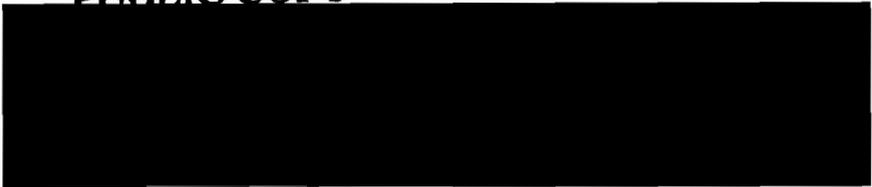


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FILE: WAC 04 090 51650 Office: CALIFORNIA SERVICE CENTER Date: **JUN 01 2006**

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:  
[Redacted]

**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.

*for Michael T. Gully*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The 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 nursing home that seeks to employ the beneficiary as an associate director for nursing services. 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 on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation and that the beneficiary does not qualify to perform the duties of a specialty occupation.

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

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:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

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 proposed position.

The petitioner’s February 7, 2004 letter of support stated that the beneficiary would provide strategic leadership to management to ensure equitable distribution of the resources of the nursing services department and delivery of high quality, cost-effective health care, and efficient management of staff. The beneficiary would work directly with the director of nursing to develop and administer appropriate policies, standards, practices, and procedures and establish goals, objectives, and plans for subordinate staff, as well as plan, direct, organize, and evaluate the services and care delivered by subordinate staff. The beneficiary would also assist the director of nursing in planning, controlling, and maintaining the operation of administration, patient care, and professional services, as well as monitor and evaluate the overall system of service delivery. The beneficiary would assist the director of nursing in planning, developing, implementing, evaluating, and directing the programs and activities of the nursing services department. The beneficiary would also be responsible for the day-to-day operation of the facility by facilitating the development, implementation, and monitoring of service, development, quality, and utilization. The beneficiary would meet with the administrator, medical and nursing staff, and other staff to plan and maintain operational and performance standards of the department’s services for patients, visitors, and family members. The beneficiary would also evaluate and improve the delivery of services by initiating and promoting best practice models, identifying individual needs to serve as the basis for a comprehensive care management plan (short- and long-term). The beneficiary will contribute to effective and accurate communication, operation, and planning by conducting studies and reporting the findings of such studies, and by participating in special committees and/or projects. The beneficiary would assure compliance with administrative, legal, and regulatory requirements of the health plan and government/accrediting agencies. The beneficiary would also participate in community relations activities so as to enhance the petitioner’s image and reputation. The petitioner stated that a qualified candidate for the proposed position would possess a bachelor’s degree in nursing, administration, or a related health science field.

The AAO notes that the Form I-129 indicates that the petitioner employs 81 persons and has a gross annual income of \$4.2 million. No evidence of record corroborates these figures, establishes the number of beds for which the facility is licensed, or the number of nurses for whom the beneficiary will be responsible.<sup>1</sup>

In determining whether a proposed position qualifies as a specialty occupation, 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

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<sup>1</sup> Hospital data on the petitioner found at [REDACTED] indicates that the petitioner is licensed for 99 beds, has 6.17 full-time registered nurses, 5.97 full-time LPN/LVN, 32.779 full-time certified nurse aides, and 2 full-time R.N. directors of nursing.

Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

Although titled associate director for nursing services, the petitioner states that the duties of the proposed position are similar to those of medical and health services managers, as those occupations are discussed in the *Handbook*. The *Handbook* states that the general requirement for a health services manager is a master's degree, but that a bachelor's degree is adequate for some entry-level positions in smaller organizations and at the departmental level within healthcare organizations; it also states, "[p]hysician's offices and some other facilities may substitute on-the-job experience for formal education." Thus, in many instances, a health services manager is a specialty occupation.

However, the AAO does not agree with the parallel that counsel has drawn between the two positions, as the beneficiary would be in a subordinate position to the director of nursing. The AAO finds that the medically-related knowledge required by the duties of the position reflects the occupation of a head nurse or nurse supervisor. According to the *Handbook*:

*Head nurses or nurse supervisors* direct nursing activities, particularly in hospitals. 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 that the patients receive proper care. They also may ensure that records are maintained and equipment and supplies are ordered.

