

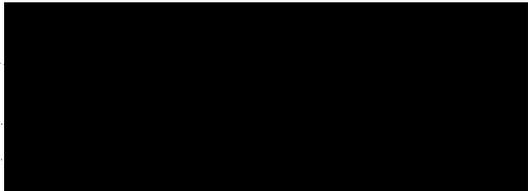
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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship
and Immigration
Services



File: EAC 02 092 53933 Office: VERMONT SERVICE CENTER

Date: **MAR 04 2004**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 staff nurse in a post anesthesia Critical Care Unit (PACU). The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) (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) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a staff nurse in a post anesthesia intensive care unit. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's letter, dated January 14, 2002, in support of the petition; and the petitioner's response to the director's request for evidence. According to

this evidence, the beneficiary would perform duties that entail, in part, working with a group of specially trained doctors and surgeons to provide care for patients in the post anesthesia critical care unit. This unit specializes in patients who have had major medical problems from disease or accident, including all types of neurosurgery, trauma, thoracic, vascular, major gastrointestinal and other complicated surgery, or who are post surgical patients with medical complications, or who are recovering from anesthesia. The petitioner described the position as utilizing high technology, advanced instrumentation and specially designed computer software. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in nursing (BSN).

The director denied the nonimmigrant visa petition and cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and its classification of registered nurses. The director stated that, according to the *Handbook*, an individual does not need to possess a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, counsel states that the duties of critical care units in a university hospital are so complex that a nurse without a baccalaureate degree could not fill them. Counsel states that the duties involve administrative duties and that the position is made much more complicated because student doctors may be providing the medical care. Counsel states that the positions identified on the LCA were all for critical care nurses, and that the number sought was a small fraction of all the registered nurses employed in the hospital. In addition, counsel examines the differences in curricula between four-year nursing programs and programs with only two or three years of instruction. Counsel draws attention to the coursework in four-year programs that teach care of the aged in depth, which is not taught in any great depth in an associate degree in nursing program. Counsel submits no further documentation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The petitioner referred to the position as a Staff Nurse position in its job description submitted in response to the director's request for further evidence. In addition, the job advertisements submitted by the petitioner list the PACU positions under the generic title of staff nurse. Therefore the position in the instant petition is viewed as a staff nurse 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.

On appeal, counsel states that the position will involve administrative duties, but does not provide any more details on this job duty. The initial petition and explanation of the proffered position did not mention any major administrative duties. With regard to administrative positions, on November 27, 2002, CIS 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. Dept 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.

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).

With regard to the post anesthesia critical care unit 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. 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 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 established any administrative component to the proffered position for the record, and 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.

Regarding parallel positions in the petitioner's industry, the petitioner also submitted a list of thirty-one I-797 approval notices for nurse petitions for rural areas that it stated had been approved by the Vermont Service Center. The petitioner stated that similar medical facilities utilizing nurses in critical care units prefer to hire individuals with baccalaureate in nursing degrees. According to the petitioner, this is the industry standard, although due to the reality of a shortage of nurses presently, medical facilities cannot adopt this preference as a policy. The petitioner also submitted to the record a U.S. Department of Veterans Affairs directive, dated 1999, that outlined the department's new required qualifications for its nursing staff. In addition, to establish the industry standard, counsel stated that it had attached letters from similar medical facilities to the record; however no such letters are found in the record. 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).

It should also be noted that other associations such as the American Nursing Association (ANA) support a change in the nursing industry that would require a bachelor of science degree in nursing as the minimum credential for an entry-level position. However, the reality is, at the present time, neither the ANA nor any other nursing association has made such a degree a minimum requirement. A nurse with an associate's degree can still work as a nurse, can join the ANA, and can have the ANA represent her/his interests. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has, thus, not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. Although the petitioner submitted a description of the working environment of a post anesthesia intensive care unit, the documentary evidence in the record does not specifically identify the unique or complex nature of the specific nursing duties, and why these duties could not be performed by an experienced registered nurse with an associate degree in nursing. 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.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The evidence submitted by counsel with regard to the hospital's staffing and nursing vacancies is not persuasive with regard to the instant petition. For example, the petitioner asserted that all the nurses employed in the intensive care units had a baccalaureate degree in nursing or its equivalent, and identified six departments with authorized intensive care nursing slots. Nevertheless, the petitioner provided no substantive evidence, such as academic diplomas, to establish the educational requirements for nurses working in any of the hospital's intensive care units. 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*. In addition, the one page job description for staff nurses clearly states that a bachelor of science degree in nursing is preferred, rather than required. Without more persuasive evidence, the petitioner has not established that it requires a baccalaureate degree or higher or its equivalent for entry into the proffered position.

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 the duties is usually associated with the attainment of a baccalaureate or higher degree. The nurse memo previously mentioned also states that petitioners, through affidavits from independent experts or other means, could demonstrate that the nature of the 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's or higher degree (or its equivalent.) The petitioner has submitted no such affidavits from independent experts with regard to the proffered position.

With regard to the specialized or complex nature of the proffered position, the petitioner provided a narrative description of the difference between the academic programs for baccalaureate degrees in nursing and associate degrees in nursing. The petitioner also mentioned the use of computer technology in the intensive care units, and the use of medical students in the various intensive care units. The varying levels of training in nursing programs, the equipment used, and the presence of medical students in the critical care units do not necessarily establish that such nursing care is either 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.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.