

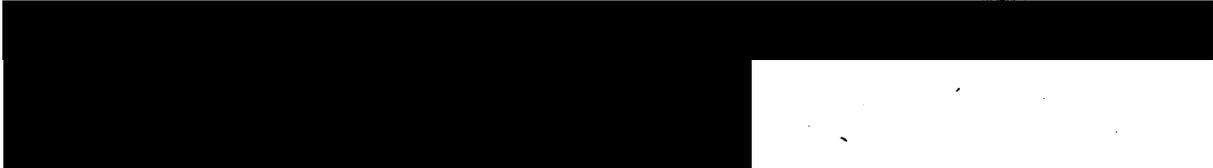
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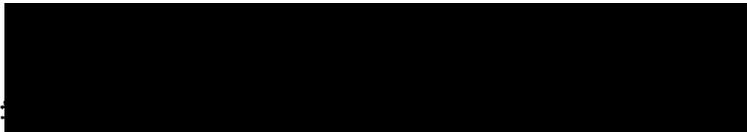
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FILE: WAC 03 102 51888 Office: CALIFORNIA SERVICE CENTER Date: AUG 24 2005

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:

SELF-REPRESENTED

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

**DISCUSSION:** The 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 healthcare management firm that seeks to employ the beneficiary as an education coordinator. The petitioner, therefore, 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 on the basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 proposed position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s RFE response and supporting documentation; (4) the director’s denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In the petitioner’s letter of support, the duties of the proposed position were set forth as follows:

The individual will be required to set educational standards and goals and establish the policies and procedures to carry them out. She will also be required to supervise managers, support staff, teacher [sic], nurses, counselors, and others. She will be required to develop academic programs; monitor students' educational progress; train and motivate [sic] teachers and other staff members; manage guidance and other students; administer record keeping[,] and prepare [the] budget. [Must have] [t]he ability to make sound decisions and to organize and coordinate nursing students' development. Knowledge of management principles and practices, gained through work experience, as a Nurse is very important.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, the petitioner contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO does not agree with the petitioner's assertion that the proposed position normally requires a bachelor's degree in nursing or a related field. The position proposed in the instant petition is that of an education coordinator. The *Handbook* provides the following information regarding the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: a bachelor's of science degree in nursing (BSN), an associate degree in Nursing (A.D.N.), and a diploma. . . . Generally, licensed graduates of any of the three types of educational programs 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 whose duties appear to mirror those of the proposed position. The *Handbook* offers the following information regarding the duties of head nurses or nurse supervisors:

*Head nurses or nurse supervisors* direct nursing activities, primarily in hospitals. 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 that the patients receive proper care.

They also may ensure that records are maintained and equipment and supplies are ordered.

The duties of the proposed position are more analogous to those of head nurses or nurse supervisors rather than to those of an administrative nursing position. A recent CIS policy memo states the following regarding 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 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).

In this case, the petitioner has not demonstrated that the proposed 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, which do not require a bachelor's degree, or its equivalent, in a specific specialty for an entry-level position. As such, it is concluded that the petitioner has not demonstrated that the proposed position is a specialty occupation within the meaning of the regulations. The petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Therefore, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed both job postings submitted by counsel in response to the director's RFE. The petitioner contends that these job postings establish that the petitioner's degree requirement is an industry standard. The petitioner, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The petitioner has submitted no evidence to demonstrate that it is similar to these employers in scope or scale of operation. Nor can these positions be considered parallel to the position proposed in the petition. For example, one of the positions requires California licensure, which the petitioner concedes the beneficiary does not possess. Both positions require several certifications, and there is no evidence that the beneficiary possesses any of them. It also does not appear as though the duties of the proposed position are as complex as those of the advertised positions.

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are very similar to those of head nurses or nurse supervisors, as discussed in the *Handbook*, positions which do not require bachelor's degrees. The record contains no documentation to support a finding that the proposed position is more complex or unique than head nurse or nurse supervisor positions in other, similar organizations.

Therefore, the petitioner cannot establish that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. While the petitioner states that it has hired an H-1B nonimmigrant in the past to perform the duties of the position, none of the aforementioned evidence that would support this assertion was submitted. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO has also reviewed the three advertisements placed by the petitioner in *Tribune U.S.A.* However, they do not state that a bachelor's degree is required.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – that 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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than head nurse or nurse supervisor positions in other, similar organizations. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the petitioner contends that the petition should be approved because the service center has approved similar petitions in the past. To support this contention, the petitioner includes a submission letter, for an earlier H-1B petition, dated November 28, 2000, as well as an I-824 approval notice. However, the record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by a previous attorney are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proposed position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior H-1B petition were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of that petition would constitute material and gross error on the part of the director. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of*

*Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the director was correct to deny the petition.

