



U.S. Citizenship
and Immigration
Services

102



FILE: WAC 03 193 50487 Office: CALIFORNIA SERVICE CENTER Date:

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:



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

Identifying data omitted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The director of the service center 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 general acute care facility that seeks to employ the beneficiary as a critical care nurse specialist. The petitioner, therefore, endeavors to classify the beneficiary 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 states that the proffered position qualifies as a specialty occupation and submits additional evidence.

Section 214(i)(1) of 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 critical nurse specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail providing care to patients who are at a critical care/advanced life support level; performing patient assessments based on medical reports; performing interventions and assessing responses to this; planning, directing, and participating in patient care and education; advising and assisting the nursing team in identifying operational goals and planning for continuity of nursing care; participating in evaluating and improving standards of patient care; participating in clinical research projects; and assisting in planning, scheduling, and conducting ward conferences to continue personal education. The petitioner stated that a candidate must possess a baccalaureate or higher degree in nursing.

The director determined that the proffered position was not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) revealed that the proffered position's duties were performed by a registered nurse, a position that does not require a bachelor's degree. According to the director, the evidentiary record was not persuasive in establishing that the proffered position was a specialty occupation. Finally, the director stated that it is not common in the industry to require a registered nurse to possess a baccalaureate or higher degree.

On appeal, counsel states that the proffered position requires skills exceeding those of a staff or floor nurse; it requires knowledge of dysrhythmias, appropriate interventions, and sophisticated equipment, and the possession of a special certification and at least six months of experience in a telemetry or intensive care unit. Counsel emphasizes that the position requires responding to code blue situations and immediate intervention in the absence of a physician, and contends that this is not a regular nurse position. According to counsel, the petitioner requires that critical care nurses have extensive experience and training. Counsel relates that the American Association of Critical-Care Nurses (AACN) reported that the typical or beginning nurse is not prepared to care for critically ill patients. Counsel maintains that an acute critical nurse, such as the beneficiary, has more education than a typical nurse.

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 first considers 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)).

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 However, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.²

CIS looks beyond the title of the position and determines, from a review of the duties of the position 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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

After a careful review of the *Handbook*, the AAO finds that the beneficiary's proposed duties closely resemble those performed by registered nurses who provide direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regiments. These nurses, the *Handbook* reports, are usually assigned to one area, such as surgery, maternity, or intensive care. As such, the proffered position's duty of caring for patients who are at a critical care/advanced life support level would be performed by a registered nurse as delineated in the *Handbook*.

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.

¹ Memorandum from ██████████ 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).

² It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

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.

Thus, according to the *Handbook*, candidates for the offered position would not require a bachelor's degree for entry into the occupation.

The evidentiary record fails to show that a baccalaureate degree in a specific specialty is the minimum requirement for entry into the occupation. The submitted document entitled "Garden Grove Hospital Position Description/Performance Appraisal" plainly indicated that the petitioner merely preferred an applicant with a B.S.N. for the proffered position; it accepted candidates holding degrees or diplomas in nursing. Although counsel claims that "special certification" is required for the position, nowhere in the evidentiary record does the petitioner confirm this claim. The assertions of counsel 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). Consequently, the AAO will disregard counsel's claim. The document from the AACN Certification Corporation merely emphasized that certification validates specialized knowledge, skills, and experience. Counsel points to the beneficiary's educational background to establish the requirement of a bachelor's degree for the proffered position. However, the requirement of a college degree to obtain what an employer perceives to be a higher caliber employee does not establish eligibility. *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988). Finally, the petitioner's information about Emory University's nursing program in acute/critical care is irrelevant in demonstrating that a baccalaureate degree or its equivalent is the normal minimum requirement for entry into the proffered position.

There is no evidence in the record that establishes the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. As already discussed, the document entitled "Garden Grove Hospital Position Description/Performance Appraisal" plainly indicated that the petitioner preferred, but did not require, an applicant with a B.S.N. for the proffered position.

None of the evidence establishes the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A); namely, that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. By accepting candidates who do not hold a baccalaureate degree, the petitioner implicitly concedes that the nature of the specific duties is not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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.

Beyond the decision of the director, the AAO finds that the beneficiary is not qualified to perform the duties of the proffered position; the *Handbook* states that a registered nurse position requires proper licensure. No evidence of licensure appears in the record. For this additional reason, the petition will not be approved.

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.