

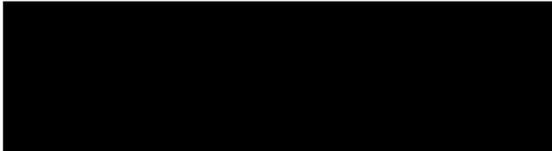
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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: LIN 00 230 53043 Office: NEBRASKA 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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The director subsequently affirmed his decision on motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a network of physicians, outpatient centers, and hospitals. It seeks to employ the beneficiary as a clinical nurse in Hanna House, its geriatric rehabilitation facility, for a period of three years. The director denied the petition because the petitioner had not shown that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional evidence.

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.

The term "specialty occupation" is defined at section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), 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:

Provides safe, efficient age specific nursing care to geriatric patients/families using nursing interventions, i.e. administer medication, obtain intravenous access, etc. Assist physicians and observe, assess, and record symptoms of geriatric populations, in order to assist them to attain, maintain, regain and sustain optimal health status.

In a brief that accompanied the I-129 petition, counsel submitted the following, expanded description of the job's duties:

- Responsible for providing safe, efficient age specific nursing care to geriatric patients/families using interventions (i.e.,

administer medication, obtain intravenous access, etc.) [;]

- Ensure that nursing duties are being performed in accordance with standards set forth by the Joint Commission on the Accreditation of Healthcare Organizations, Ohio Board of Health (of Ohio Dept. of Health), and the Ohio Revised Code[;]
- Assist physicians and observe, assess, and record symptoms of geriatric populations, in order to assist them to attain and maintain, regain, and sustain health status. Assists JCPR staff with statistical analysis of data generated through survey research and database processing[;]
- Supervise other RNs and technicians; and provides leadership to co-workers and peers using skills of coordination, delegation, collaboration and evaluation in order to influence the performance of others;
- Delegates [sic] nursing responsibilities based on nursing care requirements for patient/families, and the assess [sic] competencies and role expectations of personnel;
- Initiates [sic], implements [sic], evaluates [sic], modifies [sic] and documents [sic] teaching plans using teaching/learning principles to meet the complex needs of patients, families and significant others;
- Demonstrates [sic] use of research findings in clinical practice; [and]
- Promotes [sic] and facilitates [sic] patient/family interdepartmental and intradepartmental communication using written, verbal and non-verbal techniques in order to facilitate effective patient care, enhance professional relationships and to identify/resolve issues or problems.

The director determined the petitioner had not shown that a Bachelor of Science degree in Nursing (BSN) is normally the minimum requirement for entry into the occupation or that the petitioner required a BSN for the position in question.

On appeal, counsel asserts that the petitioner normally requires a BSN degree for the position of clinical nurse and that the proffered position qualifies as a specialty occupation because it involves supervisory, administrative, and teaching duties. Counsel states that the beneficiary will be working as a clinical nurse in the field of geriatric rehabilitation, a sub-specialty of geriatric nursing. Counsel asserts that geriatric rehabilitation nursing involves highly specialized skills that are usually attained through completion of a BSN program. Finally, counsel contends that the denial of the petition constituted a violation of due process because the Service (now the Bureau) did not request additional evidence to show that the proffered position is a specialty occupation.

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.¹ However, the mere fact that a nursing position has a title such as "geriatric nurse" does not necessarily mean that it qualifies as a specialty occupation.²

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.)

² 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 Bureau often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (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.

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 is that of a clinical nurse in a geriatric rehabilitation facility. The beneficiary will provide nursing care to geriatric patients using nursing interventions; will assist physicians; and will observe, assess, and record symptoms of geriatric populations, in order to assist them to attain, maintain, regain and sustain optimal health.

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.