Beyond the decision of the director, the AAO has determined that the beneficiary does not qualify to perform services in a specialty occupation.

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.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above. The beneficiary did not earn a degree from a United States institution of higher education, so he does not qualify under the first criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. The record does contain an "Equivalency Report" from the International Education Research Foundation, Inc. (IERF), dated October 24, 2003. The IERF evaluation did not determine that the beneficiary's foreign education is equivalent to a United States baccalaureate or higher degree. Rather, the IERF evaluation deemed the beneficiary's educational background equivalent to an associate of applied science degree in nursing plus 63 additional undergraduate semester units. While the combination of an associate's degree in nursing and 63 undergraduate semester units may be equivalent to a bachelor's degree in nursing, the IERF evaluation made no such determination, and the record does not reflect the equivalency.

The beneficiary does not hold an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that 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), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (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.

The beneficiary's combination of education and previous experience do not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). No evaluation has been submitted by an evaluator with authority to grant college-level credit for training and/or experience in nursing at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. A credentials evaluation service may evaluate educational credentials only. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that he submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As noted previously, the IERF evaluation did not determine that the beneficiary's education is equivalent to a United States baccalaureate or higher degree.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that he submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. 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<sup>1</sup>;
- (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's resume traces his work history from March 1981 through July 1984, October 1985 through December 1988, December 1989 through May 1991, and January 1992 through June 2002, for a total of 18 years and four months. The formula utilized by CIS is three years of specialized training and/or work experience for each year of college-level training that the alien lacks. A baccalaureate degree from a United States institution of higher education would require four years of study. The beneficiary has the equivalent of an associate's degree, for which the AAO will recognize two years of academic study leading to a four-year degree. The beneficiary must therefore demonstrate at least six years of qualifying work experience.

As noted above, the beneficiary appears to have over 18 years of work experience. The AAO's next line of inquiry is therefore to determine whether this work experience included the theoretical and practical

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<sup>1</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

application of specialized knowledge required by the specialty occupation, whether it was gained while working with peers, supervisors, or subordinates who held a degree or its equivalent in nursing, and whether the beneficiary achieved recognition of expertise in the specialty evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The petitioner submits a copy of a letter from the Isabela Provincial Health Office, which states that the beneficiary worked for the company, in the Philippines, as a public health nurse from January 17, 1992 until at least July 1, 2002 (the date of the letter). However, no information regarding his duties is provided, which precludes the AAO from determining whether this experience included the theoretical and practical application of specialized knowledge required by the specialty occupation, whether it was gained while working with peers, supervisors, or subordinates who held a degree or its equivalent in nursing, and whether the beneficiary achieved recognition of expertise in the position. No evidence regarding the beneficiary's other work experiences is submitted, either.

As noted previously, a baccalaureate degree from a United States institution of higher education requires four years of study, so the beneficiary would need to demonstrate at least six years of qualifying work experience that included the theoretical and practical application of specialized knowledge required by the specialty occupation, that it was gained while working with peers, supervisors, or subordinates who held a degree or its equivalent in nursing, and that the beneficiary achieved recognition of expertise in the position in order to qualify for its equivalency. Such a demonstration has not been made.

As such, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Therefore, the beneficiary does not qualify to perform services in a specialty occupation, and the petition may not be approved.

Finally, 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.

Pursuant to 8 C.F.R. § 214.2(h)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

- (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.
- (D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.
- (E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

The beneficiary holds licensure as a registered nurse from the Filipino Professional Regulation Commission. However, she does not hold California licensure. The petitioner concedes on appeal that the beneficiary does not hold California licensure. The petitioner states that “[a]lthough he has no RN license yet in California, he had taken the exam and [is] just waiting for the result.” However, 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). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The portion of the California Code of Regulations governing licensure of nurses states the following:

An applicant who is currently licensed in a foreign country and who meets the educational requirements in § 2736 may be issued an interim permit, subject to the conditions set forth in subsections (b), (c), (d), and (e) of § 1414. *See* 16 Cal. Admin. Code § 1414.1.

The record contains no evidence that the beneficiary holds such an interim permit.

Thus, the beneficiary is precluded from performing the duties of a specialty occupation by 8 C.F.R. § 214.2(h)(v). For this additional reason, the beneficiary does not qualify to perform the duties of a specialty occupation.

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation. The petitioner has also failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the AAO will 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.