

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



Date: **JAN 24 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, 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 The director's decision will be withdrawn. The matter will be remanded to the director for action consistent with this decision.

On the Form I-129 the petitioner stated that it is a hospital that seeks to employ the beneficiary as an operating room registered nurse. The petitioner wishes to obtain H-1B classification for 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, finding that the petitioner failed submit evidence of the beneficiary's operating room certification examination.

On appeal, the petitioner, through counsel, maintains that the beneficiary has the equivalent of a U.S. bachelor's degree in nursing and a state license and is fully qualified for the proffered position. The petitioner further states that the position of operating room registered nurse within its hospital does not require a certification examination.

The AAO has reviewed the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and supporting documentation, (2) the service center's request for additional evidence, (3) the response to the request for evidence, (4) the director's denial letter, and (5) the Form I-290B and counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has established that the beneficiary will be employed in a specialty occupation position.

The director cited no authority in support of the requirement for an operating room certification examination. The director's decision must therefore be withdrawn. The matter will nevertheless be remanded to the director to determine whether the petitioner has established that the position of operating room registered nurse is in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of

highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) 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 (2) 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In a December 16, 2009 letter submitted with the petition, the petitioner described the occupation of operating room registered nurse as follows:

The Beneficiary will be responsible for the management and efficient maintenance of the Operating Room, following generally-accepted surgical standards for sterility of the facility, the equipment, supplies and personnel within it, and the surgical environment in general. This requires knowledge of, and compliance with, established statutory and regulatory guidelines for occupational safety, as well as those pertaining to the patient's safety, health and well-being. As a Circulating Nurse, the worker is responsible for ensuring that the necessary complement of staff members, surgical supplies, equipment and drugs are readily available to the surgical team concerned for the successful completion of the procedure. Further the Perioperative Nurse is responsible for the provision of effective assistance to the surgical staff in the care of the patient in the OR, including analysis of the appropriate medical care for the patient, prior to, during and after surgery. As the Circulating Nurse in the OR, the worker is charged with the efficient organization and provision of additional information, equipment and supplies to be used in the surgical procedure, the administration of medications and other therapeutic measures, close and constant monitoring of the patient's vital signs and this patient's response to the procedure, maintenance of accurate and complete record of procedures, and care for specimen and materials for post-surgical laboratory examination. The position requires familiarization with and assistance in the discussion and application of modern concepts, techniques and developments in surgery, medical and nursing care. Further, the Perioperative Nurse is responsible for instruction and training of new employees and active participation in continuing education programs.

The petitioner submitted copies of the beneficiary's foreign degree and transcripts, which were evaluated as equivalent to a U.S. Bachelor of Science degree in Nursing, together with evidence of his New York State registered nurse license.

The registered nurse occupational category typically includes persons with one of three types of educational credentials. These are (1) a bachelor's of science degree in nursing, (2) an associate degree in nursing, and (3) a diploma granted by certain hospitals. The petitioner contends that

performance of the proffered position requires at least a bachelor's degree, but does not specify that the bachelor's degree must be in a specific specialty.

As the AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, the petitioner's submission of its chapter on registered nurses is relevant and worthy of discussion.

As indicated in the following excerpt from the "Training, Other Qualifications, and Advancement" section of the *Handbook's* "Registered Nurses" chapter, a bachelor's degree in nursing is neither required for licensure as a registered nurse nor normally required for the general range of registered nurse jobs, regardless of their specialty. In pertinent part, this section reads:

Training, Other Qualifications, and Advancement

The three typical educational paths to registered nursing are a bachelor's degree, an associate degree, and a diploma from an approved nursing program. Nurses most commonly enter the occupation by completing an associate degree or bachelor's degree program. Individuals then must complete a national licensing examination in order to obtain a nursing license. Advanced practice nurses—clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners—need a master's degree.

Education and training. There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years. Generally, licensed graduates of any of the three types of educational programs qualify for entry-level positions as a staff nurse. There are hundreds of registered nursing programs that result in an ADN or BSN; however, there are relatively few diploma programs.

Individuals considering a career in nursing should carefully weigh the advantages and disadvantages of enrolling in each type of education program. Advancement opportunities may be more limited for ADN and diploma holders compared to RNs who obtain a BSN or higher. Individuals who complete a bachelor's degree receive more training in areas such as communication, leadership, and critical thinking, all of which are becoming more important as nursing practice becomes more complex. Additionally, bachelor's degree programs offer more clinical experience in nonhospital settings. A bachelor's or higher degree is often necessary for administrative positions, research, consulting, and teaching[.]

Many RNs with an ADN or diploma later enter bachelor's degree programs to prepare for a broader scope of nursing practice. Often, they can find an entry-level position and then take advantage of tuition reimbursement benefits to work toward a BSN by completing an RN-to-BSN program. Accelerated master's degree in nursing (MSN) programs also are available. They typically take 3-4 years to complete full time and result in the award of both the BSN and MSN.

