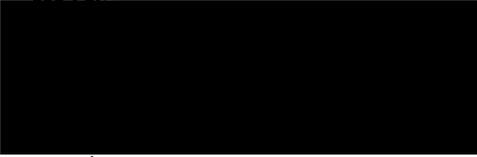


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



File: EAC 01 025 51197 Office: VERMONT SERVICE CENTER Date: MAY 19 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



PUBLIC COPY

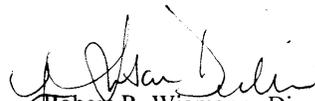
INSTRUCTIONS:

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, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New Jersey nursing and rehabilitation center that has over 150 employees and a gross annual income of \$10 million. It seeks to temporarily employ the beneficiary as a sub acute unit nurse for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation based on the specialized and complex nature of the specific duties.

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 proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on October 30, 2000, the petitioner identified the position as sub acute unit nurse and described the duties of the proffered position as follows:

This position requires theoretical and practical body of highly specialized knowledge to enable one to fully perform the clinically complex, ultra high rehab and extremely medically complex functions which include, but [are] not limited to, the following:

- Neurological assessment
- Cardiac assessment
- Gastrointestinal assessment
- Integumentary system assessment
- GU assessment
- Mental status assessment
- Oral assessment
- Restorative potential assessment
- Visual assessment
- Hearing assessment
- Reproductive assessment
- Pain assessment

The petitioner also provided a two-page description of the job duties of the position, some of which are identified below:

Actively help the Subacute Unit Manager plan, develop, organize, implement, evaluate and direct the Subacute Unit, as well as its programs and activities, in accordance with current rules, regulations and guidelines that govern the long-term care facility.

Develop methods of coordination of nursing services with other resident services to ensure the continuity of the residents' total regimen of care.

Assist with development, implementation and maintenance of an ongoing quality assurance program for the unit.

Participate in survey (inspections) made by authorized government agencies.

Provide written and/or oral reports of nursing service programs and activities as required, or as may be directed by such committees.

Participate in regularly scheduled reviews for the discharge plans as required.

Recommend the number and level of nursing personnel to be employed.

Develop, maintain and periodically update the written procedure for ensuring that professional nursing personnel, including private duty nurses, have valid and current licenses as required by the State.

Review complaints and grievances made or filed by unit personnel.

Provide the Subacute Unit Manager and Nurse Supervisor with information relative to the nursing needs of the residents and the unit's ability to meet those needs.

Monitor medication passes and treatment schedules to assure that medications are being administered as ordered and that treatment is provided as scheduled.

Assist with all aspects of staff development.

Develop and implement procedures for the safe operation of all nursing service equipment.

Develop and implement procedures that ensure nursing service supplies are used in an efficient manner to avoid waste.

The petitioner stated that "the facilities employ subacute staff nurses, unit managers and supervisors, all of whom are B.S. holders." According to the petitioner, regular staff nurses with a bachelor of science degree and even with a number of years of progressively responsible experience cannot perform the unique and technical requirements of the position in a subacute setting. The petitioner stated that the job required a broader scope of nursing practice that involved education, supervision and discipline of subacute unit staff, as well as formulation of guidelines and policies.

On January 28, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested evidence that in the petitioner's facility and in the medical industry, a baccalaureate degree in a specific field of study is a standard minimum requirement for the proffered position. In addition the director requested information on how many individuals the

petitioner employed in similar positions, and the educational level and specific studies of these individuals.

In response, the petitioner submitted various newspaper articles that discussed the dimensions of the nursing shortage in the United States. In addition, the petitioner stated that the proffered position met the criteria for specialty occupations based on the clinically complex nature of the position's responsibilities that require ultra high rehabilitation. The petitioner also discussed the differences in coursework and clinical training between a four-year bachelor of science degree in nursing and an associate's degree in nursing. Finally, with regard to the specific position, the petitioner identified the following diagnoses for patients in its subacute unit with some corresponding and necessary job skills:

- Acute exacerbated COPD
- S/P Coronary Arterial Bypass Grafts 3rd day and up post op
- Infected wound to the sternum requiring packing
- IV PICC LINE antibiotics
- Fresh trachs to be weaned and decannulized
- Fractures with resident requiring Fragmin, Coumadin or Lovenox therapy and titrations
- HIV related diseases with respiratory pneumonia
- Peritoneal dialysis
- Uncontrolled brittle diabetes
- S.P G-Tube 2nd day post-op

With regard to the assessment duties mentioned previously in the initial petition filing, the petitioner provided the following more specific descriptions for these assessments:

1. Assess all the cranial nerves for neurological purposes.
2. Use an ophthalmoscope to check the ears, nose and eyes.
3. Do a true cardiac assessment for unusual occurrences such as murmurs, etc.
4. Do an indepth assessment of the respiratory tract including such things as particular breath sound and respiratory excursion.
5. Do an assessment of the GI tract to check with stethoscope of bowel and sounds [sic]
6. Assess the integumentary system for any unusual skin conditions.
7. Assess the musculoskeletal system for abnormalities.

On July 2001, the director denied the petition and stated that the petitioner had not established any of the four criteria outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A) for specialty occupations.

