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U.S. Department of Justice

Immigration and Naturalization Service

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*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

[redacted]

File: EAC-01-207-52831 Office: Vermont Service Center Date: jan 16 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an acute care hospital with 3000 employees and a gross annual income of $341 million. It seeks to employ the beneficiary as a "specialty RN-operating room" for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

> an 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.

The director denied the petition because a baccalaureate degree is not a requirement for a nursing position. On appeal, counsel states, in part, as follows:

> The position in question, Operating Room-Registered Nurse in the petitioner's hospital, is a specialty occupation as defined in the regulations for the following reasons:
>
> (1) the acute shortage of Registered Nurses in the country;
>
> (2) the petitioner's usual requirement of a bachelor's degree in Nursing or equivalent experience plus training in the specific area of Medical, Surgical or Critical Care;
>
> (3) the endorsement by AORN, the primary professional association in the discipline, and the active efforts of the various State Boards of Nursing, for the adoption of the baccalaureate degree as a standard minimum academic preparation for entry into the profession of Operating Room R.N.;

(4) the petitioner's demonstration that the duties of the worker in the offered position are so specialized and complex, that the knowledge required to perform such duties are usually associated with the attainment of a baccalaureate or higher degree;

(5) the U.S. Department of Labor's acknowledgment that the O.R. nurse performs significantly more complicated duties than the usual R.N., and gives it an SVP of 8, compared to an SVP level of 7 for a General Duty Nurse or Staff Nurse; and

(6) the petitioner's consistent practice to require a B.S.N. degree whenever possible, consistent with the AORN standards, or significant O.R. experience, for hiring in this job.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

A. Facilitate the maintenance of an efficient and therapeutically safe physical environment, instruments, equipment, and supplies for patient care...

B. Assist Surgical Team in the care of patients in the surgical unit or in the Operating Room...

C. Appraise and help raise nursing service standards and nursing care practices to meet new surgical concepts and methods. Review current journals regarding recent advances in medical and nursing activities; participate in operating room nursing conferences.

D. Participate in Operating Room staff development program. Instruction and training of new employees; participation in regular in-service education program sessions; evaluation of staff development programs; analyze problems to determine worker's learning needs by assessment of patient's symptoms, causative factors and priority needs.

E. Assume responsibility for self-development. Participation in hospital and nursing service programs and meetings associated with emergency, preventive and rehabilitative patient care; enrollment in advance nursing programs.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in nursing or a related field. The proffered position appears to be that of a registered nurse. Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the Department of Labor's (DOL) Dictionary of Occupational Titles (DOT)(4th Ed., Rev. 1991). However, the Associate Commissioner does not consider the DOT a persuasive source of information regarding whether a particular job 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.

The DOL has replaced the DOT with the Occupational Information Network (O*Net). Both the DOT and O*Net provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The DOL's Occupational Outlook Handbook (Handbook) provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Service is not persuaded by a claim that the proffered position is a specialty occupation simply because the DOL has assigned it a specific SVP rating in the DOT.

A review of the DOL's Handbook, 2002-2003 edition, at page 269, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a registered nurse. The three educational paths to nursing are as follows: Associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. The Handbook further states that:

> . . . some 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.

As the record does not demonstrate that the beneficiary's proffered position is an administrative position, or a graduate nursing program in research, consulting, teaching, or a clinical specialization, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner has shown that it has, in the past, hired individuals with baccalaureate or higher degrees in a specific specialty area such as nursing, the petitioner's vice president of patient services states in a letter dated October 2, 2001, that only 40% of operating nurses hold a baccalaureate degree in nursing. She further states that the remaining nurses without such degrees hold O.R. experience ranging from four years to 20 years. As such, the petitioner has not demonstrated that the proffered position requires a bachelor's degree in nursing or an equivalent thereof.

Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. The position statement of the Association of periOperative Registered Nurses, Inc. (AORN) submitted by the petitioner is noted. Such organization states as follows:

> AORN believes there should be one level for entry into nursing practice; furthermore, AORN believes the minimal preparation for future entry into the practice of nursing shall be the baccalaureate degree.

The Handbook, 2000-2001 edition, at page 212, states, in part, that:

> There have been attempts to raise the educational requirements for an R.N. license to a bachelor's degree and, possibly, create new job titles. These changes, should they occur, will probably be made State by State, through legislation or regulation...

In view of the foregoing, it appears that the petitioner and the nursing industry, in general, prefer rather than require a baccalaureate degree in nursing for the proffered position.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.