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20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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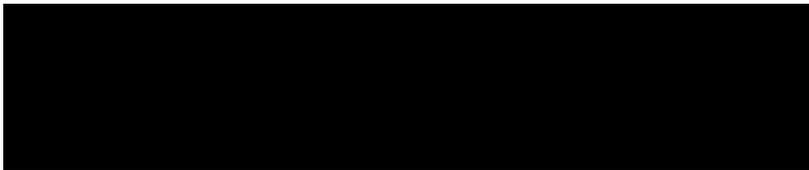


FILE: LIN 04 024 54157 Office: NEBRASKA SERVICE CENTER Date: FEB 25 2005

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:



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 is a long-term care facility that seeks to employ the beneficiary as a healthcare educator. 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 director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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.

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 a healthcare educator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail instructing family members and guardians about the healthcare needs of patients; designing healthcare education programs; researching and selecting healthcare materials; monitoring public health information regarding communicable diseases that may affect staff and patients; devising staff education with the goal of preventing and minimizing infections; and collaborating with affiliates to maintain high educational standards in healthcare. The petitioner stated that the usual minimum requirement for the proffered position is a baccalaureate degree in a mental/behavioral health field and experience in nursing or general healthcare.

The director determined that the proffered position was not a specialty occupation. According to the director, the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) is referred to when determining whether an occupation qualifies as a specialty occupation. The director stated that the *Occupational Information Network (O*Net)* replaced the *Dictionary of Occupational Titles (DOT)*, and further, that the *Handbook's* information about the educational requirements of certain occupations is more specific than the *O*Net*. The director found the proffered position's responsibilities and the submitted job advertisements did not indicate that the proffered position requires a specific baccalaureate degree.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that a health care educator requires at least a baccalaureate degree; that CIS agreed that the proffered position parallels a health educator; and that the director should have relied on the *O*Net's* information instead of the *Handbook*. Counsel states that the healthcare industry commonly requires a candidate to possess a baccalaureate degree and that the five job advertisements established this. Referring to *Young China Daily v. Campbell*, 745 F. Supp. 553 (N.D. Cal. 1989), counsel states that the court in the case noted that "the similarity of positions resided in the duties ascribed to the positions, not the parity of the firms offered employment"; thus, counsel contends that the record contains ample evidence to establish that a baccalaureate degree is the industry standard. Counsel declares that the court in *Unico Am. Corp. v. Watson*, 1991 WL 11002594, (C.D.Cal., Mar 19, 1991) held that CIS should "give deference to the employer's job requirements when evaluating requirements for specialized positions." Counsel claims that the job description submitted by the petitioner established that the proffered position requires a complex body of knowledge.

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 first considers 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Counsel asserts that the proffered position is a specialty occupation based on information in the *DOT*. However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *DOT* with the *O*Net*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. As explained by the director, the *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *DOT*.

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

On appeal, counsel refers to the unreported case of *Unico Am. Corp.* to assert that CIS should "give deference to the employer's job requirements when evaluating requirements for specialized positions." This assertion is not persuasive. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The *Handbook* discloses that the proffered position's duties parallel those of a training specialist, and seem similar to the duties of a social worker, though they do not rise to the level of a social worker. According to the *Handbook*, training specialists are described in the *Handbook* as planning, organizing, and directing a wide range of training activities. The *Handbook* indicates that a specific baccalaureate degree is not required for a training specialist, and states:

Because of the diversity of duties and levels of responsibility, the educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably. In filling entry-level jobs, many employers seek college graduates who have majored in human

resources, personnel administration, or industrial and labor relations. Other employers look for college graduates with a technical or business background or a well-rounded liberal arts education.

In the *Handbook*, social workers are described as specializing in services for senior citizens such as running support groups for family caregivers or for the adult children of aging parents; advising elderly people or family members about choices in areas such as housing, transportation, and long-term care; and coordinating and monitoring services. These duties correspond to the beneficiary's duty to inform patients and families of available non-medical care concerns and possible solutions and about primary health maintenance, and to work with caregivers to design programs for patients and families. The *Handbook* indicates that a baccalaureate degree in social work (BSW) is the most common minimum requirement to qualify for a job as a social worker, and a master's degree in social work (MSW) is typically required for positions in health settings. The *Handbook* reports that all states and the District of Columbia have licensing, certification, or registration requirements regarding social work practice and the use of professional titles. Because the proffered position does not require a BSW or MSW or have a licensing, certification, or registration requirement, the proffered position does not rise to the level of a social worker, a specialty occupation.

Since a training specialist does not require a specific baccalaureate degree, and the proffered position does not rise to the level of a social worker, which is a specialty occupation, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel turns to job advertisements. This evidence is not convincing for various reasons. Health Trust seeks candidates who are registered nurses; the proffered position does not have this requirement. The position with School Health Clinics of Santa Clara County differs from the proffered position; it entails providing underserved children with primary medical care. No description of Global Healthcare Services, Inc. is in the posting; consequently, the AAO cannot determine if the organization is similar in nature to the petitioner, a long-term care facility. Since the New York State Department of Labor is a public entity, naturally it differs in nature from the petitioner. The posting from Scott and White Memorial Hospital requires a baccalaureate degree, though it did not indicate a specialty. As delineated, the postings fail to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations.

On appeal, counsel claims that the court in *Young China Daily* noted "the similarity of positions resided in the duties ascribed to the positions, not the parity of the firms offered employment." However, the language in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) explicitly indicates that the degree requirement must be common to the industry in parallel positions *among similar organizations*. The plain language of the regulation states that the organizations must be similar to the petitioner. Thus, the court's decision in *Young China Daily* is not applicable here.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. The *Handbook* reveals that the beneficiary's duties are performed by training specialists, an occupation that does not require a specific baccalaureate, and that although the duties are somewhat reflective of a social worker, a specialty occupation, they do not rise to the same level. Therefore, the proffered position does not require a baccalaureate degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. Because the *Handbook* reveals that the beneficiary's duties are performed by training specialists, an occupation that does not require a specific baccalaureate, and relays that the beneficiary's duties are similar, yet do not rise to the same level of a social worker, a specialty occupation, the proffered position would not require a baccalaureate degree in a specific specialty.

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.