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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 05 2013 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn.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 visa petition, the petitioner describes itself as a hospital established in 1956. In order to employ the beneficiary in what it designates as a registered nurse – operating room position, the petitioner seeks 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, finding that the petitioner failed submit evidence of the beneficiary's operating room certification examination. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

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.

Based on the evidence presented, the AAO finds that the beneficiary is more likely than not qualified to perform the duties of the proffered position. The director's decision is therefore withdrawn. The matter will be remanded, however, to determine whether the petitioner has established that the position of registered nurse - operating room is a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *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, a proposed 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 particular positions 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category

In the petition signed on April 28, 2011, the petitioner indicates that it wishes to employ the beneficiary as a registered nurse – operating room on a full-time basis at the rate of pay of $39.67 per hour ($82,513.60 per year). In the support letter dated April 20, 2011, the petitioner describes the proffered position's duties as follows:

> As a Perioperative Nurse (Operating Room Nurse) at the [petitioning company], 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 accurare 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 in new employees and active participation in continuing professional education programs.

In addition, the petitioner states that it "requires a BSN or the equivalent for the position of Operating Room (OR) Nurse."

With the Form I-129, the petitioner submitted a copy of the beneficiary's foreign academic credentials, as well as a credential evaluation from The evaluation indicates that the beneficiary's foreign education is equivalent to a U.S. bachelor's degree in nursing.

In addition, the petitioner submitted a copy of 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).

The AAO recognizes the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook* (hereinafter the *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[1] The petitioner asserts in the Labor Condition Application (LCA) that the proffered position falls under the occupational category "Registered Nurses."

The AAO reviewed the chapter of the *Handbook* entitled "Registered Nurses," including the sections regarding the typical duties and requirements for this occupational category.[2] However, the *Handbook* does not indicate that "Registered Nurses" comprise an occupational group for which normally the minimum requirement for entry is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states the following about this occupation:

> Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses must also be licensed.
>
> **Education**
> In all nursing education programs, students take courses in nursing, anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take four years to complete; ADN and diploma programs usually take two to three years to complete.
>
> All programs also include supervised clinical experience in hospital departments such as pediatrics, psychiatry, maternity, and surgery. A number of programs include clinical experience in extended and long-term care facilities, public health departments, home health agencies, or ambulatory (walk-in) clinics.
>
> Bachelor's degree programs usually include more training in the physical and social sciences, communication, leadership, and critical thinking, which is becoming more important as nursing practice becomes more complex. They also offer more clinical

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[1] The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

[2] For additional information regarding the occupational category "Registered Nurses," *see* U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Registered Nurses, on the Internet at http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-1 (last visited February 27, 2013).

experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse.

Many registered nurses with an ADN or diploma 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. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field.

Important Qualities

Critical-thinking skills. Registered nurses must be able to assess changes in the health state of patients, including when to take corrective action and when to make referrals.

Compassion. Registered nurses should be caring and sympathetic, characteristics that are valuable when treating patients.

Detail oriented. Registered nurses must be responsible and detail oriented because they must make sure that patients get the correct treatments and medicines at the right time.

Emotional stability. Registered nurses need emotional stability to cope with human suffering, emergencies, and other stresses.

Organizational skills. Nurses often work with multiple patients with various health needs, and organizational skills are critical to ensure the patient is given proper care.

Patience. Registered nurses should be patient so they can provide quality care under stressful or hectic circumstances.

Speaking skills. Registered nurses must be able to talk effectively with patients to correctly assess their health conditions. Nurses need to clearly explain how to take medication or give other instructions. They must be able to work in teams with other health professionals and communicate the patients' needs.

Licenses

In all states, the District of Columbia, and U.S. territories, registered nurses must have a nursing license.

To become licensed, nurses must graduate from an approved nursing program and pass the National Council Licensure Examination, or NCLEX-RN.

Other requirements for licensing vary by state. Each state's board of nursing can give details. (For more on the NCLEX-RN examination and a list of state boards of nursing visit the National Council of State Boards of Nursing.)

Certification
Nurses may become credentialed through professional associations in specialties such as ambulatory care, gerontology, and pediatrics, among others. Although certification is usually voluntary, it demonstrates adherence to a higher standard, and some employers may require it. Certification is required for all registered nurses serving in any of the four advanced practice registered nurse roles.

Advancement
Most registered nurses begin as staff nurses in hospitals or community health settings. With experience, good performance, and continuous education they can move to other settings or be promoted to positions with more responsibility.

In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles, such as assistant director, director, vice president, or chief of nursing. Increasingly, management-level nursing positions require a graduate degree in nursing or health services administration. Administrative positions require leadership, communication and negotiation skills, and good judgment.

Some RNs choose to become advanced practice registered nurses (APRNs). APRNs work independently or in collaboration with physicians. They may provide primary care, and, in most states, they may prescribe medications. APRNs require at least a master's degree. Each state's board of nursing can provide the specific regulations regarding APRNs.

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses.

Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need registered nurses for jobs in health planning and development, marketing, consulting, policy development, and quality assurance.

Other nurses work as postsecondary teachers in colleges and universities. For more information, see the profile on postsecondary teachers.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, Registered Nurses, on the Internet at http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4 (last visited February 27, 2013).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. Rather, the *Handbook* states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. The *Handbook* does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in nursing, or its equivalent. Thus, the *Handbook* does not support the petitioner's claim that the proffered position falls under an occupational group that qualifies as a specialty occupation.

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 the "duties and titles often depend on where they work and the patients they work with," rather than by degree type (i.e., ADN or BSN).[3] In any event, the *Handbook's* information does not support the proposition that normally the minimum requirement for entry into operating room nurse positions as an occupational category or the particular position proffered in this petition is at least a BSN, or its equivalent.

The AAO acknowledges the petitioner's reliance on the Williams Memo, which states that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical RN or staff position. However, 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 Williams Memo.[4] Rather, the proffered position fits

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[3] 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.

[4] 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 Anesthesists; and Certified Nurse-Midwife. The AAO finds these categories to be the same as the four APRN 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 the range of registered nurse specialty positions described at section E of the Memo as those for which qualification as a specialty occupation 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 in a specific specialty, 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 its 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 its equivalent, or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty, or its 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 a registered nurse – operating room 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 a specialty occupation.

ORDER: The director's July 19, 2011 decision is withdrawn. The matter is remanded to the director for action consistent with this decision.

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within any of these APRN specialties.