

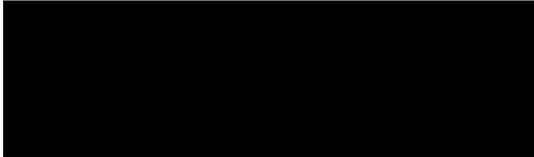
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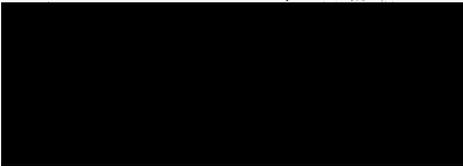
FILE: EAC 02 073 50099 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



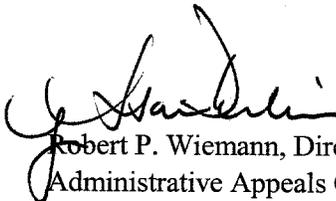
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a hospital that seeks to employ the beneficiary as a registered nurse (RN) in its surgical intensive care unit (surgical ICU). In order to employ the beneficiary, the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The evidence of record indicates that the petitioner is a teaching hospital in a large metropolitan area. According to the petitioner, duties of the surgical ICU position require a RN with at least a bachelor of science degree in nursing (BSN). Among the reasons cited for the BSN requirement are the critical-care nature of surgical ICU nursing and the fact that the petitioner's surgical ICU nurses must work with doctors in training. According to the petitioner, these nurses must be able to identify and take corrective action on mistakes that such doctors may make. Also according to the petitioner, the position is not supervisory, but it fully engages its nurse in "highly specialized critical care" of patients of all ages who are in very serious condition after any type of surgery.

The petitioner's submissions include documentation (1) to the effect that the Department of Veterans Affairs (VA) is now requiring a BSN for positions such as the one proffered here, and (2) reflecting that the American Association of Colleges of Nurses (AACN) "calls for the [BSN] as the minimum educational requirement for professional nursing practice."

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director relied, in part, on the information in the Department of Labor's *Occupational Outlook Handbook (Handbook)* to the effect that a BSN is not yet a normal requirement for RN positions similar to the one proffered here.

On appeal, counsel emphasizes the complexity of the proposed duties in the context in which they are to be exercised, namely, a busy teaching hospital in a large metropolitan area.

The AAO has determined that the director's decision to deny the petition was correct. As discussed below, the evidence of record does not establish the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A).

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1), which provides for specialty occupation qualification of those positions whose normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties. The VA and AACN documents that the petitioner submitted into the record are themselves evidence that the healthcare industry has not yet established a BSN as a standard requirement for RN positions such as the one proffered here. Furthermore, the *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, includes ICU positions among those which are filled by RNs with associate degrees or two or three-year hospital diplomas, as well as BSNs.

Next, the evidence of record has not satisfied the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) by establishing that a degree requirement is common to the industry in parallel positions among similar organizations. The AAO noted counsel's statement:

Among the university hospitals in the area, which require operating room and Surgical ICU nurses, which are critical care nurses, [a BSN] is required as an industry standard. University hospitals in this area cannot allow their critical care units to operate with registered nurses who have less than a baccalaureate degree or their equivalent.

The assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no documentation in

the record to support counsel's assertion to the effect that teaching hospitals uniformly require a BSN for their surgical ICU nurses.

Factors often considered by CIS when determining this criterion include: whether the Department of Labor's *Occupational 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." See *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)).

As already discussed, the *Handbook* does not report an industry-wide degree requirement for the type of position proffered here. The record also lacks evidence from firms, individuals in the industry, or professional associations about routinely recruiting and employing only individuals with a BSN.

The AAO also found that the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), that is, as one that is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The record contains no persuasive evidence that the proffered position is unique from or substantially more complex than surgical ICU nurse positions at hospitals that do not require a BSN. It is worth repeating that statements by counsel that are not substantiated by documentary evidence do not constitute evidence. See *Matter of Obaigbena* and *Matter of Ramirez-Sanchez, supra*. Likewise, a petitioner's conclusions that are not substantiated by evidence in the record have no evidentiary weight. 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).

Next, the past-hiring-practice criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3) is not a factor. The petitioner presented no documentation relevant to this criterion, and it does not assert this as a basis for approval of the petition.

as the petitioner presented no documentation relevant to this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. No evidence in record invalidates the *Handbook's* information to the effect that RN positions, including those in an ICU, are not normally associated with a BSN.

The AAO notes that 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 require a higher degree of knowledge and skill than a typical RN staff nurse position.<sup>1</sup> The evidence of record, however, does not establish that performance of the proffered position would require a level of skill and knowledge associated

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<sup>1</sup> 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).

exclusively with a BSN. It appears that the proffered position is within the performance range of an RN with an associate degree or hospital diploma.

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.