



U.S. Citizenship
and Immigration
Services

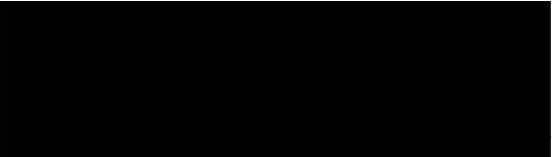


FILE: WAC 04 037 50568 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 2004

IN RE: Petitioner: [Redacted]
Beneficiary [Redacted]

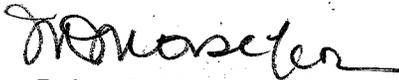
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

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 nursing home that seeks to employ the beneficiary as a rehabilitation services coordinator. 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 beneficiary is not qualified to perform the duties of the instant position, if it is categorized as a specialty occupation, because the beneficiary does not hold a license. On appeal, counsel submits a brief.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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.

With regard to licensure for H classification, 8 C.F.R. § 214.2(h)(4)(v), states the following:

- (A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification

in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) *Duties without licensure.* In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (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 rehabilitation services coordinator. The evidence implies that the petitioner requires a baccalaureate degree in a health related field for the proffered position. The petitioner indicated that it wished to hire the beneficiary because he possessed a bachelor's degree in nursing (BSN) and relevant work experience as a nurse.

The AAO notes that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that all States and the District of Columbia require nursing care facility administrators to have a bachelor's degree, pass a licensing examination, complete a State-approved training program, and pursue continuing education. It appears that the proffered position is subject to these requirements. A review of the record reveals no evidence to show that the beneficiary passed a licensing exam, completed a State-approved training program, and/or pursued continuing education.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary did not possess a State license to work as a nursing home administrator. On appeal, counsel states that the beneficiary is qualified for the position because he would be working under the supervision of licensed healthcare administrators, which, according to counsel, fulfills the regulatory criterion at 8 C.F.R. § 214.2(h)(4)(v)(C).

The job description provided in the original filing of the petition listed the duties such as: gathering data about the standards of care and services offered to the petitioner's residents; directing and coordinating activities of various healthcare and other personnel; developing, implementing, and expanding rehabilitative programs; inspecting the petitioner's facilities; monitoring and appraising the performance of healthcare staff; following legislative developments in the petitioner's industry; and assigning work to facility administrators, health services managers, physicians, and other staff. No evidence in the record other than the appeal brief indicates that the proffered position was intended to be an assistant only, or even that the beneficiary would be limited to performing duties under supervision only.

The new information that the beneficiary would be working only under supervision constitutes a material change to the original job description. In the job description submitted with the petitioner's initial petition, the proffered position's duties included directing, leading, monitoring, appraising, and coordinating the efforts of subordinate health care staff. On appeal or in response to a request for evidence, a petitioner cannot offer a new position to the beneficiary or materially change a position's title or its 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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. Thus, the beneficiary's qualifications must be examined in light of the duties that the petitioner originally described.

On appeal, counsel states that the regulatory criterion described at 8 C.F.R. § 214.2(h)(4)(v)(C) is satisfied, as the beneficiary would work under supervision only. In addition to the fact that this portrayal of the beneficiary's role is different from that appearing in the original petition and the petitioner's response to the director's request for evidence, counsel fails to provide documentation that the State of California legally sanctions such arrangements, or evidence to support the subordinate-supervisory roles described on appeal. 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).

The documentation on the record does not meet the statutory and regulatory criteria regarding the beneficiary's qualifications to perform the duties of the proffered position. 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.