On appeal, counsel resubmits materials from the initial petition filing and submits a list of twenty-eight medical facilities that

he identifies as the following: "subacute (skilled) and long-term care centers in New Jersey that preferably require a B.S. degree in nursing in their subacute units for certain RN, middle-management positions, such as subacute unit nurses and managers, supervisors, MDs Coordinators and infection control coordinators." [sic]

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 as 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)

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 as outlined in the 2002-2003 edition of the *Handbook* on page 268 are as follows:

Registered nurses (RNs) work to promote health, prevent disease, and help patients cope with illness. . . . 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. . . . While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

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.

The *Handbook* does not elaborate on administrative nursing positions

within the registered nurse classification, although the *Handbook* states the following about head nurses or nurse supervisors:

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.

To the extent that a two-year associate's degree in nursing is sufficient to perform the duties of an entry level registered nurse, it does not appear that a bachelor of science degree in nursing is the minimum requirement for entry into the nursing field. Accordingly, the *Handbook* does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for an entry level nursing position.

The evidence provided for the record with regard to the actual nursing or administrative nature of the proffered position is unclear. This is based in part on the various titles used by the petitioner to describe the position. In the instant petition, the petitioner used the title of charge nurse in the Labor Condition Application (LCA), while it referred to the position as a subacute unit nurse in its response to the director's request for evidence. On appeal, the beneficiary is identified as the "subacute unit manager". In addition, the materials provided by the petitioner in the initial filing appear to describe two distinct positions: one for a position with extensive nursing duties and a second for an administrative position with very few direct nursing responsibilities. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this reason, both the classifications of nursing positions beyond entry level nurse and of nurse administrators will be examined in this proceeding.

On November 27, 2002, the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services, (Bureau) issued a policy memorandum on H-1B nurse petitions (nurse memo)¹. This 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. Dep't of Labor, *Occupational Outlook Handbook* at 75.)" The Handbook reference is to the classification of medical and health

¹ Memorandum from [REDACTED] Executive Associate Commissioner, INS 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).

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.

With regard to the subacute nursing position outlined by the petitioner, the nurse memo previously identified in this proceeding, also comments on nursing positions that are beyond entry-level positions. On page two, the memo refers to certified advanced practice registered nurses (APRNs) and contrasts the educational requirements for APRNs with those of general registered nurse positions. The policy memo also acknowledges that an increasing number of nursing specialties, such as critical care and operation room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.

With regard to these non-APRN nurses working in specialty areas, the memo states that certification examinations are available to registered nurses who are not advanced practice nurses, but who may possess additional clinical experience. Subacute care is not mentioned as a category for certification examination; however other similar areas such as rehabilitation nursing, and critical care nursing are mentioned. *Id* at 3. To date the petitioner has not indicated any need for certification examinations in a specific area such as subacute care for the proffered position. The record is not sufficient to establish that the proffered position would fall under the general guidance provided in the nurse memo with regard to positions employing non-APRN nurses that may be H-1B eligible.

To the extent that the petitioner has not clearly established the exact nature of the proffered position for the record, and that position as described does not appear analogous to either a nursing administrator job with regard to its higher educational requirements or to the non-APRN nursing positions, the petitioner has not established that the position requires a baccalaureate degree as a minimum requirement for entry into the job.

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. In the instant petition, to establish the industry standard, the petitioner submitted a list of twenty-eight long term and subacute skilled care centers in New Jersey. The petitioner claims that all the facilities require that nurses holding jobs in certain areas have a bachelor of science degree in nursing. Among the positions listed are subacute unit nurses. The origin of this list is unidentified, and the petitioner provided no documentation, such as job listings from any of the organizations on the list, to substantiate its assertion with regard to the educational requirements of other medical facilities for subacute nurses. 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 submitted no documentation that any professional nursing association has made a bachelor's degree a requirement for entry into the field of subacute nursing. 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. The petitioner submitted for the record a list of medical diagnoses for patients seen in the subacute unit interspersed with some indications of the medical tasks to be performed with such patients. While the list provides more specific information with regard to the activities of the petitioner's subacute unit, the record is not clear that the beneficiary would be providing such direct patient care. If the petitioner's final description of the position as a subacute unit manager is the actual definition of the proffered position, this list does not provide information on the unit manager position. Without more persuasive evidence, the petitioner has not established either the industry standard or that the position is so unique or complex that it can only be performed by a person with a baccalaureate degree.

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 provided no substantive evidence with regard to the educational requirements for previous or present nurse hires in its subacute unit. It only provided a generic assertion in the initial filing that "facilities" employ subacute nurses all of whom have bachelor of science 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, supra*. Of more probative weight would be copies of job announcements produced by the petitioner to recruit candidates for the proffered positions, or a list of registered nurses working in the petitioner's subacute unit along with proof of their educational credentials. Without more persuasive evidence, the petitioner employer 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 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 CFR § 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 duties of certain 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 or higher degree (or its equivalent.) The petitioner has submitted no such affidavits from independent experts with regard to the proffered position. The evidence already submitted for the record which includes newspaper articles on the nursing shortage and a list of diagnoses and nursing skills required by the petitioner's subacute unit is not found persuasive enough to establish this criterion. For example, the petitioner listed peritoneal dialysis as a diagnosis for a patient received in its subacute unit; however, no additional information is provided as to what subsequent nursing care for this diagnosis would be viewed as specialized or complex. Without more persuasive evidence, the petitioner has not established this criterion. Accordingly, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.