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

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



OCT 23 2003

File: EAC 02 134 50668 Office: VERMONT SERVICE CENTER Date:

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:



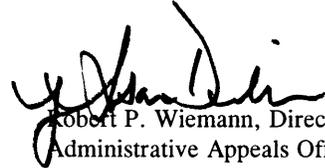
INSTRUCTIONS:

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

The petitioner is a non-profit medical facility that provides health care services to the general public. It has 7000 employees and an annual operating budget of \$350,000,000. The petitioner seeks to employ the beneficiary as a registered nurse (Specialist/Respiratory Care) for a period of three years. The director denied the petition on the grounds that the proffered position was not a specialty occupation, and that the beneficiary did not hold the equivalent of a bachelor's degree in nursing.

On appeal, counsel states that the proffered position is a specialty occupation. Specifically, counsel asserts that the petitioner normally requires a minimum of a bachelor's degree for entry into the position, and that the duties of the proffered position are so specialized and complex that only a person with a baccalaureate level degree, or its equivalent, is qualified to perform the duties.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the 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 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 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.

When determining whether a particular job qualifies as a specialty occupation, the specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that the AAO considers. The beneficiary's duties were detailed as follows in the I-129 petition:

[The] employee will provide specialized, advanced nursing care in employer's Respiratory Care Unit, including overseeing the administration of oxygen therapy, humidity and aerosol therapy, pulmonary rehabilitation, tracheostomy care, diagnostic testing, specialized pre and post operative care, [and] physiotherapy.

Subsequent to the filing of the I-129 petition, the director requested additional evidence. Specifically, the director asked that the petitioner submit evidence proving that the proffered position required the services of an individual with at least a baccalaureate degree in nursing, along with a list of nurses currently working in the petitioner's critical care unit (CCU), their salaries and educational backgrounds. The director also wished to review copies of job advertisements for the proffered position, and the internal job posting published by the petitioner's human resource department.

In response to the director's request for evidence, the petitioner provided the following:

- **EXPANDED DUTY DESCRIPTION**

The person whom we employ for this temporary, professional position of registered nurse/respiratory care will have responsibility for and be directly and critically involved in multiple aspects of pulmonary rehabilitation in the application of respiratory therapy of COPD patients including assessments of heart rate, ECG rhythm, blood pressure, symptoms during activity, arterial oxygen saturation values, PaO₂, oxygen consumption rate, minute ventilation, respiratory rate and carbon dioxide production. In addition, this employee will be required to perform cardiac monitoring of arterial blood gas measurements, pulse oximetry reading and analyze arterial oxygen saturation.

In performing these advanced care duties and responsibilities this employee will be required to use and administer the most highly advanced, state-of-the-art technical equipment in use by any medical facility throughout the United States. The use and administering of such sophisticated equipment requires an extensive level of training and background to be considered minimally proficient in its use and operation of at least a college Bachelor's degree in Nursing or its equivalent in education and experience. Such equipment includes oropharyngeal, nasopharyngeal and endotracheal tubes, pressure cycle, volume cycle and time cycle ventilators, incentive spirometer and other equipment.

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 petitioner has not met any of the above requirements to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary fall within the duties of a registered nurse. In the *Occupational Outlook Handbook, 2002-03, (Handbook)* at 268, the Department Of Labor describes, in part, the duties of a registered nurse:

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. While State laws govern the tasks that RNs may perform, it is usually the work setting that determines their daily job duties.

Hospital nurses form the largest group of nurses. Most are staff nurses, who provide bedside nursing care and carry out medical regiments. They also may supervise licensed practical nurses and nursing aides. Hospital nurses usually are assigned to one area, such as surgery, maternity, pediatrics, emergency room, intensive care, or treatment of cancer patients. Some may rotate among departments.

A review of the *Handbook* finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a registered nurse.

