



U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

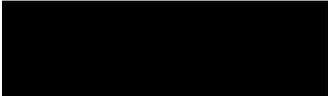


DEC 03 2003

FILE: SRC 99 118 51975

OFFICE: TEXAS SERVICE CENTER

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

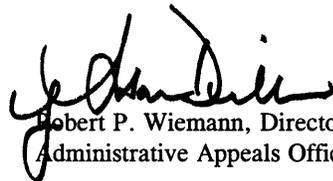
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 Director of the Texas Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a terminally ill patient whose petition seeks to employ the beneficiary as a nurse. The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation. The AAO summarily dismissed the appeal in accordance with 8 C.F.R. § 103.3(a)(1)(v), for previous counsel's failure to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On motion to reopen, newly hired counsel does not contest the basis of the AAO action, but requests consideration of new matters which are beyond the scope of the petition as filed and previously adjudicated by Citizenship and Immigration Services (CIS). In the motion, counsel asserts that the petitioner needs the beneficiary to serve in a dietician position, instead of the nurse position specified in the Form I-129. Counsel submits documents in support of the petition.

In a letter of support for the petition as filed, the petitioner's legal guardian had described the duties of the nursing position proffered for the beneficiary as follows:

Administer medications and treatments according to Physician's instructions and condition of patient; Observes, evaluates and records symptoms; Applies independent emergency measures to counteract adverse developments and notifies Physician of patient's condition; Maintains equipment and supplies; Takes temperature, pulse, blood pressure and other vital signs to detect deviations from normal.

In contrast, the motion describes the dietician duties now proposed for the beneficiary as follows:

Planning, organizing, and evaluating nutritional component of health care service for the patient; developing and implementing plan of care based on the assessment of patient's changing nutritional needs; correlating the nutrition plan with other components

of patient's overall medical care; consulting with the physician regarding the patient's volatile nutritional requirements; evaluating patient's changing dietary needs and adjusting the nutritional plan accordingly; supervising preparation of meals; inspecting meals served for conformance to prescribed diet and for standards of palatability; overseeing and administration of meals to the patient three times daily through the gastric feeding tube as necessitated by patient's volatile medical condition; instructing patient's family, personal care attendants, and the domestic cook in nutritional principles, dietary plans, food selection and preparation.

Along with the change of position and title, counsel also submits reasons why the new position and duties would qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

A petitioner may not use a motion as a vehicle to effect material changes in a petition, as counsel is attempting to do here with regard to the beneficiary's position and related duties.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). On motion, a petitioner cannot materially change the proffered position and its associated duties in order to conform to statutory and regulatory requirements. The petitioner must establish that the position offered to the beneficiary when the I-129 petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As the position described on motion is not the same position initially offered to the beneficiary, the AAO cannot consider the new position and duties to determine if the petitioner has proffered a position that qualifies as a specialty occupation. If the petitioner now seeks to classify the beneficiary as a dietician, the petitioner may file a new I-129 petition with fee.

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 previous decision of the AAO, dated October 15, 2001, is affirmed. The petition is denied.