

**PUBLIC COPY**

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

D2

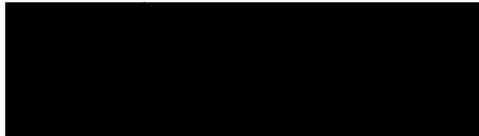


FILE: WAC 02 132 54461 Office: CALIFORNIA SERVICE CENTER Date: MAY 03 2004

IN RE: Petitioner: [Redacted]  
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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

*Mari Johnson*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a hospital that seeks to employ the beneficiary as a nurse manager. The petitioner endeavors to classify the beneficiary 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), 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.

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.

Citizenship and Immigration Services (CIS) 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.

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

The petitioner is seeking the beneficiary's services as a nurse manager in the pediatrics department. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's letter in support of the petition; and the petitioner's response to the NOID. According to this evidence, the beneficiary would perform duties that

entail, in part: planning, organizing, and directing the activities of the pediatrics nursing staff; establishing policies and procedures according to the directions of hospital administrators; observing nursing staff in order to evaluate their performance; training new personnel; noting personnel problems and taking corrective action; and preparing the nursing work schedule. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in a health-related field.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the duties of the position are essentially those of a registered nurse and, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an individual does not need to hold a baccalaureate degree in nursing to fill a registered nurse position.

On appeal, counsel states that the petitioner has satisfied the criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Counsel states that the proffered position is so specialized, complex, and unique that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the AAO will address this criterion only.

First, the AAO notes that in its response to the NOID, the petitioner added a duty that was not included in the job description provided with the initial filing. The responsibility for developing an annual operating budget and capital expenditure plan for the department was not mentioned in the original petition and will not be considered for the purposes of this analysis. When responding to a NOID or a request for evidence, a petitioner cannot materially change a position's associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, only the job duties noted in the original filing of the petition will provide the basis for the AAO's determination.

On appeal, counsel reiterates the job duties detailed in the NOID and contends that the instant position is not a nursing position but rather is that of a health services manager. The AAO disagrees. The duties as originally described are those of a head nurse or nurse supervisor. According to the *Handbook*, nurse supervisors direct nursing activities, plan work schedules, assign duties, provide training, observe nurses, and ensure that equipment and supplies are ordered and records are maintained. These duties are not those of a health services manager, a position whose focus is on departmental management rather than direct supervision.

Regarding the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4), counsel asserts that the proffered position meets this criterion because the duties are so complex; however, the AAO disagrees. The original job description contains duties that are routine to any supervisory registered nurse position. The more detailed description of these original duties provided in response to the NOID and on appeal does not alter the essential character and focus of the instant position.

CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 baccalaureate or higher degree in the specific specialty

as the minimum for entry into the occupation as required by the Act.<sup>1</sup> In this regard, the petitioner fails to establish that the supervisory nurse position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

The AAO notes that on November 27, 2002, CIS issued a policy memorandum on H-1B nurse petitions (nurse memo) and acknowledged that an increasing number of nursing specialties require a higher degree of knowledge and skill than a typical registered nurse staff nurse position.<sup>2</sup> In this matter, however, nothing in the proffered position's job description indicates that the beneficiary would be working in a nursing specialty that requires a higher degree of knowledge or skill. As stated previously, while the duties of the position are perhaps not entry level, they do not go beyond those of a supervisory registered nurse. An individual who does not possess a bachelor's degree or its equivalent in a health-related field, such as an experienced registered nurse, would be able to successfully execute the duties that the petitioner describes.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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. The petition is denied.

---

<sup>1</sup> 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." *See id.* at 387.

<sup>2</sup> 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).