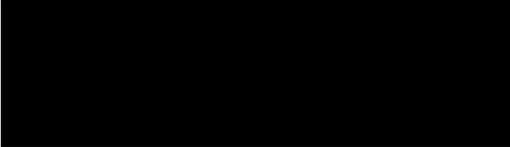


DR

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: WAC-01-290-56801

Office: CALIFORNIA SERVICE CENTER

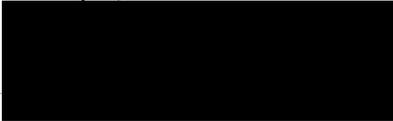
Date: **AUG 21 2003**

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:



PUBLIC COPY

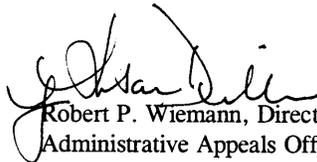
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing registry with 55 employees and a gross annual income of \$1,362,000. It seeks to employ the beneficiary as a counseling aide for an approximate period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not demonstrated that a baccalaureate degree is required for the proffered position, or that the beneficiary is qualified to perform the duties of a specialty occupation. On appeal, counsel states, in part, that the Department of Labor (DOL) in its *Occupational Outlook Handbook (Handbook)* has determined that a counseling aide requires a baccalaureate degree. Counsel further states that the beneficiary's bachelor's degree in nursing qualifies her for the proffered position.

Counsel's statement on appeal is not persuasive. The Bureau 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 Bureau considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

The alien worker's main responsibility is to assist [the] in-house Rehabilitation Counselor help patients deal with personal, social, and vocational effects of disabilities resulting from illness, old age, disease, or stress; thus, promoting the optimum health of the residents in the facility is her concern. She will assist in helping individuals deal with stress management, problems with self-esteem, issues associated with aging, issues of mental and emotional health, and family. And, in so doing, she will assist in evaluating the strengths and limitations of patients or residents and be able to provide personal counseling.

The position also involves to [sic] assistance to patients achieve [sic] personal adjustment and maximum independence through training and counseling on daily living. She will have to teach patients activities to encourage and increase capacity for social participation and improve general health.

In addition to the above, the alien worker will do [an] initial assessment of the patient. She will meet with the patients to obtain detailed information regarding medical history, behavioral factors, and other vital issues. Upon completion of the assessment, a detailed report will be prepared outlining the Counseling Aide's professional opinion regarding the rehabilitation potential and recommendations for future intervention. She will prepare progress reports to allow members of the rehabilitation team to evaluate patient's ability to perform varied activities essential to daily living. It is therefore her goal to help the patients to live independently with care and compassion and be able to recover fast through counseling.

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.

The Bureau does not agree with counsel's assertion that the proffered position would normally require a bachelor's degree in nursing or a related field. The proffered position is that of a counseling aide. A review of the DOL's *Handbook*, 2002-2003 edition, at pages 154-155, finds that a bachelor's degree in rehabilitation services, counseling, psychology, sociology, or an equivalent thereof, often qualifies a person to work as a counseling aide, rehabilitation aide, or social service worker. As the petitioner is a nursing registry, however, the Bureau must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Bureau was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *Supra* at 387.

specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See *id.* at 388.

In this case, nowhere in the record is there any indication as to where the beneficiary will perform the duties of the proffered position. As such, there is no comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client where the beneficiary will ultimately perform the proposed duties. Without such description, the petitioner has not demonstrated that the proffered position meets the statutory definition of specialty occupation. For this reason, the petition may not be approved.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

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.