and groups take steps to improve or maintain their health.

² 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.)

³ It is worth noting that the nurse memo also mentions that certification examinations are available to registered nurses who work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

The DOL further describes the duties of head nurses or nurse supervisors at page 268 of the *Handbook* as follows:

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 position as described by the petitioner appears to be that of a supervisory or head nurse in a critical care setting. For example, the beneficiary will provide direct patient care; observe, assess, and record patients' symptoms, reactions, and progress; assist physicians during treatments and examinations; develop and manage nursing care plans; instruct patients and their families in proper care; administer, coordinate, and supervise nursing activities; and plan work schedules and assign duties to nurses and aides.

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/supervisory 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.

The *Handbook* does not elaborate on administrative nursing positions within this classification. A recent policy memo from the Immigration and Naturalization Service (Service), now the Bureau, 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. Department of Labor, *Occupational Outlook Handbook* at page 75.)" ⁴ The *Handbook* reference applies to the classification of medical and health services managers rather than that of head nurse or nurse supervisor. The *Handbook* describes the work of medical and health services managers at page 75 as follows:

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.

While the duties of the proffered position are clearly more complex than those of an entry-level registered nurse, the evidence of record does not support a conclusion that the job is an administrative or medical and health services management position. Although the petitioner states that the beneficiary's duties include the "administration, coordination, and supervision of nursing activities in a critical care environment," this phrase does not provide any insight into the specific tasks the beneficiary would be expected to perform. Additionally, there is no indication that such activities would be the primary focus of the beneficiary's job. The majority of the beneficiary's duties involve direct and indirect patient care, duties normally performed by registered nurses in a critical care setting. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a BSN is normally the minimum requirement for employment as a critical care 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

⁴ *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002), *supra*.

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 need not be repeated here. Neither counsel nor the petitioner presents evidence that any nursing association has attested that a baccalaureate or higher degree in nursing is a minimum entry requirement for this occupation.

Counsel 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." Counsel mentions the portion of the article, which states that 72 percent of the individuals surveyed had at least a BSN. 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 practice nurses from Georgia, South Carolina and North Carolina. With only 100 respondents, the Bureau contends that the results 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. Therefore, this article is not persuasive evidence that a degree is common to the 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 Ryder Trauma Center, the largest trauma center in the world. According to Dr. [REDACTED] his employer currently employs 17 critical care nurses, all of whom held a BSN or its equivalent on the date each was hired for employment with the Trauma Center. Dr. [REDACTED] states that the duties of a critical care nurse are so complex and sophisticated that individuals who do not hold a BSN are not well-equipped to perform the duties of a critical care nurse. The second letter is from [REDACTED] the Dean of the University of Miami's School of Nursing. Ms. [REDACTED] 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 letter is from [REDACTED] 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 constitute an industry standard. The University of Miami 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 North Shore's operations. As the largest trauma center in the world, the Ryder Trauma Center is comparable neither in size nor in scope to North Shore. Additionally, the Bureau contends that the DVA also may not be considered a "similar organization" to North Shore, as it employs approximately 36,000 registered nurses, whereas North Shore 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*, *id.* at 1165.

The Bureau also notes that Ms. [REDACTED] the Dean of Nursing at the University of Miami School of Nursing, states that the proffered position "can best be performed by a Registered Nurse with a Bachelor of Science Degree in Nursing." Ms. [REDACTED] statement indicates that a BSN is a preference rather than a requirement for performing the duties of a critical care nurse. (Emphasis added.)

Although [REDACTED] stated in her January 2, 2000 letter that "[w]e believe that our requirement for the Critical Care Specialist position of a Bachelor of Science in Nursing Degree or the equivalent thereof in terms of academic achievements and nursing work experience are common throughout the health care industry in the State of Florida, Ms. [REDACTED] has not provided any independent evidence to corroborate her assertion. Simply going on record without supporting documentary evidence is not sufficient for meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel asserts on appeal that the director ignored the provisions in the statute and the regulations, which indicate that the position may require either a baccalaureate degree or its equivalent for the proffered position. Counsel contends that North Shore and other petitioners require their registered nurses to hold baccalaureate degrees or the education, training and experience that is equivalent to a baccalaureate degree in nursing. (Emphasis in original.)

Although counsel correctly asserts that a specialty occupation may be one that requires either a baccalaureate or higher degree, or its equivalent, no evidence in the record demonstrates that individuals with BSN degrees or their equivalent are routinely recruited and hired for critical care nursing positions within organizations similar to North Shore. As previously stated, the evidence submitted does not relate to organizations that are similar in size and scope to North Shore. More importantly, no witnesses have submitted documentary evidence of its hiring practices to show either that their critical care nurses held BSN degrees at the time of hiring, or that the individuals held the education, training, and experience equivalency of a BSN degree. 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 its position is so complex or unique that it can be performed only by an individual with a BSN. In support of its claim that its critical care registered nurse position is so complex or unique that it can only be performed by an individual with a BSN, the petitioner submitted a letter dated August 8, 2001 from [REDACTED]. In this letter, Ms. [REDACTED] stated that "NSMC 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." Ms. [REDACTED] further stated 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 six weeks of clinical orientation with an experienced critical care nurse as compared to two weeks of clinical orientation for a medical/surgical nurse;
- (5) A critical care nurse is required to have Advanced Life Support Certification in addition to a Basic Life Support Certification ("BLSC") [certification], while

a medical/surgical nurse is required to obtain only a BLSC;

- (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.

