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U.S. Department of Homeland Security
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Washington, DC 20536



**U.S. Citizenship
and Immigration
Services**

[Redacted]

FILE: WAC 02 088 53805 Office: CALIFORNIA SERVICE CENTER Date: **APR 16 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

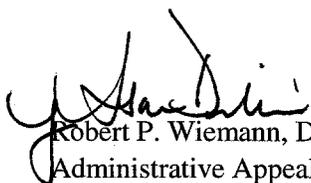
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action.

The petitioner is a drug and alcohol treatment center that seeks to employ the beneficiary as a human resources specialist. 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 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 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)(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 human resources specialist. The petitioner filed its petition on January 31, 2002. On May 7, 2002, the director issued a request for additional evidence, entirely focused on the issue of whether the beneficiary was qualified for employment in a specialty occupation. On May 31, 2002, counsel replied to the director's request for evidence. On September 9, 2002, the director issued a decision denying the petition, solely on the ground that the proffered position was not a specialty occupation.

The issue of whether the position is a specialty occupation is clearly critical to the adjudication; however, basing the entire denial on this ground without giving the petitioner notice and opportunity to respond to a request for evidence warrants a withdrawal of the director's decision to deny the petition. The purpose of the request for evidence is to elicit additional information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). As the director requested evidence that related only to the beneficiary's qualifications to perform a specialty occupation, the petitioner reasonably presumed that the evidence it had initially submitted regarding the duties of the proffered position was sufficient to establish eligibility for this visa classification. The petitioner's presumption was reasonable, given the purpose of a request for evidence as described at 8 C.F.R. § 103.2(b)(8). For this reason, the director's decision must be withdrawn.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation, as the evaluator it used was not qualified to make an assessment regarding the equivalency of the beneficiary's work experience to a bachelor's degree in a specific specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D).

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the proffered position is a specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 9, 2002 decision is withdrawn. The matter is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.