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U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 03 127 54013 Office: NEBRASKA 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)

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 service center director denied the nonimmigrant visa petition. 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 home health care company that seeks to employ the beneficiary as a staff and health 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 evidence in the record did not establish that the proffered position is a specialty occupation. Counsel states that the position is a specialty occupation, based on a new salary projection, and a review of previously submitted documentation.

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 petitioner's letter of support; (3) the director's request for additional evidence, dated May 22, 2003; (4) the petitioner's letter that responds to the director's request, dated June 18, 2003; (5) the director's denial letter;

and (6) 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 staff and health educator. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; and counsel's letter in response to the director's request for further evidence. According to the job description submitted by the petitioner, the beneficiary would function as a member of the management team by developing, implementing and evaluating educational plans for healthcare services which include orientation, competency assessment/validation, staff performance development, and policy/procedure development. The beneficiary would also coordinate resources to provide a learning environment that would enable staff to develop behavioral skills to perform their work responsibilities in a knowledgeable and competent manner.

In its response to the director's request for further evidence, the petitioner equates the job duties for the proffered position with numerous other health-related positions throughout the United States and provides an additional job description. This description mentioned an outpatient clinic, and that the beneficiary would develop a complete plan of educational development for outpatient clinic patients and their families through an interdisciplinary team process. The description also stated that the beneficiary, on a concurrent basis, would assess level of care, diagnostic testing, procedures performed, assess quality and clinical risk issues, and review documentation for medical completeness. In addition, the beneficiary would maintain a current knowledge of health care techniques and practices by participating in educational programs. The petitioner provided a breakdown of the beneficiary's duties into allotments of ten per cent of the beneficiary's time. In these allotments of time, the petitioner included new duties such as assessing, developing and evaluating individual plans of care for patients/residents presenting subtle or more complex variables; collaborating with other health care members by recommending the latest development in mode of treatment, care, and activities, interventions or referrals that may prevent complications and promote optimal and physical well-being, and present interdisciplinary patient-centered conferences to coordinate and enhance plan of care development, revision and evaluation. In its letter of support, the petitioner indicated that the position would require an individual with a bachelor's degree in any health-related field, along with good mental and physical health, verbal and written communications skills, and good organization and leadership skills.

The director denied the petition and stated that the petitioner had not submitted evidence of the beneficiary's master's degree in public health. The director also stated that the job announcements submitted by the petitioner in its response to the director's request for further evidence did not appear equivalent in scope and complexity to the duties of the proffered position. The director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of medical and health services managers and commented that the petitioner would be paying the beneficiary \$36,629, a salary that is less than the median salary for medical and health services managers, as indicated by the *Handbook*. Based on these factors, the director did not find the proffered position to be a health educator position. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits a copy of the beneficiary's master's degree in public health from a Filipino university, along with his diploma and course transcript. Counsel states that the duties of a staff and health educator were described in the job announcements submitted by the petitioner, and states that a detailed description of the job duties of a staff and health educator are attached. There is no such attachment to the petitioner's appeal. Counsel also states that the proposed salary for the beneficiary as listed in the petition was a typographical error, and that the actual annual salary is \$44,491.

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 turns first to 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. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, the record does not contain sufficient evidence to establish the actual business operations of the petitioner. It identifies itself as a home health care company that employs fifty individuals who are physical therapists, occupational therapists, speech therapists, skilled nursing, medical social workers, certified registered dieticians, among other personnel. These personnel appear to work outside the actual company. Although the petitioner initially stated that the proffered position is in the home health care facility, the petitioner also mentioned a rehabilitation facility. The petitioner also identified an outpatient clinic in its response to the director's request for further evidence. There is no further information on the record as to whether the petitioner is a company that provides outpatient services in private homes, or whether it is a rehabilitation facility or an outpatient clinic, all three of which are distinct entities. As a result, the exact location and nature of the duties of the proffered position are not clearly established in the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

A review of the record reveals that the director requested additional evidence because there was insufficient evidence that the proffered position was a specialty occupation. In response, the petitioner assigned job responsibilities to the position that had not been previously submitted to the record, and changed significantly the nature of the position. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

In addition, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being

subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). In the instant petition, the petitioner significantly changed the duties of the proffered position. The original petition appears to support an office health educator position that would provide training opportunities to staff members; however, in the petitioner's response to the director's request for further evidence, the position has become both an educator position and a medical services position. The petitioner stated that the beneficiary would be assessing individual plans of care, collaborating with other health care members in recommending the latest mode of treatment, care and activities. Such duties are significantly beyond the scope of a health educator or training position. Therefore, the analysis of this criterion will be based on the job duties described in the petitioner's letter of support.

Upon review of the initial job description, the position appears to be an in-house staff position that develops, implements and evaluates educational plans for healthcare services which include orientation of staff, competency assessment/validation of staff members, staff performance development, and policy/procedure development. Without more persuasive evidence, the proffered position does not appear to that of a medical and health service manager, which is a specialty occupation that usually requires a master's degree in related fields for entry into the position. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

With regard to parallel positions in similar businesses, counsel provided 22 job vacancy announcements from various health care institutions and private industries that involved training and educational responsibilities. These job vacancy announcements represented a range of positions with varying academic credential requirements. Some positions required a baccalaureate degree in business, nursing or a related field, while others, for positions such as coordinator of training and quality improvement in a hospital, did not specify that a baccalaureate degree in a specific specialty was required for entry into the position. The relevance of these job vacancy announcements in establishing the second criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) is not clearly established in the record. In addition, the petitioner identified and briefly described eight petitions apparently submitted to the Nebraska Service Center for health educator positions. However, the petitioner provided no further information or documentation for these particular petitions, including whether they were approved or denied by the same service center. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner did not provide documentation from professional associations or individuals in the industry as to whether a baccalaureate degree in a specific specialty is required for entry into the profession. The petitioner also did not provide sufficient documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to 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. The petitioner stated, in its letter of support, that in accordance with its established practice, it required candidates for the staff and health educator position to have a baccalaureate degree in any health-related field; however, the petitioner did not provide any documentation on previous or current holders of the proffered position. Therefore, the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. To the extent that they are depicted in the record, the majority of duties of the position appear routine to staff recruitment and development. As previously stated, only the job description contained in the original petition is considered in this proceeding. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a staff and health educator in a home health care company. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.