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FILE: WAC 03 081 54050 Office: CALIFORNIA SERVICE CENTER Date: 8/19/2005

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:

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 of the service center 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, the operator of two healthcare facilities for the developmentally disabled, seeks to employ the beneficiary as a home health aide/menu planner. The petitioner therefore filed this H-1B petition in order 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).

On appeal, the petitioner notes that it is responsible for the care and well-being of its residents, who are identified as Level IV-I developmentally disoriented individuals by the California Licensing Division of the California Department of Health Services, and who “require the utmost nutritional, behavioral, medical/dental, hygienic, and adaptive learning attention simply because of their human development and nature.” The petitioner asserts that it sets a high standard for excellence. It requires its workers to “complete various seminar courses, especially the California mandated DSP I and II certifications, and pass the certification exams.” Relevant to the knowledge, skills, and competencies of the proffered position, the petitioner’s administrator states:

Beyond all the body of “theoretical and practical” field of specialized knowledge required in accordance with [the Act] and Department of Labor definitions, the applicant-worker must be capable of performing a sundry of tasks, in addition to “generic” and/or “specialized”; must be a “willing” worker to provide personal traits of human understanding, a lot of patience, and unquestionably very caring relationship[s] with the goal of ensuring the well-being of the residents so that they may be integrated back to their social sphere of the home and family environment.

Operating and managing a healthcare facility in the category of Level IV-I residents demands special workers and special skills and expertise. The job involves special “communication” skills due to the non-verbal/body language status of both resident and caregiver. As the licensee and owner of this facility, I simply cannot afford to hire common workers with minimum entry requirements, with barely common work experience, with a common high school diploma. In a litigious state like California, healthcare facilities have historically been subject to expensive litigations due to the simple fact that the operators and workers failed to live up to the high standards of performance in providing care to the developmentally disoriented segment of society.

The director’s decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the director’s request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, and the petitioner’s February 24, 2005 letter on appeal with its enclosures.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] requires *theoretical and practical application of a body of highly specialized knowledge* in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires *the attainment of a bachelor's degree or higher in a specific specialty*, or its equivalent, as a minimum for entry into the occupation in the United States. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner does not take exception to the accuracy of the following summary of the proffered position and its duties that the director presented in his decision:

[T]he duties include menu planning and food preparation, emergency response and preparation, emergency CPR and rescue, and behavior management. It says that the applicant for the position must have the basic skills needed to be certified in California as a home health aide, primarily in the DSP (direct support program) of the California Department of Developmental Services. A minimum of one-year training and experience is required for this position.

....

In response to the [RFE], the petitioner provided the following duties:

Menu Planning, food preparation and serving	45%
Kitchen sanitation	10%
Bedroom cleaning	2.5%
Living/family room cleaning	2.5%
Home emergency intervention	12.5%
Taking vital signs	2.5%
Measuring/recording intake & output	2.5%
Administering medication	2.5%
Reports	20%

For the following reasons, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor’s degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹ To the extent that it is described in the record, the proffered position appears to be a combination of the 2004-2005 *Handbook*’s occupational categories of Home Care Aides (discussed in the Personal and Home Care Aides section, pages 391-

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/.

393) and Nursing, Psychiatric, and Home Health Aides (discussed at pages 344-346). The information in the *Handbook* indicates that neither of these occupational categories normally has an entry-level requirement of at least a bachelor's degree, or the equivalent, in a specific specialty. There is no evidence of record that rebuts or refutes this DOL information, and, in fact, the documentation provided by the petitioner is consistent with it. Accordingly, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) has not been satisfied.

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted attestations from other health care facilities or from a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty.

As the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). While it may be the petitioner's opinion that either or both of these criteria have been satisfied, it is not supported by evidence of record. 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)).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.