With respect to the educational requirements for such positions, the *Handbook* indicates that there are three alternative paths for registered nurses generally. They include a four-year B.S.N. degree from a college or university; a two- or three-year associate degree in nursing (A.D.N.) from a community or junior college; and a diploma program, usually three years, at a hospital. Thus, the *Handbook* makes clear that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a registered nursing position. An educational attainment lower than a bachelor's degree may suffice for many positions. Certain advanced practice nurses, the *Handbook* notes, have educational and clinical requirements beyond those generally applicable to all RNs. However, there is no indication in the *Handbook* that head nurses or nurse supervisors, though their duties may exceed those of some other registered nurses, require a B.S.N. as a minimum degree requirement for entry into such a position. Rather, it would appear that a two-year associate degree in nursing is often sufficient educational background. According to the *Handbook*, therefore, a baccalaureate or higher degree in the specific specialty of nursing – *i.e.*, a B.S.N. – is not the minimum requirement for entry into the position proffered by the petitioner, as required to meet the first criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

A policy memorandum issued by the legacy Immigration and Naturalization Service in November 2002 (the nurse memo)<sup>2</sup> provides additional guidance for the adjudication of H-1B petitions for nursing positions. In surveying the educational requirements for the nursing occupation, the nurse memo notes that the minimum requirement for entry into the field as a registered nurse is a two-year associate degree in nursing (A.D.N.). Although a four-year B.S.N. can be earned at some U.S. and foreign universities, the

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<sup>2</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).

degree is not required for most entry-level nursing positions in the United States. The nurse memo indicates that certain advanced practice nurses – such as clinical nurse specialists, nurse practitioners, certified registered nurse anesthetists, or certified nurse-midwives – do require a B.S.N. or higher degree, which makes them specialty occupations. Likewise, some nursing specialties – such as critical care, peri-operative, rehabilitation nursing, oncology, and pediatric nursing – require a B.S.N. or equivalent knowledge, making them specialty occupations as well. In addition, some nurses in high-level management positions – “such as an upper-level ‘nurse manager’ in a hospital administration,” according to the nurse memo – require a B.S.N. or higher degree, making them specialty occupations.

The position at issue in this petition does not fit any of the foregoing examples of nursing positions that would require a B.S.N. or higher degree. While the proposed position may involve some first-line supervision of nurses or other healthcare aides, such duties would not enhance the position to that of an H-1B level nurse manager as referenced in the nurse memo. Accordingly, the AAO determines that a baccalaureate or higher degree in nursing or a related specialty is not the normal minimum requirement for entry into the proposed position, as required for it to meet the first criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, no such evidence has been presented.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of nurse supervisors as discussed in the *Handbook*, which do not require a bachelor’s degree. The record contains no documentation to support a finding that the proposed position is more complex or unique than nurse supervisor positions at other, similar organizations.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner’s ability to meet this criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. However, no such evidence has been presented.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or

higher degree, or its equivalent. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of nurse supervisor positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The letter submitted on appeal from [REDACTED] R.N., Ph.D., F.N.P., dated March 10, 2004 does not establish the proposed position as a specialty occupation. Ms. [REDACTED] presents no evidence, other than her personal opinion, that the position requires a bachelor's degree, or its equivalent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Dr. [REDACTED] states that the American Association of Colleges of Nursing (AACN) sets the Bachelor of Science degree in nursing as the minimum educational requirement for professional nursing practice. While the AACN website does indicate that a B.S. in nursing is the minimum educational requirement for professional nursing practice, that same website indicates that by 2000, 32.7% of nurses had a bachelor's degree in nursing, and 34.3% held an associate's degree. See <http://www.aacn.nche.edu/Media/FactSheets/nursfact.htm>. Thus, while more and more nurses are seeking a B.S.N., the facts listed on the cited survey do not indicate that the B.S.N. is the minimum educational requirement for nursing. The AACN data supports the *Handbook's* conclusion that the normal minimum educational requirement for nursing is the associate's degree. As Dr. [REDACTED] opinion contradicts the industry-wide data reported in the *Handbook*, the evidentiary weight of her letter is diminished. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.