



U.S. Citizenship
and Immigration
Services



FILE: WAC 01 135 50968 Office: CALIFORNIA SERVICE CENTER Date **OCT 25 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:

SELF-REPRESENTED

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

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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 residential facility for special needs children that seeks to employ the beneficiary as an administrator. 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, and because the petitioner failed to submit an approved Labor Condition Application (LCA). On appeal, the petitioner submits a statement and a copy of a certified LCA.

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.

Before a petition is filed under this section, the petitioner must obtain a Labor Condition Application for H-1B Nonimmigrants (LCA), Form ETA 9035, that has been certified by the United States Department of Labor.

8 C.F.R. 214.2(h)(4)(i)(B) lists the requirement of a certified LCA in the specialty occupation obtained prior to the filing of a petition, as follows:

(1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certificate from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

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 an administrator. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 27, 2001 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: handling clients' records; attending meetings regarding clients' educational and personal progress; instructing clients in independent living skills; assisting in meal preparation; and assisting clients with medical visits, recreational activities, and preparation for school. The petitioner did not state that this job requires a bachelor's degree in any field, although the record reflects that the beneficiary holds a Peruvian university degree in education.

The director found that the proffered position was not a specialty occupation, because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the job description was too vague to allow CIS to make a determination. The director also denied the petition because the petitioner did not submit evidence that it had obtained a certified LCA from the Department of Labor, as the director had requested subsequent to the filing of the present petition.

On appeal, the petitioner expands on the job description and submits a certified LCA. However, the information provided on appeal does not clarify the exact nature of the proffered position, its level of responsibility with respect to education and/or health care, or whether any licensing issues are involved. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The duties listed in the record appear to resemble those of a home care aide, as that position is described in the *Handbook*. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a home care aide position. In addition to the difficulties presented by the vagueness of the job description, the record contains no evidence in support of any of the four criteria described above. Therefore, the proffered position cannot be considered to be a specialty occupation.

Moreover, the LCA was certified on May 1, 2003, well after the petition was filed on December 10, 2001. As previously stated, regulations require the petitioner to provide evidence that it has obtained a certified LCA prior to filing the petition. The petitioner failed to comply with this requirement. For this additional reason, the petition is denied, pursuant to 8 C.F.R. § 103.2(b)(12).

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.