* * *

All nursing education programs include classroom instruction and supervised clinical experience in hospitals and other healthcare facilities. Students take courses in anatomy, physiology, microbiology, chemistry, nutrition, psychology and other behavioral sciences, and nursing. Coursework also includes the liberal arts for ADN and BSN students.

Supervised clinical experience is provided in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in nursing care facilities, public health departments, home health agencies, and ambulatory clinics.

Licensure and certification. In all States, the District of Columbia, and U.S. territories, students must graduate from an approved nursing program and pass a national licensing examination, known as the National Council Licensure Examination, or NCLEX-RN, in order to obtain a nursing license. Other eligibility requirements for licensure vary by State. Contact your State's board of nursing for details.

Other qualifications. Nurses should be caring, sympathetic, responsible, and detail oriented. They must be able to direct or supervise others, correctly assess patients' conditions, and determine when consultation is required. They need emotional stability to cope with human suffering, emergencies, and other stresses.

RNs should enjoy learning because continuing education credits are required by some States and/or employers at regular intervals. Career-long learning is a distinct reality for RNs.

Some nurses may become credentialed in specialties such as ambulatory care, gerontology, informatics, pediatrics, and many others. Credentialing for RNs is available from the American Nursing Credentialing Center, the National League for Nursing, and many others. Although credentialing is usually voluntary, it demonstrates adherence to a higher standard and some employers may require it.

The *Handbook* indicates that a BSN or BSN equivalency is *not* normally a requirement for emergency or trauma nurses or most other nursing specialties in which RNs engage, including the following that the *Handbook's* chapter on registered nurses lists, along with the emergency

room or trauma specialty, as distinct nursing specialties: diabetes management; dermatology; geriatrics; pediatric oncology; ambulatory care; critical care; emergency or trauma; transport; holistic; home health care; hospice and palliative care; infusion; long-term care; medical-surgical; occupational health; perianesthesia; psychiatric-mental health; radiology; rehabilitation; transplant; addictions; intellectual and developmental disabilities; diabetes management; genetics; HIV/AIDS; oncology; wound, ostomy, and continence; cardiovascular; gastroenterology; gynecology; nephrology; neuroscience; ophthalmic; orthopedic; otorhinolaryngology; respiratory; urology; neonatology; and gerontology or geriatrics.

For the purposes of this appeal, it is important to note that the *Handbook* states, and its discussion of the RN occupational category and its specialties reflects, that RNs' "duties and title are often determined by their work setting or patient population being served," rather than by degree type (i.e., ADN or BSN).¹ In any event, the *Handbook's* information does not support the proposition that operating room nurse positions as an occupational category or the particular position proffered in this petition normally require at least a BSN.

Moreover, the AAO finds that, as described in the record of proceeding, the proffered position and the duties comprising it do not fit any type of direct-care RN position listed as specialty occupations in the 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 (Nov. 27, 2002) (hereinafter referred to as the Williams Memo).² Rather, the proffered position fits within the range of registered nurse specialty positions described at section E of the Memo as those for which qualification as a specialty occupation

¹ The *Handbook* notes an important exception, namely, the four types of "advanced practice nurses [(APNs)], who work independently or in collaboration with physicians," which the *Handbook* identifies as "clinical nurse specialists, nurse anesthetists, nurse-midwives, and nurse practitioners." The *Handbook*, states:

All four types of advanced practice nurses require at least a master's degree. In addition, all States specifically define requirements for registered nurses in advanced practice roles. Advanced practice nurses may prescribe medicine, but the authority to prescribe varies by State. Contact your State's board of nursing for specific regulations regarding advanced practice nurses.

However, the requirements for APN positions are not relevant to this appeal, as the petition was not filed for such a position. Also, the record of proceeding indicates that the beneficiary is neither qualified nor licensed or certified for any type of APN position.

² The four types of RN positions that the Williams Memo recognizes as categorically requiring at least a specialty-occupation level of education are Clinical Nurse Specialists; Nurse Practitioners; Certified Registered Nurse Anesthetists; and Certified Nurse-Midwife. The AAO finds these categories to be the same as the four APN specialties that the *Handbook* identifies as requiring at least a master's degree in nursing. The AAO reiterates that the record of proceeding establishes that the proffered position does not fit within any of these APN specialties.

would depend upon the extent and weight of the evidence presented in the petition. Thus, while the Williams Memo summarizes the statutory and regulatory standards for establishing an H-1B specialty occupation, it is not evidence that the particular position that is the subject of this petition is a specialty occupation.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner also has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent, or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As stated above, the decision of the director finding the beneficiary not qualified to serve as an operating room registered nurse for lack of an operating room certification examination will be withdrawn. The matter will be remanded to the director for issuance of a new decision determining that the petitioner failed to demonstrate that the proffered position is in a specialty occupation.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for action consistent with this decision.