Counsel asserts that the proffered position qualifies as a specialty occupation because the duties of the job include "substantial supervision of health care professionals." The *Handbook* does not elaborate on administrative nursing positions within this classification. The nurse memo 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.)" ³ 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 supervision of other registered nurses and

³ *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002), *supra*.

technicians and delegation of nursing responsibilities, this description of the position's supervisory duties 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 nursing home. Indeed, according to the sample "Job Description and Performance Appraisal" form submitted by the petitioner, the job's supervisory duties represent only about 15 percent of the beneficiary's overall responsibilities. Thus, the petitioner has not shown that the proffered position is an administrative position requiring at least a BSN degree. 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 registered nurse. It is noted that the petitioner identified the position as a "registered nurse" position on the ETA 9035 Labor Condition Application. As to the teaching duties referred to by counsel, these duties are among the normal responsibilities of registered nurses in a nursing home setting as described by the DOL at page 268 of the *Handbook*. Therefore, the supervisory and teaching duties of the position are not sufficient to qualify the job as a specialty occupation.

Furthermore, the evidence of record supports the DOL's finding in the *Handbook* that a BSN is not the normal minimum requirement for entry into the occupation. For example, counsel submitted an article published by the American Association of Colleges of Nursing (AACN) entitled "A Vision of Baccalaureate and Graduate Nursing Education: The Next Decade," in which the AACN stated:

Because the majority of RNs do not have baccalaureate or higher degrees, it is important that options for educational mobility be available.

In a press release entitled "Health of Residents in Nursing Homes at Risk Due to Understaffing" the Hartford Institute, New York University Division of Nursing, New York University, stated:

Currently, registered nurses in nursing homes have substantially lower levels of education compared to nurses in hospitals. Many nurses in nursing homes have no training in gerontology or chronic disease management.

In a publication entitled "The Baccalaureate Degree in Nursing as Minimal Preparation for Professional Practice," the AACN noted that as health care shifts increasingly away from hospital-centered inpatient treatment to community health and other outpatient centers, there is a growing demand for nursing personnel who can function with more independence in clinical decision-making and case management. The AACN stated:

Such responsibilities include skill at delegation and, increasingly, will require planning and integrating treatment for patients as they receive care across multiple settings. As such, registered nurses at the entry-level of professional practice *should* possess, at a minimum, the educational preparation provided by a four-year Bachelor of Science degree in Nursing. (Emphasis added.)

The AACN further states:

Many hospitals not already requiring the Bachelor's of Science degree in nursing have established "BSN-preferred" policies for new hires.

The AACN further states:

By 1996, a diploma was the highest educational credential for only 24 percent of RNs, while the number with BSN degrees climbed to 31 percent with 34 percent holding an associate degree. (citing from Division of Nursing. (March 1996). *The Registered Nurse Population: Findings from the National Sample Survey of Registered Nurses*, p, 16. Washington, D.C.: U.S. Department of Health and Human Services, 1995.

While there is a chronic shortage of registered nurses in nursing homes, especially nurses with a BSN and specialized training in gerontology, a BSN is not currently the normal minimum requirement for entry into the occupation of clinical nurse. If anything, the BSN is a preference by many hospitals and outpatient facilities rather than a requirement.

Counsel also submitted material from the website of the University of California School of Nursing, <http://www.nurseweb.uscf.edu>, describing the areas of specialized master's degrees available

within the School of Nursing. According to this material, there are two specialized master's degrees available in the field of geriatric nursing: gerontological nurse practitioner and advanced practice gerontology nursing. These programs have no relevance to the position being offered to the beneficiary, however, as the position is not that of an advanced practice nurse or nurse practitioner, and the petitioner does not require a master's degree in nursing for the position.

