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

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



File: LIN 02 226 53978 Office: NEBRASKA SERVICE CENTER Date:

OCT 14 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:

SELF-REPRESENTED

**PUBLIC COPY**

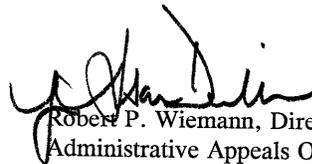
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Alaska acute care and long term care center and hospital with 190 employees and a gross annual income of \$20,382,262. It seeks to temporarily employ the beneficiary as a day charge registered nurse for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, the petitioner asserts that an inaccurate job description was supplied with the initial application and submits further documentation.

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 Nebraska Service Center on July 3, 2002, the petitioner identified the position as day charge registered nurse and described the duties of the proffered position as follows: "The RN/Charge Nurse supervises the day shift activities assuring that established procedures and standards are followed. Performs initial and continuing assessment of residents and coordinates their plan of care."

On July 10, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested evidence as to how the petitioner met the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) with regard to establishing that the proffered position was a specialty occupation. In addition the director requested a certified Labor Condition Application (LCA), Form ETA 9035, and a photocopy of the beneficiary's Form I-94 nonimmigrant arrival/departure record. The director also requested evidence as to how the beneficiary was qualified to perform the duties of the proffered position.

In response, the petitioner submitted a job description for a position entitled RN [Registered Nurse] Level I and II that listed the following duties:

Essential Functions:

1. The RN provides direct patient care in accordance with the facility and department policies and procedures and with currently accepted standards of practice. The nurse admits patients to the nursing unit assessing needs, identifying nursing problems, establishing priorities of care needed to return the patient to optimal health, and documenting appropriate admission information.
2. Nursing activities also include assisting in the implementation of regiments established by other health care disciplines. This position formulates and implements a formal discharge plan based on patient needs, goals, and available resources.

3. The RN makes patient rounds, observing patient condition and vital signs, assessing findings and recording observations in the patient's chart. This position also assists physicians during their patient rounds and treatment. This includes preparing the patient for examination, setting up equipment needed for treatment, carrying ordered treatments and documenting appropriately, and explaining to and instructing the patient in necessary treatments as appropriate.
4. He/she transcribes and reviews physician orders and assures that necessary arrangements are made with other patient care departments as ordered.
5. The RN reviews patient medication records and prepares, administers, accurately records medication and IV solutions, and starts IV's.
6. He/she provides patient and family instruction regarding the patient's care throughout hospitalization and appropriate discharge teaching upon discharge.

Secondary Functions:

1. The RN may participate in unit activities such as serving on nursing committees, working on individual patient care projects, and helping with hospital activities in the community.
2. The RN maintains his/her skills and knowledge by regularly attending inservices [sic] and keeps informed of unit activities by participation in staff meetings and reading policies and procedures and other communications.
3. The RN participates in keeping the unit clean, well stocked, and ready for patient care. Contributes actively to unit stability and function.

Under the knowledge, skills and abilities section of the job description, the petitioner stated:

The position of RN requires current licensure as a registered nurse in the State of Alaska. The RN must be able to administer effective patient care and assessment, be able to follow verbal and written instructions, be able to learn and follow hospital, department, and nursing unit procedures and practices, and be able to maintain accurate records. A current BLS certification is required or must be obtained within 3 months from the date of hire. ACLS certification must be obtained within 6 months of beginning to work in the ICU. Neonatal resuscitation certification

must be obtained within 6 months of beginning to work in Labor and Delivery. These certifications (ACLS and NNR) must be renewed within 6 months of their expiration date.

The petitioner also submitted documentation with regard to the beneficiary's qualifications to perform the duties of the proffered position, as well as the requested I-94 document. The petitioner submitted a letter from the Alaska Department of Labor, Research and Analysis Division with regard to the prevailing wage rate for a registered nurse in western Alaska. The copy of the LCA submitted by the petitioner was not certified.

On July 23, 2002, the director denied the petition and stated that the petitioner had not established that the proffered position, as outlined in the Position Description for RN I and II, was a specialty occupation. The director pointed out that the petitioner's position description for RN I and II required current licensure as a registered nurse in the State of Alaska, and that it did not require the possession of a bachelor of science degree in nursing. The director determined that none of the criteria outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A) had been established.

On appeal, the petitioner submits a revised I-129 petition, along with a new job description for a position entitled RN Level 4. The petitioner explains that at the time the original application was filed, it did not realize the importance of the job description. Due to this fact, it provided Citizenship and Immigration Services (CIS) with a job description that had not been updated. According to the petitioner, all of the job descriptions at the medical center have been updated as of July 2002. In addition, the petitioner is working toward the implementation of a clinical ladder system that will require registered nurses to demonstrate special skills and/or higher preparation for the different levels of registered nurse positions available.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 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)**

CIS 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 original job description submitted by the petitioner described the position of Nurse Level I and II. This job description states job duties for an entry level nursing position within the

petitioner's health facility. The job description submitted by the petitioner on appeal outlines the duties of another position entitled Nurse Level 4. This latter position contains duties distinct from those contained in the initial job description. For example, the beneficiary would spend 40 percent of her time involved in serving as a resource person for clinical issues and providing education to other staff, as well as providing direct nursing services to patients. The educational qualifications required for the latter job description is the completion of a bachelor of science degree in nursing, or its equivalent, from an accredited nursing program. The job description appears to be for a position beyond the entry-level nursing job described in the initial petition.

With regard to the two job descriptions, the petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248,249 (Reg.Comm.1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. On appeal, the petitioner submits a job description that is fundamentally different than the initial job description. This second job description will not be considered in the present proceeding. The analysis of this criterion will be based on the initial job description for Nurse Level I and II 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 proffered position does not appear to be an administrative position as outlined in the *Handbook*. 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.

The proffered position does not appear to be a head nurse or nurse supervisor. These two positions would also not be viewed as specialty occupations. 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 proffered position. 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.

With regard to more recent policy determinations on nursing positions, on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo)<sup>1</sup>. 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 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.

<sup>1</sup> 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).

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. The job duties outlined by the petitioner in the nurse level I and II job description are not mentioned as a category for certification examination. *Id* at 3. Although the petitioner has indicated the need for certification examinations in its proffered position in neonatal resuscitation (NNR), basic life support (BLS), and advanced cardiac life support (ACLS), these certifications are not of the same caliber as those identified in the nurse memo such as Clinical Nurse Specialists (CNS), Nurse Practitioner (NP), or certified nurse-midwife (CNM). As such, 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 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. Accordingly the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

**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 CIS 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, the petitioner submitted no further documentation to establish this criterion. 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 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 no further documentation in addition to the initial job description with regard to this criterion. 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. On appeal, the petitioner asserts that it is attempting to create a clinical ladder system, which would require registered nurses to demonstrate special skills and/or higher preparation for the different levels of positions available. However, the initial job description submitted by the petitioner does not establish that such a system existed in the particular medical department in which the beneficiary would be employed at the time of filing the initial petition. Accordingly the petitioner has not established this criterion.

**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)**

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 is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor of science or higher degree in nursing (or its equivalent.) The petitioner has submitted no such affidavits from independent experts with regard to the proffered position. Without more persuasive evidence, the petitioner has not established any of the criteria of 8 C.F.R. § 214.2(h) (4) (iii) (A). Accordingly, it is

concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the petitioner has never submitted a certified LCA for the instant petition. Pursuant to 8 C.F.R. § 214.2 (h)(4)(i)(B)(1), the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed, before filing a petition for H-1B classification in a specialty occupation.

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.