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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: WAC-01-099-52294 Office: CALIFORNIA SERVICE CENTER Date: AUG 21 2003

IN RE: Petitioner: [redacted]
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: SELF-REPRESENTED

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 long-term care facility with 110 employees and an approximate gross annual income of $5 million. It seeks to employ the beneficiary as a charge nurse for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner submits a letter.

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. On appeal, the petitioner states, in part, that various publications as well as newspaper advertisements had been submitted to demonstrate that the proffered position requires a baccalaureate degree in nursing.

The petitioner'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 position we offer to [the beneficiary] is that of a Skilled Care Charge Nurse in our facility. As such [the beneficiary] will be involved in all aspects of the nursing care program. [The beneficiary] will be in charge of planning, directing and supervising of [sic] nursing care in an assigned unit. [The beneficiary] will supervise nursing care and be responsible for nursing activities in a nursing unit.
>
> In addition to the above duties, [the beneficiary] will be expected to maintain knowledge of current developments in the field of nursing by reading and attending seminars and in-service training programs. [The beneficiary] will be supervised by the Director of Nursing.

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;
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> 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 Bureau often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) when determining whether

a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

In its *Handbook*, 2002-2003 edition, at page 269, the DOL states the following about the training and educational requirements for registered nurse positions:

> There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma . . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.
>
> . . . .
>
> [S]ome 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.

The *Handbook* does not elaborate on administrative nursing positions within this classification, although reference is made to two nursing positions within the classification of registered nurse that appear analogous to the proffered position. The *Handbook* states the following about head nurses or nurse supervisors:

> Head nurses or nurse supervisors direct nursing activities. 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 the proper delivery of care. They also may see that records are maintained and equipment and supplies are ordered.

The proffered position appears to resemble a nursing position beyond the entry-level registered nurse, but it does not appear to be analogous to an administrative nursing position. A recent Bureau policy memo provides the following commentary on administrative nursing positions: "Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration. (*See* Bureau of Labor Statistics, U.S. Dep't of Labor,

Occupational Outlook Handbook at 75.)" [1] The *Handbook* reference is to the classification of medical and health services managers. On page 75, the *Handbook* states:

> The term "medical and health services manager" encompasses all individuals who plan, direct, coordinate and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.
>
> The structure and financing of healthcare is changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. . . . Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of interrelated services, for example, those ranging from inpatient care to outpatient follow-up care.
>
> . . . .
>
> In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

In this case, the petitioner has not demonstrated that the proffered position is an administrative position, which would require a registered nurse with a master's degree in nursing or health administration. Rather, the proposed duties are similar to those of a head nurse or nurse supervisor, as described herein. It is noted that the beneficiary holds a baccalaureate degree in nursing. As such, 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.

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[1] 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).

Second, although the petitioner has provided evidence that it employs a nurse supervisor with a bachelor's degree in nursing, and the petitioner asserts that it normally requires a baccalaureate degree in nursing for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, 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.3 d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, 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.[2] 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-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *See id.* at 388.

In this case, although the petitioner claims to have hired only individuals with a bachelor's degree in nursing for its charge nurse positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, although the petitioner has submitted various job advertisements for nurse supervisor positions in the states of New York and New Jersey that require a bachelor's degree in nursing, they are not persuasive evidence of a degree requirement being common to the industry in parallel positions among similar organizations. An Internet search for nurse supervisor positions reveals that such a degree requirement is not industry wide.

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[2] 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.

Furthermore, the pages from the publication, *Dimensions of Professional Nursing*, 8th Edition, Copyright 1999, are noted. Although not explicitly stated, the petitioner suggests that such publication indicates that the proffered position has been recognized by the nursing industry as complex and requiring a baccalaureate degree. It is noted, however, that page 333 of such publication states that the requirements for employment in nursing positions in extended and long-term care facilities are similar to those in hospitals for like positions, "although often the need for a degree is not emphasized." (Emphasis added.)

Also noted is the page from another publication, *Encyclopedia of Careers and Vocational Guidance*, 11th Edition, Copyright 2000. Here again, although not explicitly stated, the petitioner suggests that this publication indicates that a bachelor's degree in nursing is required for most supervisory or administrative positions. The cited reference on page 368 states, however, that a bachelor's degree in nursing is required for most supervisory or administrative positions for jobs in public health agencies, and for admission to graduate nursing programs. It is noted that the petitioner is neither a public health agency nor a graduate nursing program.

The record also contains a position statement by the *American Association of Colleges of Nursing* (*AACN*), recognizing the Bachelor of Science degree in nursing as the minimum educational requirement for professional nursing practice. In its February 1998 bulletin, however, the AACN states, in part, as follows:

> Although 32 percent of RNs employed in nursing in 1996 held bachelor's degrees as their highest academic credential, an even larger 34 percent held associate degrees, 24 percent had hospital diplomas, 9 percent had obtained master's degrees, and fewer than 1 percent held the doctoral degree, according to the Division of Nursing.

As such, despite the AACN's position statement recognizing the Bachelor of Science degree in nursing as the minimal educational requirement for professional nursing practice, less than a third of the RNs employed in nursing in 1996 held bachelor's degrees as their highest academic credential.

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.