Counsel also submitted a press release issued by the Commission on Graduates of Foreign Nursing Schools on December 2, 1999, along with an article dated November 15, 1999, from www.nurseweek.com, entitled "Visas for Foreign Nurses Aimed at Relieving Shortage." Both of these articles refer to the passage of the Nursing Relief for Disadvantaged Areas Act by Congress on November 3, 1999. This legislation created a new nonimmigrant visa category for foreign nurses, H-1C, to allow up to 500 foreign nurses to enter the United States each year to work at medically underserved hospitals in inner-city and rural areas. This program, which was narrowly defined by Congress for the specific purpose of helping to relieve the nursing shortage in medically underserved areas, expired after four years. Since Congress created a separate H-1C classification for nurses, without requiring a BSN degree, it may be presumed that Congress did not intend for nurses to be covered by the H-1B classification. Indeed, if Congress had intended for the nursing shortage to be addressed through the use of the H-1B classification, there would have been no need to create the H-1C classification.

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the Department of Labor's *Dictionary of Occupational Titles* (DOT) (4th Ed., Rev. 1991). However, the DOT is not considered to be a persuasive source of information regarding whether a particular job 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.

The Department of Labor has replaced the DOT with the *Occupational Information Network* (O*Net). Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's *Occupational Outlook Handbook* (Handbook) provides a more

comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Bureau is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

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. § 214.2(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.

In attempt to show that the BSN degree is standard to the industry in parallel positions among similar organizations, counsel submitted two Internet job advertisements for positions in nursing homes for the elderly. One advertised job cannot be considered to be a parallel position because the position is that of a geriatric nurse practitioner. Nurse practitioners are advanced practice nurses who have specialized training leading to an advanced practice certification, a BSN, and additional graduate level education. In this case, the prospective employer requires a master's degree in nursing and three years of clinical nursing experience and one year of experience as a nurse practitioner.

The other prospective employer is seeking registered nurses to train and oversee aides who provide care to frail seniors in their homes and in an adult day health center. The stated educational requirement for this position is "graduate of an accredited college or university." One employer's hiring practice, however, is not sufficient to demonstrate an industry standard. 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 degree. Counsel states that the duties of the proffered position are those of a registered nurse working in the subspecialty of geriatric rehabilitation. Counsel asserts that geriatric rehabilitation involves highly specialized skills which are usually attained through completion of a bachelor's degree program. In support of this assertion, counsel submits documentation from the Journal of Gerontological Nursing, Geriatric Nursing Magazine, the National Gerontological Nursing Association, the Journal of Gerontology, the Association of Rehabilitation Nurses, the National Gerontological Nursing Association, and various other sources associated with rehabilitation and geriatric nursing. This material addresses the duties typically performed by geriatric nurses and advocates methods of training to better enable geriatric nurses to care for the elderly in nursing homes and other settings. Even if the Bureau were to conclude that geriatric rehabilitation is a recognized subspecialty of geriatric nursing, the evidence of record does not support a finding that the duties of a geriatric rehabilitation nurse can only be performed by a registered nurse with a BSN degree. As previously stated, most registered nurses working in nursing homes and similar facilities today do not, in fact, have a BSN or specialized geriatric training.

The various geriatric and gerontological nursing organizations are advocating a higher standard of education and specialized training as a future minimum requirement for geriatric nursing positions rather than describing the current standards in the nursing home industry. Nothing in the job description for the proffered position indicates that the position of a geriatric rehabilitation nurse working at Hanna House 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)

Counsel states that the petitioner has required a BSN for the clinical nurse position since January of 2000. In support of this statement, counsel submits a letter dated December 26, 2000 from [REDACTED] Director of Recruitment Services, University Health Hospitals Health System. Ms. [REDACTED] stated that University Hospitals of Cleveland had hired 73 individuals as clinical nurses in the year 2000, all of whom had BSN degrees. Ms. [REDACTED] provided a list of clinical nurses hired in the year 2000. The list does not, however, specifically identify the clinical nurses who were hired by the facility in 2000. Furthermore, the petitioner did not identify the degree held by each clinical nurse hired in 2000 or provide any evidence of such degrees. Additionally, the petitioner has not provided any information or evidence regarding its hiring practice prior to the year 2000. Finally, it is noted that the petitioner did not submit any prior advertisements demonstrating that University Hospital of Cleveland requires a BSN degree as part of the hiring process for the clinical nurse position. 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). Additionally, it was held in *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence.

