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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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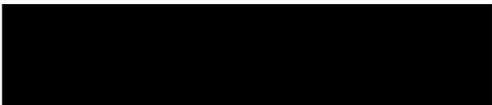
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



AUG 05 2003

File: WAC 02 089 51460 Office: CALIFORNIA SERVICE CENTER Date:

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)

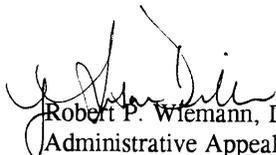
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides health care workers to hospitals and nursing homes. It employs nine people and has a gross annual income of \$720,000. It seeks to temporarily employ the beneficiary as an occupational therapist aide for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, the petitioner asserts: "The decision is 'inconsistent' with the previous petition we filed where our beneficiary was granted H-1B classification basing [sic] on their [sic] degree in Occupational Therapy and with the same job duties described in this case."

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.

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 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.

The petitioner asserts that the Bureau has already determined that the proffered position is a specialty occupation since the Bureau has approved another similar petition in the past. This record of proceeding does not contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the two positions are identical, or whether the prior H-1B petition was approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. The Bureau is not required to approve 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). Neither the Bureau nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

In addition, the Administrative Appeals Office is not bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The director denied the petition because the position description contained none of the necessary criteria to be classified as a specialty occupation.

The position description submitted by the petitioner states that the duties of an occupational therapist aide are to "[a]ssist in the occupational rehabilitation of patient to be functional and be able to regain at an optional [sic] level their [sic] activities in daily living, provide a step-by-step instruction on the use of utensils, toothbrush, comb, etc."

Additional information was submitted on May 24, 2002 in response to the director's request for evidence. The petitioner stated that an occupational therapist aide will:

Carry out plan of treatment under the supervision of a Registered Occupational Therapist (OTR) for the purpose of restoring patient to their [sic] full function in the area of Activities of Daily Living (ADL's), range of motion. Muscles [sic] strength, endurance, cognition, etc. Document treatment done daily in the patient's medical chart to be co-signed by OTR. Report to OTR or Rehab Supervisor any incidents, patient/family reaction that may affect functional outcomes and course of treatment. OT Aide perform [sic] only delegated, selected or routine task in specific situation under close supervision of an OTR, such as preparing patient and treatment room.

The first issue to be considered under 8 C.F.R. § 214.2(h)(4)(iii)(A) is whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that occupational therapy aides usually receive most of their training on the job. The petitioner has not submitted any evidence to indicate that a baccalaureate degree is a requirement for this position.

The second issue is whether the degree requirement is common to the industry in parallel positions among similar organizations. Since the petitioner did not submit any evidence of a degree requirement, this element is not relevant. 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. The position description states that the beneficiary would perform "only delegated, selected or routine task[s] . . . under close supervision." This indicates that the position is not particularly complex or unique and the petitioner submitted no evidence to the contrary.

The third criterion used to determine if a position is a specialty occupation is whether the employer normally requires a degree or its equivalent for the position. The petitioner submitted no information about past hiring practices or the qualifications of its other occupational therapist aides, so this element cannot be considered.

The final element to be considered is whether 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. As discussed above in element two, the position descriptions do not indicate that the duties are complex or specialized and the petitioner has not submitted any evidence or information that would support a different interpretation.

The petitioner has failed to establish that any of the four criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.