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

D2



FILE: LIN 03-158-52409 Office: TEXAS SERVICE CENTER Date: **MAY 03 2004**

IN RE: Petitioner: 
Beneficiary: 

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

For 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 appeal will be dismissed. The petition will be denied.

The petitioner is a nursing home. In order to employ the beneficiary as a staff educator, 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a Form I-290B annotated with the reasons for the appeal.

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) counsel's contentions stated on the Form I-290B.

The director's decision to deny the petition was correct. The record does not present an evidentiary basis for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) is satisfied where the evidence establishes that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

A critical deficiency is the failure of the evidence of record to provide concrete details about the specific nature of the tasks that would occupy the beneficiary if she were employed in the proffered position.

From the record it is clear that the staff educator's duties would be directed towards a nursing home staff that includes a physical therapist, occupational therapists, speech therapists, and at least one physical therapist aide. In her reply to the RFE, counsel describes the duties and their respective expenditures of work time as follows:

1. Directs and/or presents all education offerings for the staff[.] 10%
2. Organizes and/or presents all mandatory education offerings for all facility staff. 10%.
3. Organizes and conducts all employee orientation.10%
4. Organizes and conducts nurse aide competency program. 10%
5. Organizes all student nurse rotations from three training programs[.] 5%
6. Initiates policies and procedures related to [the] nursing center[.] 5%
7. Participates as a presenter at the General Orientation Program for all facility Staff. 10%
8. Manages, edit[s], and research[es] all resources material for all nursing staff and other employees. [No percentage stated.]
9. Organizes and updates Nursing Center Library and Resource Center. 5%
10. Advises and directs staff in appropriate management techniques and [/] or conflict resolution. 5%
11. Provide all annual mandatory training for all staff. 10%
12. Develop and modify continuing education program for the facility. 10%

These nebulous descriptions are too general to convey what aspects of duty performance, if any, would require the theoretical and practical application of the type of highly specialized body of knowledge that is associated with a baccalaureate or higher degree, or the equivalent, in a specific specialty.

This deficiency is not remedied by additional statements at the same abstract level, such as counsel's statement (at the second paragraph of page 29 of her reply to the RFE) that "a degree in physical therapy requirement is based upon the job duties involving services rendered by the facility, which is to plan and administers [sic] medically prescribed physical therapy treatment for patients suffering from injuries, or muscle, nerve, joint, and bone diseases to restore function, relieve pain and prevent disability." Another example of these non-specific descriptions is counsel's assertion, repeated many times in her RFE reply, that the person in the proffered position "performs numerous other duties such as evaluating technical data, evaluating staff educational need[s] and development, develop[ing], modify[ing] and maint[aining] educational program[s], [and] plan[ning] offerings that correlate with the total program."

The job vacancy announcements submitted into the record have no persuasive value. Most of them relate to industries other than healthcare. In light of the generality of the job duties information both in the announcements and in the record about the proffered position, there is an insufficient basis for a meaningful comparison between the educational requirements for the healthcare positions advertised and for the one proffered here. Furthermore, many of the advertisements are from firms whose business and instructional matters are clearly remote from nursing home care. They include advertisements for non-healthcare positions from many non-healthcare firms, such as NACCO Materials Handling Group, Hastings Mutual Insurance Company, Avis Rent-A-Car, and Valeo Wipers Systems, to name a few.

The favorable dispositions of other H-1B petitions to which counsel refers are not relevant. Each petition must be evaluated on the basis of its own particular factual record. The AAO office is never bound by a decision of a service center or district director. *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). Furthermore, CIS is bound to follow only AAO decisions which CIS has designated and published as precedent decisions. See 8 C.F.R. § 103.3(c).

As the evidence does not establish that the proffered position is one that normally requires a baccalaureate or higher degree, or the equivalent, in any specific specialty, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is not met.

Next, the petitioner has not presented evidence that would qualify the proffered position under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

There is no evidence to satisfy the first prong by a specific-specialty degree requirement that is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS 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. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The evidence does not establish the proffered position as one for which the *Handbook* reports a degree requirement in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

The job vacancy advertisements are too few to establish an industry-wide hiring practice, even if they were relevant. In fact, though, the advertisements are not relevant. Most of them relate to positions outside the petitioner's industry, are in organizations that are not similar to the petitioner's nursing home, and are not parallel to the proffered position. There are some advertisements related to healthcare. However, to the extent that the advertisements describe them, the healthcare positions have too little in common with each other, with the degrees they require, and with the proffered position to indicate an industry-wide degree standard among parallel positions in similar organizations.

Next, the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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 descriptions of the position proposed for the beneficiary - which, as discussed, lack specificity - do not show such complexity or uniqueness to require a person with at least a baccalaureate degree in a specific specialty. The record does not substantiate counsel's contrary position. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the employer normally requires a degree or its equivalent for the position - is not a factor, as the petitioner provided no evidence about a hiring history for the proffered position.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) - specific duties so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. To the extent that they are described in the record, the proposed duties indicate no such complexity or specialization.

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Aside from the director's decision, it is noted that counsel appears to describe the proffered position as non-clinical because it involves no contact with patients (see paragraph 2 at page 9 of her RFE reply). However, this does not establish that the position's instructional involvement in clinical areas, such as physical therapy, would not require licensure in accordance with the Illinois Physical Therapy Act and implementing regulations. The AAO will not further comment on this issue, as the issue is not before us for consideration and the appeal has been decided on other grounds.

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.