Although the petitioner's past hiring practice indicates that it has required a BSN degree for the position since the year 2000, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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.⁴ 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.

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 Hanna House is so specialized and complex that it can be performed only by an individual with a BSN degree.

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.

⁴ 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.

In this case, although the position in question is identified as that of a clinical nurse working in a geriatric rehabilitation facility, 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 and observing, assessing, and recording symptoms of geriatric populations. 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 geriatric rehabilitation facility does not, in itself, demonstrate that the duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a BSN or its equivalent.

In his decision on motion to reopen and reconsider, the director stated:

Item 4 on [counsel's] "inappropriate and erroneous" list is the claim that this particular field is "so specialized" that the duties are "usually" associated with a bachelor's or higher degree. "Usually," rather than "always" or "absolutely." Such a statement clearly leaves doubt if a degree is "required."

On appeal, counsel states that the petitioner is not required by the statute or the regulations to show that the field of geriatric nursing is so specialized and complex that the duties are *always* associated with the attainment of a BSN degree as stated by the director in his decision. Nevertheless, since the petitioner has not shown that the duties of the position are so specialized and complex that they are *usually* associated with the attainment of a BSN degree, the director's usage of the word "always" rather than "usually," although incorrect, constitutes harmless error. 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 has provided several publications from various nursing associations addressing the critical shortage of qualified registered nurses in the nursing home industry in the United States and predicting that the current shortage will reach a

crisis point as the "Baby Boom" generation retires and ages, generating a need for more nursing homes and more qualified nurses to care for the elderly. Nevertheless, the assertion that a shortage exists has no bearing on the question of 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).

On appeal, counsel asserts that the Bureau has violated the equal protection clause of the U.S. Constitution by treating non-nursing "professional occupations" more favorably than similarly situated nursing occupations that are professional in nature, despite the fact that both have to establish the same basic legal requirements for H-1B classification. In support of his assertion, counsel cites the holding reached in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). In that case, the court rejected the Service's (now the Bureau's) interpretation of the statute at section 212(c) that permitted discretionary relief for lawful resident aliens who had briefly left the country after having been convicted of criminal possession of marijuana and then returned, but did not grant such relief to similarly situated aliens who had not left the country after having been convicted of criminal possession of marijuana. The AAO is without authority to determine whether the Bureau has violated the equal protection clause of the Constitution in arriving at its determination that the proffered position of clinical nurse does not qualify as a specialty occupation. Cf. *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (B.I.A. 1991). The jurisdiction of the AAO is limited to that authority specifically granted to the Bureau of Citizenship and Immigration Services, through the regulations at 8 C.F.R. § 103.1(f)(3)(iii). Accordingly, the Bureau has no authority to address the petitioner's constitutional claim.

Pursuant to 8 C.F.R. § 103.2(b)(8), an application or petition shall be denied if there is evidence of ineligibility in the record, notwithstanding any lack of required initial evidence. In other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the

Bureau finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Bureau shall request the missing initial evidence, and may request additional evidence.

Counsel contends that the denial of the petition is erroneous and in violation of due process because the director did not issue a request for additional evidence and there was no obvious evidence of ineligibility in the record of proceeding. After careful review of the record of proceeding, it is concluded that there is no obvious evidence of ineligibility in the record. Therefore, the director should have issued a Form I-797 Request for Additional Evidence affording the petitioner the opportunity to present additional evidence in support of the petition. Nevertheless, the petitioner and counsel have now had additional opportunities to provide any additional evidence they deemed necessary to show that the proffered position is a specialty occupation, initially on motion to reopen and reconsider, and again on appeal. Therefore, in the interest of entering a more timely decision, the AAO will not remand this matter for issuance of a request for evidence.

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.