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. A.D.N. programs, offered by community and junior colleges, take about 2 to 3 years. About half of the 1,700 RN programs in 2000

were at the A.D.N. level. B.S.N. programs, offered by colleges and universities, take 4 or 5 years. More than one-third of all programs in 2000 offered degrees at the bachelor's level. Diploma programs, administered in hospitals, last 2 to 3 years. Only a small number of programs offer diploma-level degrees. Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses. *Id* at 269.

On November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and 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 As stated in the nurse memo, certification examinations are available to registered nurses who work in such specialties and possess additional clinical experience, but who are not advanced practice nurses. The mere fact, however, that a nursing position has a title such as "critical care", or "registered nurse (specialist/respiratory care)" in this instance, does not necessarily mean that the position qualifies as a specialty occupation.

The AAO looks beyond the title of the position and determines, from a review of the position's duties 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 (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 AAO must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title. Here, the duties of the position do not entail any specialized or complex responsibilities that involve the theoretical and practical application of a body of highly specialized knowledge. As noted above, the duties ascribed to the position, which include assessment of heart rate, ECG rhythm, blood pressure, symptoms during activity, arterial oxygen saturation values, PaO₂, oxygen consumption rate, minute ventilation, respiratory rate carbon dioxide production, and monitoring of arterial blood gas measurements, etc., are routine to many registered nurse positions. The fact that the beneficiary would perform these duties within a critical care unit with medically complex cases, does not elevate the duties complexity. CIS cannot find, based upon the current record,

¹ Memorandum from Johnny N. Williams, 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).

that the job fits the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has also failed to establish that the proffered position meets any of the remaining three criteria for qualification of the position as a specialty occupation. Any of the three career paths noted above are sufficient for the beneficiary to perform the duties associated with the offered position. There is no requirement that a nurse have a baccalaureate or higher degree, or its equivalent, as a minimum requirement for entry into the position. Thus, the petitioner has not established compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, or that the position is so complex or unique that it can be performed only by an individual with a degree. The petitioner submitted numerous job advertisements in an attempt to establish that certain nursing positions now routinely require bachelor's degrees in the industry. Many of those advertisements did not, however, require a bachelor's degree, but simply stated that bachelor's degrees were preferred. Likewise, CIS is not persuaded by the opinion of Jayne R. Betts, Director of Nursing at Westchester Medical Center at Yonkers, New York, that it is standard practice in the industry to require a BSN degree for a registered nurse/respiratory care in a CCU. Mrs. Betts' statement is an uncorroborated assertion, and she offers no evidence supporting her opinion. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has accordingly, failed to establish compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner indicated that it employs only nurses with bachelor's degrees in critical care medicine. The petitioner's self imposed hiring standards, however, are not crucial to the determination of whether the proffered position qualifies as a specialty occupation. The determining factor is whether the position involves the theoretical and practical application of a body of highly specialized knowledge requiring a bachelor's degree for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5th Cir. 2000). The duties of the offered position do not require such highly specialized knowledge. Compliance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has, therefore, not been established.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Finally, the director determined that the petitioner did not hold the equivalent of a bachelor's degree in nursing. The petitioner presented a credentials evaluation from International Credentials Evaluation and Translation Services. That evaluation determined that the beneficiary's foreign education was equivalent to three years of academic study toward a Bachelor of Science Degree in Nursing from an accredited institution in the United States. The evaluator then determined that the beneficiary had the equivalent of a Bachelor of

Science Degree in Nursing based upon her foreign education, plus 15 years 9 months of prior work experience.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184 (i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) completion of such experience in the specialty equivalent to the degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the beneficiary must:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such

credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent or the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In this instance, the record does not establish that the evaluator is qualified to render an opinion of degree equivalence based upon the beneficiary's work experience. There is no proof in the record that the evaluator possesses authority to grant college-level credit in the specialty for training and experience as required by 8 C.F.R. § 214.2 (h)(4)(iii)(D)(1). The evaluation is, therefore, insufficient to establish that the beneficiary is qualified to perform the duties of 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.