

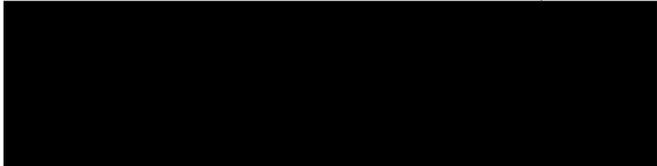
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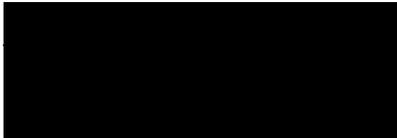


FILE: LIN 05 200 50427 Office: NEBRASKA SERVICE CENTER Date: FEB 26 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition. 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 home health care facility. It seeks to employ the beneficiary as its administrator. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the June 2, 2005 Form I-129 with supporting documentation; (2) the director's June 27, 2005 request for further evidence (RFE); (3) an undated response to the director's RFE including a copy of the petitioner's Colorado State license to operate a home health care facility and a copy of the petitioner's state unemployment insurance report showing the names of its employees and their wages for the second quarter of 2005; (4) the director's September 1, 2005 RFE; (5) counsel for the petitioner's October 17, 2005 response to the director's RFE; (6) the director's November 1, 2005 denial letter; (7) the Form I-290B and statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Preliminarily, the AAO observes that the labor condition application (LCA) in the record is certified on June 3, 2005, one day after the petitioner filed the petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B) requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor in the occupational specialty in which the H-1B worker will be employed. The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Thus when the petition was filed the petitioner had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

The AAO now turns to whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The Form I-129 Supplement H describes the proposed duties of the proffered position as: "Directs/coordinates activities of the service of health care facility. Develops organizational policies and establishes evaluative or operational criteria for the facility." The record also includes a document titled "The highlights of the Employment Agreement between [the petitioner] and [the beneficiary]." This document lists the beneficiary's main responsibilities as:

- Directs and coordinates activities of the service, and maintenance personnel of health care facility.

- Develops organizational policies and procedures and establishes evaluative or operational criteria for the facility.
- Establishes work schedules and assignments for staff, according to workload.
- Inspects facilities for emergency readiness and compliance of access, safety, and sanitation regulations and recommends building or equipment modifications.
- Recruits, hires, and evaluates the performance of staff and auxiliary personnel. Reviews and analyzes facility activities and data to aid planning and cash and risk management and to improve service utilization.
- Implements and administers programs and services for health care facility. Administers fiscal operations, such as planning budgets, authorizing expenditures and coordinating financial reporting.

In response to the director's September 1, 2005 RFE, counsel for the petitioner indicated that although the petitioner is a home health care facility it serves a great number of its clients at their homes. Counsel also asserted that the petitioner normally requires a degree or its equivalent for the proffered position. Counsel submitted documents showing the previous administrator held the equivalent of a bachelor's degree in nursing when he took over the position and had since earned a doctorate degree. Counsel also referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* heading of medical and health services managers and noted that an administrator/manager was not required to work exclusively in a nursing home or similar facility.

On November 1, 2005 the director denied the petition, determining that the petitioner provides home health care and is not a health care facility that admits patients, thus the petitioner had not established that the beneficiary would be performing the duties described. In addition, the director determined that although the petitioner's previous administrator had a bachelor's degree in nursing, the petitioner had not established that the position itself required the theoretical and practical application of a body of highly specialized knowledge. The director also noted that the petitioner had not submitted documentary evidence that businesses similar to the petitioner required the services of individuals with specialized degrees in parallel positions or that the nature of the proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel for the petitioner again references the *Handbook* regarding health care managers and indicates that health care managers will grow the fastest in practitioners' offices and in home healthcare agencies. Counsel also takes issue with the director's reference to the prior administrator's relationship with the petitioner. Counsel states that the petitioner is a corporation and that the petitioner's requirement of a degree for the position is not a self-imposed standard.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. The AAO turns first to the duties of the proffered position and the statutory and regulatory requirements of a specialty occupation.

The AAO takes note of the following discussion in the *Handbook* regarding medical and health services managers:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. Medical and health services managers, also referred to as *health care executives or health care administrators*, plan, direct, coordinate, and supervise the delivery of health care. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

The structure and financing of health care are changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated health care delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work and an increased focus on preventive care. They will be called on to improve efficiency in health care facilities and the quality of health care provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of related services - for example those ranging from inpatient care to outpatient followup care.

