

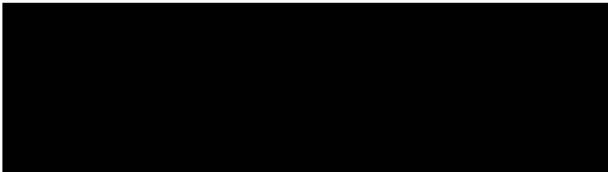
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FILE: WAC 05 258 52609 Office: CALIFORNIA SERVICE CENTER Date: JUL 08 2008

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:
[Redacted]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) remanded a subsequent appeal to the director for entry of a new decision. The director has denied the petition and certified her decision to the AAO for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a general nursing and rehabilitation services center that seeks to employ the beneficiary as a psychiatric rehabilitation counselor. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's December 6, 2005 request for additional evidence; (3) the petitioner's January 26, 2006 response to the director's request; (4) the director's February 22, 2006 denial letter; (5) the Form I-290B and supporting documentation, received on March 16, 2006; (6) the AAO's August 6, 2007 remand of the petition to the director; (7) the director's September 24, 2007 request for additional evidence; (8) the petitioner's December 7, 2007 response to the director's request; and (9) the director's March 25, 2008 notice of certification. The AAO reviewed the record in its entirety before issuing its decision.

In its August 6, 2007 decision, the AAO determined that, although the petitioner had overcome the director's concerns regarding licensure,¹ the petitioner had still not established that the beneficiary qualifies to perform the duties of a psychiatric rehabilitation counselor. Looking to the 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), at page 190, the AAO found that while a bachelor's degree often qualifies an individual to work as a counseling aide, rehabilitation aide, or social service worker, the position proposed by the petitioner is not that of a counseling aide, rehabilitation aide, or social service worker. Moreover, the AAO looked to the website of the California Labor Market Information Service² and found that, while government agencies will accept a bachelor's degree with related work experience, rehabilitation counselors in the private sector need a master's degree or to be enrolled in a master's degree program. As the record did not establish that the beneficiary possesses a master's degree or that he was enrolled in a master's degree program at the time the petition was filed, the AAO determined that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a psychiatric rehabilitation counselor. As the AAO found the beneficiary unqualified to perform the duties of the proposed position on grounds different from those relied upon by the director, the petition was remanded to the director for entry of a new decision, with certification to the AAO if her decision was adverse to the petitioner. The AAO's decision is part of the record and its full contents need not be repeated here.

Pursuant to the AAO's instruction, the director issued a request for additional evidence on September 24, 2007. In relevant part, the director stated the following: "[S]ubmit evidence that the beneficiary possesses a master's degree or was enrolled in a master's program at the time the petition was filed."

In its December 7, 2007 response to the director's request for additional evidence, the petitioner stated that it does not require a master's degree; that the beneficiary has the equivalent of a bachelor's degree in psychology; that the beneficiary was previously granted H-1B status in order to work as a psychiatric

¹ Specifically, the AAO found that while the *Handbook* states that 48 states require licensure, California is one of the two states (Nevada being the other) that do not require such licensure.

² See <http://www.caccl.org/faq.html> (accessed July 12, 2007).

rehabilitation counselor; and that the beneficiary has now enrolled in a master's degree program at the University of Phoenix.

The petitioner has failed to establish that the beneficiary qualified to perform the duties of a psychiatric rehabilitation counselor at the time the petition was filed. 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, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. As noted previously, the degree required by the specialty occupation in the private sector is a master's degree. Enrollment in a master's degree program would also suffice.

The first criterion requires a showing that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary did not earn a degree in the United States, so he does not qualify under this 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. While the record contains an evaluation stating that the beneficiary has the equivalent of a bachelor's degree in psychology, the AAO notes that if a particular specialty occupation requires an educational attainment *higher* than that of a baccalaureate degree, then the beneficiary of the proposed position must possess that requisite higher education. The record establishes that, in California, psychiatric rehabilitation counselors in the private sector must possess either a master's degree or be enrolled in a master's degree program. The beneficiary does not possess a master's degree, nor was he enrolled in a master's degree program at the time the petition was filed.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he 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. Again, in California, psychiatric rehabilitation counselors in the private sector must possess either a master's degree or be enrolled in a master's degree program. The beneficiary does not possess a master's degree, nor was he enrolled in a master's degree program at the time the petition was filed. The beneficiary does not qualify under the fourth criterion.

The AAO turns next to the petitioner's submission of documentation indicating that the beneficiary has enrolled in a master's degree program. As noted previously, a person may become a psychiatric rehabilitation counselor without a bachelor's degree so long as they are currently enrolled in a master's degree program. The instant petition was filed on September 28, 2005. The petitioner submits a copy of an online application for a master's degree program from the University of Phoenix, dated November 2007, over two years after the petition was filed.³ The 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). The beneficiary was not enrolled in a master's degree program at the time the petition was filed and, therefore, he was not qualified to perform the duties of the proposed position at the time the petition was filed.

Finally, the AAO turns to the petitioner's statement on appeal that CIS did not require the beneficiary to possess a master's degree when it approved a petition for the beneficiary to work as a psychiatric rehabilitation counselor for his previous employer in Illinois. However, the prior approval does not preclude CIS from denying this petition based on reassessment of petitioner's qualifications.⁴ *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Moreover, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute material error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors

³ The University of Phoenix application states that the beneficiary is currently working for the beneficiary as a full-time admissions and marketing director. As this decision relates, the petitioner filed the Form I-129 for the beneficiary to work for it as a psychiatric rehabilitation counselor. Therefore, the basis of the beneficiary's permission to work for the beneficiary as an admissions and marketing director is unclear to the AAO. However, the AAO will not address this issue, as issues regarding the beneficiary's maintenance of nonimmigrant status are beyond the scope of its jurisdiction.

⁴ Notably, the AAO notes that, according to the *Handbook*, 48 states require licensure in order to work as a psychiatric rehabilitation counselor. The only two states not to require licensure are California and Nevada. Illinois, therefore, does require licensure, and the beneficiary would have been unable to accept employment there without licensure. If CIS approved a petition for a position that required licensure when the beneficiary did not possess such licensure, the approval was erroneous.

as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to overcome the grounds of the director's denial. In accordance with the previous discussion, it has failed to demonstrate that the beneficiary is qualified to perform the duties of the proposed position. Therefore, the director's decision will be affirmed.

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 director's March 25, 2008 decision is affirmed. The petition is denied.