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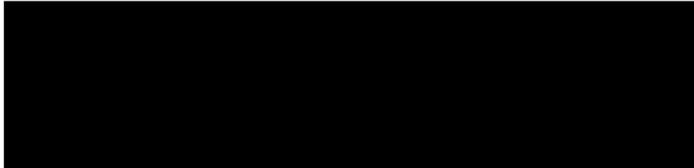
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 143 50303 Office: VERMONT SERVICE CENTER Date: JUL 3 0 2007

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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 nursing rehabilitation research center. It seeks to employ the beneficiary as a recreational coordinator, level I. Accordingly, 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 record includes: (1) the April 14, 2004 Form I-129 and supporting documents; (2) the director's September 22, 2004 request for further evidence (RFE); (3) the petitioner's undated response to the director's RFE; (4) the director's January 18, 2005 denial decision; and (5) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On January 18, 2005, the director denied the petition determining: that the petitioner had failed to establish that the proffered position is a specialty occupation; that the petitioner had failed to provide evidence of the beneficiary's eligibility to perform the duties of a specialty occupation; and that the record did not contain a copy of a Labor Condition Application (LCA), Form 9035. The petitioner states on appeal that a foreigner had been hired in the past to fill the position of activity consultant for its organization and submits a resume and a letter on behalf of the individual that had previously held the position. The petitioner also submits a copy of the beneficiary's transcript and notes that an LCA had been filed for the proffered position and was still pending.

The AAO first observes that 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). For this reason, the petition will be denied.

The next issue in this matter is whether the petitioner has established that the proffered position is that of a specialty occupation. 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)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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.

In an attachment to the Form I-129, the petitioner provided the following description of the position of recreation coordinator level I:

Essential Functions:

1. Develop programs appropriate for Level I residents.
2. Review residents in the facility to determine individuals appropriate for Level I activities.
3. Assign and supervise staff to daily activities with the residents.
4. Develop individualized Care Plans for residents in Level I.
5. Provide In-Service education to staff on the individualized Care Plans for each resident.
6. Develop group activities for residents that can interact in a group like setting.
7. Review with staff the protocol for each group activities and grade for each of the group activities on a scale of 1-10 for level of appropriateness and satisfaction expressed by resident and families.
8. Review with staff 1:1 activities for each resident and grade for appropriateness.

9. Develop initial assessments as required.
10. Document in progress notes as required.
11. Attend patient care conferences as required.
12. Attend in-services and other meetings as directed.

In response to the director's RFE, the petitioner stated: "Individuals serving as the activity coordinators for our organization must have the equivalent baccalaureate degree in science in order to be an activity coordinator. The petitioner provided the same description of duties as previously provided.

On January 18, 2005 the director denied the petition, noting the petitioner's statement but observing that the petitioner had failed to present any documentary evidence of prior employees in the proffered position or their educational levels. The director also determined that the petitioner had not established that the proffered position requires a bachelor's degree in a specific specialty or a narrow range of disciplines or that there was an industry standard requirement that an activity coordinator must have a degree in a specific discipline.

On appeal, the petitioner asserts that a foreigner had previously held the proffered position. The petitioner also presents the previous employee's resume as well as a letter requesting approval of a TN nonimmigrant visa for the beneficiary.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the position of a recreation supervisor/coordinator, a position that includes some of the duties of the proffered position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With reference to recreation supervisors, the *Handbook* 2006-2007 edition states:

Recreation Supervisors oversee recreation leaders and plan, organize, and manage recreational activities to meet the needs of a variety of populations. These workers often serve as liaisons between the director of the park or recreation center and the recreation leaders. Recreation supervisors with more specialized responsibilities also may direct special activities or events or oversee a major activities, such as aquatics, gymnastics, or performing arts.

Regarding the education and training for a recreational worker, the *Handbook* states:

Educational requirements for recreation workers range from a high school diploma – or sometimes less for those seeking many summer jobs – to graduate degrees for some administrative positions in large public recreation systems. Full-time career professional positions usually require a college degree with a major in parks and recreation or leisure studies, but a bachelor's degree in any liberal arts field may be sufficient for some jobs in the private sector.

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Graduates of associate's degree programs in parks and recreation, social work, and other human services disciplines also enter some career recreation positions. High school graduates occasionally enter career positions, but this is not common.

