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

ADMINISTRATIVE APPEALS OFFICE
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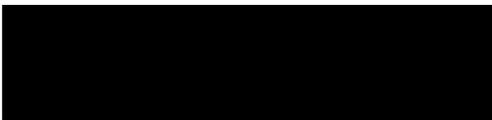
File: SRC 01 130 50823 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

MAY 19 2003

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, Texas Service Center, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the Administrative Appeals Office on motion to reconsider. The motion is granted. The previous decisions of the director and the Administrative Appeals office are affirmed. The petition is denied.

The petitioner is a Florida company that provides recruitment, placement, and consultation services for the health care field. At the time of filing the initial petition, it employed 2 persons and had a projected gross annual income of \$4 million dollars. It sought to temporarily employ the beneficiary at Palmetto General Hospital in Hialeah, Florida, as a critical care registered nurse for a period of three years.

Pursuant to 8 C.F.R. § 103.5 (a) (3), a motion to reconsider must:

state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, the petitioner states that the AAO overlooked the applicable language in the regulations and statute which states that a specialty occupation is one that requires a "bachelor's degree or its equivalent." (Emphasis in original).

In addition, counsel states that he provided a large body of evidence to demonstrate that the position of critical care nurse was one that required an individual who held a bachelor of science in nursing degree or equivalent work experience. According to counsel, the only evidence to the contrary presented by the Bureau was the registered nurse classification in the Department of Labor's (DOL) *Occupational Outlook Handbook*. Counsel asserts that this evidence is flawed because the *Handbook* is silent on the issue of work experience equivalency as well as the job duties in the critical care nursing environment. Counsel asserts that the *Handbook* classification refers to duties in the general nursing care environment. Counsel presents no pertinent precedent decisions to support his assertions.

With regard to the first issue raised by counsel, namely, that the Bureau overlooked the applicable language in the regulations and statute which refers to a bachelor's degree or its equivalent, this appears to be a reference to the adjudication of various criteria of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

Counsel correctly asserts that a specialty occupation may be one that requires either a baccalaureate degree or higher, or its equivalent. However, in the instant petition, no evidence in the record demonstrates that individuals with bachelor of science degrees in nursing or their equivalent are routinely recruited and hired for parallel critical care nursing positions within organizations similar to Palmetto General Hospital, the actual employer of the beneficiary. As previously stated, Palmetto General Hospital is not seen as similar in size and scope to institutions such as Jackson Memorial Hospital, the Ryder Trauma Center, or the Veterans Administration Hospital system in Miami. In addition, the letter from [REDACTED] Chief Nursing Officer of Palmetto Hospital, contained no documentary evidence that Palmetto Hospital required its critical care nurses to hold BSN degrees at the time of hiring, or that Palmetto Hospital's critical care nurses presently hold the education, training, and experience equivalency of a bachelor of science degree in nursing. Accordingly, on motion, the petitioner has not established that the degree requirement or its equivalent is common to the nursing industry in parallel positions among similar hospitals, or that the actual employer normally requires a baccalaureate degree in nursing or its equivalent for the proffered position.

With regard to the second issue raised by counsel, the job duties and educational requirements for a critical care nurse are not examined in the *Handbook*. However, such a nursing occupation is examined elsewhere. On November 27, 2002, the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Service, (Bureau) issued a policy memorandum on H-1B nurse petitions (nurse memo).¹ The memo looked first at advanced practice registered nurses (APRNs) who hold advanced practice certification with a prerequisite bachelor of science degree in nursing as well as some additional graduate level education. On page 3, the memo looked at another job category called nursing specialties. The memo mentions that an increasing number of nursing specialties, such as critical care and peri-operative, require a higher degree of knowledge and skills than a typical RN or staff nurse position. In addition the memo appears to suggest that such specialties may require certification examinations for nurses who are not advanced practice nurses, but who possess additional clinical experience.

The memo goes on to state:

In such nursing specialties, the employer must demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties

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).

are sufficiently specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of bachelor's or higher degree (or its equivalent).

Nevertheless, 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. 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 (or its equivalent) as the minimum for entry into the occupation as required by the Act. It should be noted that there were no new affidavits submitted by the petitioner in the instant motion to reconsider. In addition, while the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the specialized and complex nature of the position's duties, 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 the instant petition, the record does not contain any indication that the proffered position requires a certification similar to either category mentioned in the nurse memo, namely, the APRN position with requisite graduate level studies or the non-APRN position with requisite certification based on additional clinical experience. In addition, the initial decision was adjudicated prior to the issuance of the nurse memo. Thus it does not appear that the Bureau based its initial decision on an incorrect application of the law or Bureau policy in either issue raised on motion.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Upon review of the issues raised in the motion to reconsider, the petitioner has not sustained the burden of overcoming the legal basis for the initial decision. Accordingly, the previous decisions to deny the petition will be affirmed.

ORDER: The previous decision of the Administrative Appeals Office, dated February 14, 2002, is affirmed. The petition is denied.