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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: WAC-02-133-50946 Office: CALIFORNIA SERVICE CENTER Date: AUG 21 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

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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 specializes in the distribution of a full range of trim items to manufacturers of fashion apparel, licensed consumer products, specialty retailers and mass merchandisers. It has 230 employees and a gross annual income of $50 million. It seeks to employ the beneficiary as its director of research and development. The director determined the petitioner had not established 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 the beneficiary's approximate 30 years of work experience qualifies him for the proffered position. On appeal, counsel states, in part, that the beneficiary's work experience has included the theoretical and practical application of specialized research, engineering, design, and development experience required by the proffered position. Counsel also states that the record contains three letters from recognized authorities in the same specialty occupation who attest to the beneficiary's skills and superior academic knowledge, expertise, and practical application in the specialty occupation. Counsel

further states that the record contains an independent credential evaluation in support of her claim.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

> 1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> 2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> 3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> 4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

> (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience . . . .
>
> It must be clearly demonstrated that the alien's training and/or work experience included the theoretical

and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
(iv) Licensure or registration to practice the specialty occupation in a foreign country; or
(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The beneficiary does not hold a baccalaureate degree in any field of study. The record contains no evidence that the beneficiary ever attended a college, university, or comparable institution of learning. Accordingly, it is concluded that the petitioner has not shown that the beneficiary qualifies to perform the duties of a specialty occupation based upon education alone.

The record indicates that the beneficiary had over 30 years of work experience in factory-related jobs at the time the visa petition was filed. The beneficiary's training and employment background has been found by an evaluator of a credentials evaluation service, [redacted] to be equivalent to a Bachelor of Science degree in Engineering from an accredited institution of higher education in the United States. Although [redacted] asserts that, because of the positions he holds at Queens College of the City University of New York, he has the authority to grant college level credit for experience, training, and/or courses taken at other U.S. or international universities, in a letter dated November 7, 2001, the Assistant Vice President and Special Counsel to the President of Queens College, [redacted] states, in part, as follows:

> Contrary to his statement, [redacted] does not have the authority to grant college-level credit at [redacted]. The Office of Undergraduate Admissions determines whether or not to give credit to students for college-level courses taken at another college/university, domestic or foreign. While the Office of Undergraduate Admissions consults with faculty in the same academic discipline as the course(s) being evaluated, no individual faculty member has authority to grant credit for academic course work completed at another institution of higher education. (Emphasis in original.)

The Bureau uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The record contains no explanation for the discrepancy between [redacted] assertion that he has credit granting authority, and the information provided by the Assistant Vice President and Special Counsel to the President of Queens College, [redacted] stating that Dr. Itzkowitz does not possess such credit granting authority. As such, the evaluation from [redacted] is accorded little weight.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record contains a letter from a national sales manager from the South African company, Festo, who states in part as follows:

> [The beneficiary] works at Heiben (Pty) Ltd[.], in Johannesburg, South Africa. He has been the Owner and Director of Research and Development since 1978. He supervises 10 staff members, 4 of which are professional engineering employees. He has built up the company into

> a R2 million company and his design and engineering skills are always in demand.
>
> . . . .
>
> Over the past 30 years, he has gained significant experience while working with peers, supervisors and subordinates, who them-selves [sic] have Bachelor's, Master's and Ph.D degrees. He has worked with top class engineers when designing the following equipment. . . .

In addition to the foregoing letter, the record contains a letter from the director of the South African company, Trubok, who states, in part, as follows:

> In 1978, after working in the engineering and design field for 10 years, [the beneficiary] established Heiben (Pty) Ltd[.], a prototype equipment and development company. He is the Director of Research and Development at this company. The company employs a staff of 10 and has annual income in excess of R2 million. [The beneficiary] designs and produces machinery and equipment for customers according to complex engineering specifications. He has invented several machines and has been granted patents for his innovative and ground-breaking equipment all over the world. His designs have been used at many national and international companies, including Nestle. He supervises professional staff and sets company policy as well as creates a work environment to foster innovation and creativity. . . .

Also included in the record is a letter from a patent and trade mark attorney who states, in part, that the beneficiary's business often involved the solution of problems encountered by significant companies, including Nestle and Sealy.

The comments of the three writers are noted. Some of their assertions, however, conflict with the information provided by the company secretary of Heiben (Pty) Ltd., in a letter dated February 13, 2002, who states, in part as follows:

> This letter is to confirm that [the beneficiary] who [sic] is the director - Sole Owner of this Company. [The beneficiary] is in full charge - control of the activities, which are: - Designing and making of tools for its own production as well as for the company customers. . . .

> The company staff exists of [sic] 6 Machine Operators, 1 Driver, 2 Toolmakers and 1 Secretary.

The company secretary's description of the staff - six machine operators, one driver, two toolmakers, and one secretary - does not support the assertion of the national sales manager of Festo, who states that the beneficiary supervises four professional engineering employees in [redacted], and has gained experience over the past 30 years while working with peers, supervisors and subordinates who hold bachelor's, master's and Ph.D degrees. The director of Trubok also states that the beneficiary supervises a professional staff at [redacted] Not only do these assertions conflict with the company secretary's statement, but the record also contains no evidence to support such assertions. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the evidence in the record demonstrating that the beneficiary has applied for various patent grants is noted. The petitioner, however, has not satisfied the requirements described in 8 C.F.R. § 214.2(h)(4)(iii)(D), such as evidence that a recognized authority has determined that the beneficiary's achievements are significant contributions to the field of the specialty occupation.

The beneficiary is not a member of any organizations whose usual prerequisite for entry is a baccalaureate degree in a specific specialty. The record contains no evidence that the beneficiary holds a state license, registration, or certification that authorizes him to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary is qualified to perform services in a specialty occupation.

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.