The *Handbook* references a variety of avenues available to obtain a position as a recreation coordinator/supervisor/specialist. The *Handbook* notes that several different degrees, including a general degree in liberal arts, are appropriate for gaining entry into this field. The *Handbook* also acknowledges that some employers prefer a bachelor's degree in a recreation-related discipline for recreation supervisor jobs. The information in the *Handbook*, however, does not report the necessity of a bachelor's degree in a specific discipline for a recreation coordinator/specialist/supervisor. The *Handbook* recognizes that a range of disciplines may be sufficient to gain entry into this occupation. The AAO observes that when an occupation requires a degree of generalized title, like that of a liberal arts degree, or requires a range of degrees, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The record does not contain particular evidence establishing that a recreation specialist is an occupation that requires the attainment of a bachelor's degree in a specialized field of study.

The AAO also finds that some of the elements of the position may include patient care; however, the record does not contain sufficient information regarding these elements to conclude that the proffered position is a specialty occupation. 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 record contains insufficient information regarding the occupation of recreation specialist to conclude that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether 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. To determine whether the petitioner's degree requirement is shared within its industry, CIS often considers 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)). In this matter as observed above, the *Handbook* does not report that a recreational specialist/supervisor requires a baccalaureate degree in a specific discipline. The record does not contain submissions regarding standard hiring practices from individuals, firms, or professional associations in the industry.

The petitioner in this matter has not offered any documentary evidence that a baccalaureate degree in a specific discipline is a common requirement for similar organizations for parallel positions. Thus, the petitioner cannot establish the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Upon review of the duties of the proffered position, the AAO is unable to conclude, from the brief and general description provided, that the position includes duties that are so complex and unique that only an individual with a

degree can perform the work associated with the position. The AAO finds nothing in the record to persuade that the nature of the specific duties of the proposed position is more complex and unique than that of a typical recreation coordinator/activities coordinator, a position that the *Handbook* indicates as one that does not normally require a degree in a specific discipline or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO considers the petitioner's past hiring practices when evaluating the third criterion; that is whether the petitioner normally requires a bachelor's degree in a specific discipline for the proffered position. In this matter the petitioner notes that it has previously hired a foreigner in the proffered position. However, the petitioner does not provide documentary evidence in the form of tax or payroll records to substantiate its employment of this individual. Moreover, the AAO determines that a resume is insufficient to establish the previous employee's educational level. The AAO finds that the June 27, 2000 letter supporting the previous employee's TN nonimmigrant visa petition suggests the previous employee only had healthcare aide and healthcare clerk training along with some additional courses in business. The record does not demonstrate that the petitioner's past hiring practices included the requirement that the individual in the proffered position must have a baccalaureate or higher degree in a specific discipline. Further, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. 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. Accordingly, the AAO finds that proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Turning now to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO finds that the petitioner has not provided evidence sufficient to demonstrate that the individual in the proffered position will be required to apply a body of highly specialized knowledge in the role of recreation coordinator. The petitioner has not provided examples of specific duties that require the performance of specialized and complex duties. The petitioner must identify the elements pertinent to the proffered position that are so specialized and complex that only an individual with a degree in a specific discipline could perform the duties. The AAO does not find the nature of the duties described in this matter sufficient to elevate the position to one that can only be performed by an individual with a degree in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petitioner has not established the proffered position is a specialty occupation. For this reason, the petition will be denied.

The next issue in this matter is whether the petitioner has established that the beneficiary is eligible to perform the duties of a specialty occupation. The record includes the beneficiary's transcripts and an unsigned statement that the beneficiary completed three years of study (6 terms) at the University of Economics in Bratislava that is the equivalent of a baccalaureate degree in economic science. The record does not include an evaluation from an authorized credentialing agency or any other evidence establishing the beneficiary's

credentials to perform the duties of a specialty occupation. The AAO notes specifically that the beneficiary's education must directly relate to the duties of the specialty occupation. Although in this matter, the petitioner has not established that the proffered position is a specialty occupation, the AAO observes that the generally stated duties pertain to healthcare rehabilitation activities, not to economics or other business disciplines. The petitioner in this matter has not established that the beneficiary is eligible to perform the duties of a specialty occupation. For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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