Ms. [REDACTED] stated that a critical care nurse must have six weeks of classroom orientation; yet, she failed 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. North Shore 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 BSN would be unable to successfully handle the "life and death" situations that Ms. [REDACTED] claimed 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 North Shore is so complex or unique that a BSN is required for the successful performance of the duties. Accordingly, it is concluded that the petitioner has not sustained its burden of proof on this issue.

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 director notes in his approval that the petitioner requires a BSN degree for the proffered position. 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 specialized area for the position at its facility. As the record is presently constituted, there is insufficient evidence to establish that NSMC has such a requirement.

The petitioner's chief executive officer, ██████████ stated in a letter dated June 27, 2002, that Job2Career requires its nurses to have a minimum of a BSN and indicates that the company has never hired a nurse with less than a bachelor's degree. Mr. ██████████ notes that the company currently employs 20 registered critical care nurses, all of whom hold a BSN.

The petitioner's assertion that a BSN is required for the position does not establish that the job offered is a specialty occupation. With employment agencies as petitioners, the Bureau must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). 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.⁵ 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.

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

In *Defensor v. Meissner*, 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 BSN for all employees in that position.

⁵ 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." *Supra* at 387.

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 *Defensor v. Meissner*, the petitioner is an employment agency and would not be the beneficiary's actual employer. The beneficiary's actual employer in this case is North Shore Medical Center.

As the record is presently constituted, there is no evidence to establish that North Shore requires its critical care registered nurses to hold a BSN. Ms. [REDACTED] the Vice President and Chief Nursing Officer at North Shore, stated in a letter dated January 2, 2000: "Our institution requires for the Critical Care Specialist position, a Bachelor of Science Degree in Nursing or the equivalent thereof in terms of academic achievement and work experience." North Shore has not, however, submitted any documentary evidence to support Ms. [REDACTED] claim. There is nothing in the record to demonstrate that North Shore requires, rather than prefers, a BSN as part of the hiring process. While the petitioner submits evidence that it recruits individuals with a BSN, nothing in the record supports a finding that North Shore, the beneficiary's actual employer, requires rather than prefers a BSN degree for its critical care nurses.

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 North Shore is so complex or unique that it can be performed only by an individual with a BSN degree. Counsel maintains that the curriculum for a BSN 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 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 unsupported assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 note (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As previously noted, it was held in *Matter of Treasure Craft of California* that simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Moreover, analyzing whether a university or college offers courses in critical care as part of a nursing degree curriculum is irrelevant to a determination as to whether the proffered position is a specialty occupation. The requirements for obtaining a BSN degree have no relationship to the duties of the proffered position.

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 in a specific specialty (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.

In this case, although the position in question is identified as that of a critical care nurse, the duties of the position cannot be considered to be so specialized and complex that the

theoretical and practical execution of a body of highly specialized knowledge is required for the successful performance of the duties. As stated previously, the duties of the position involve providing direct patient care; assisting physicians with procedures in the intensive care unit; communicating with physicians about changes in the patient's clinical condition; educating patients and their families about pain management; and formulating an individualized plan of care for each patient. These are duties commonly performed by registered nurses in a variety of medical settings. The fact that the beneficiary would be performing these duties in a critical care setting does not, in itself, demonstrate that the duties are so specialized and complex that the knowledge required to perform the duties would normally be associated with the attainment of a BSN or the equivalent. The evidence of record, as presently constituted, does not support a finding that the proffered position qualifies as a specialty occupation based on the complexity of the duties as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that the Bureau has already determined that the proffered position is a specialty occupation since the Bureau has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Texas Service Center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.⁶

It is important to note the relationship between the AAO and the Texas Service Center. The Texas Service Center has authority to decide H-1B petitions in the first instance. 8 C.F.R. § 214.2(h)(2)(1)(A). The AAO has jurisdiction over appeals from denials of H-1B visa petitions. 8 C.F.R. § 103.1(f)(3)(iii)(J). Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior petitions were approved in

⁶ The AAO notes that it has withdrawn several of the director's decisions to approve H-1B petitions filed by this same petitioner on behalf of other alien beneficiaries.

error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petitions would have been erroneous. The Bureau is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Bureau nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert denied, 485 U.S. 1008 (1988).

Additionally, the AAO is never bound by a decision of a service center or district director. *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).

Counsel states that the AAO has held that a team leader/registered nurse is a specialty occupation, even though direct patient care may be involved along with training and supervision of personnel. In support of his statement, counsel cites an unpublished AAO decision that has no precedential effect in this proceeding. See 8 C.F.R. § 103.3(c). Moreover, counsel has not provided any evidence to show that the duties of that position are parallel to those of the critical care specialist nurse at North Shore Medical Center.

Counsel states that there is a critical shortage of qualified registered nurses in the nursing home industry in the United States. The assertion that a shortage exists has no bearing on whether the position meets the statutory definition of a "specialty occupation." A shortage of workers would, however, support a labor certification that could be used with a skilled worker immigrant petition to obtain lawful permanent resident status for the beneficiary. 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. 8 C.F.R. § 214.2(h)(4)(ii).

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. The petition is denied.