* * *

In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finances, facility operations, and admissions and also have a larger role in resident care.

The *Handbook* discusses the educational requirements for this occupation as:

Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level position in smaller facilities at the departmental level within health care organizations, and in health information management. Physicians' offices and some other facilities may substitute on-the-job experience for formal education.

The AAO also notes the *Handbook's* discussion regarding the duties of administrative services managers that provides:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services These workers manage the many services that allow organizations to operate efficiently.

* * *

In small organizations, a single administrative services manager may oversee all support services As the size of the firm increases, administrative services managers are more likely to specialize in specific support activities. For example, some administrative services managers work primarily as office managers

The *Handbook* reports: "educational requirements for these [administrative services] managers vary widely, depending on the size and complexity of the organization." Based on the *Handbook's* statements, small organizations may only require that their administrative managers have experience, some organizations may require an associate degree in business or management or a high school diploma when combined with experience, and some organizations may require managers of highly complex services to obtain a baccalaureate degree or its equivalent, to enter into a position.

In this matter, the petitioner's description of the duties of the proffered position provides only a general overview of the tasks associated with the position. Such a broadly worded description fails to establish that the duties of the position requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific specialty as a minimum for entry into the occupation in the United States. For example, the petitioner indicates that the successful incumbent in the position will develop organizational policies, establish evaluative or operational criteria for the facility, direct and coordinate activities of the service and maintenance personnel of a health care facility, and implement and administer programs and service for the health care facility as well as establishing work schedules and assignments for the staff and recruiting, hiring, and evaluating the performance of staff and auxiliary personnel. However, these generic statements do not provide sufficient detail to allow a conclusion that the duties the individual in the proffered position would actually perform comprise the fundamental functions of planning, directing, coordinating, or supervising the delivery of health care. The *Handbook* specifically notes that "[m]anagers in non-health areas, such as administrative services . . . finance and human resources . . ." are not health services managers. The general duties described in this matter could just as easily qualify as those of an administrative or office manager.

The AAO agrees that the petitioner's provision of services to clients outside of a hospital or clinic setting does not necessarily preclude the petitioner from demonstrating its need for a professional. The AAO also observes that the *Handbook* reports that a bachelor's degree in nursing often is necessary for administrative positions in the health services field. However, again, the petitioner in this matter does not describe how it will utilize the services of an "administrator" to perform tasks that encompass the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. The petitioner does not relate the generalized duties to the specific nature of its operations. The petitioner has not described: how the individual in the proffered position will coordinate its services; what organizational policies and procedures will be developed; how inspection of and reviewing the facilities requires specialized knowledge at a bachelor's degree level in a specific specialty; or, the tasks involved in implementing and administering programs for the facility. The AAO is left with general information about the proffered position and no language or documentary evidence connecting the nonspecific duties to the petitioner's business. 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 declines to accept a broad overview of the position of an "administrator" as definitive of a particular position's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation, whether the position is one that actually requires a baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular

position. The petitioner in this matter has not provided a sufficiently detailed description relating specific tasks to the nature of the petitioner's business. The petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner has not submitted evidence that other home health care facilities require administrators to attain a bachelor's degree or higher in a specific specialty. In addition, without a meaningful description of the duties of the proffered position, the petitioner cannot establish that the position's duties are parallel to any degreed positions within parallel organizations. Neither does the petitioner provide sufficient information to distinguish the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The record does not contain evidence that establishes either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), whether the petitioner normally requires a degree for the position, the AAO acknowledges the information in the record that shows that the individual, the sole shareholder of the petitioner, employed as the petitioner's prior administrator held the equivalent of a bachelor's degree in nursing (BSN). However, for the same reasons noted above, (insufficient information in the record regarding the actual duties of the position) the petitioner's employment of an individual with a BSN does not establish that the position is a specialty occupation. Moreover, the AAO notes that a petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. 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. In this matter without a meaningful description of the duties, the AAO is precluded from determining whether the proffered position 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. Further, if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees.

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the general description of the duties in the record does not substantiate that the duties are sufficiently specialized or complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. Without a meaningful description of duties related to its specific business operations, the petitioner has not established that such duties are either specialized or complex. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 met that burden.

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