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FILE: WAC 04 242 53921 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

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:



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 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 medical services business that seeks to employ the beneficiary as an administrative services manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 and additional evidence, including an amended petition and an amended labor condition application.

The amended petition and amended labor condition application are noted. Citizenship and Immigration Services (CIS) regulations, however, 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 petitioner cannot materially change a position's title or its associated job responsibilities after the filing of the petition. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, as have occurred here, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. In this case, the new or amended petition was not properly filed with fee. Furthermore, regulations at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) provide that *before filing a petition for H-1B classification in a specialty occupation*, the petitioner shall obtain a certification from the Department of Labor (DOL) that it has filed a labor condition application. (Emphasis added.) In this case, the amended labor condition application was certified on November 30, 2004, a date subsequent to September 3, 2004, the filing date of the visa petition. In view of the foregoing and for the purposes of this proceeding, the proffered position is that of an administrative services manager.

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.

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 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 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 an administrative services manager. Evidence of the beneficiary’s duties includes: the I-129 petition; the petitioner’s August 24, 2004 letter in support of the petition; and the petitioner’s response to the director’s request for evidence. According to the petitioner’s August 24, 2004 letter, the beneficiary would perform duties that entail: planning, directing, and/or coordinating the petitioner’s support services, such as mail distribution, the telephone operator/receptionist, and bookkeeping; hiring and supervising medical staff in assigned duties; planning, directing, arranging, and/or coordinating medical services to be provided to the patients; and making daily and weekly operations reports. The petitioner indicated that the beneficiary was a qualified candidate for the job because she possesses a bachelor’s degree in physical therapy.

In its response to the director's request for further evidence, counsel and the petitioner changed the job title to clinical manager and expanded the beneficiary's duties, adding items such as hiring and supervising physical therapists. In sum, the initial description appeared to have the beneficiary doing administrative work and hiring and supervising medical aides, while the second iteration of the job has the beneficiary performing the additional duties of hiring and managing professional physical therapists.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *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. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new, more complex duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so specialized and complex as to require a bachelor’s degree. Citing to the DOL’s *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of a medical and health services manager or clinical manager, and is not an administrative services manager. Counsel states further that the beneficiary “will establish the P.T. department and to [sic] direct, coordinate and supervise medical assists [sic] [and] physical therapists in providing medical and health supporting services. . .”

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is similar to that of a medical and health services manager or a clinical manager. None of the beneficiary’s job duties described at the time of filing entails the level of responsibility of either occupation. In this case, although the petitioner was established in 1996, its 2003 Schedule C, Profit and Loss from Business, reflects only \$391,296 in gross receipts or sales, and \$183,288 in salaries and wages. Further, excluding the proffered position, the petitioner’s organizational chart reflects only five positions: the president, a senior assistant, and three medical aides. A review of the Office and Administrative Support Worker Supervisors and Managers in the *Handbook*, 2006-2007 edition, finds that the proposed duties parallel the responsibilities of an office and administrative support worker supervisor or manager. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for this job.

Regarding parallel positions in the petitioner’s industry, the petitioner submitted Internet job postings for a variety of positions related to health care. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Further, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties described in the advertised positions, such as managing personnel, staffing, and material resources for a community hospital, and leading multidisciplinary teams to design, implement, and evaluate quality improvement projects in managed care. Thus, the advertisements have no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the petitioner’s owner and founder, who

previously held the proffered position, holds an M.D. degree. The owner, founder, president, and medical doctor of the organization would presumably have increased responsibilities in running the organization in addition to performing the duties of the administrative services manager. The petitioner has not established that the position of owner/founder/president/medical doctor is similar to that of the administrative services manager. Further, 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 (5th 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.¹ In this regard, the petitioner fails to establish that the administrative services manager position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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

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. 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).

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.

¹ 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.