



U.S. Citizenship
and Immigration
Services

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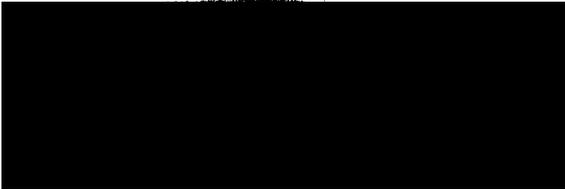


FILE: LIN 03 142 51911 Office: NEBRASKA SERVICE CENTER Date: **OCT 25 2009**

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

Identifying data deleted to
prevent unauthorized disclosure
(inclusion of name and address)

DISCUSSION: The director of the service center 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 home health care company seeks to employ the beneficiary as a staff educator/in-service coordinator. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel contends that the proffered position is a specialty occupation, and that the beneficiary is qualified to perform its duties.

The AAO will first discuss the director's conclusion that the position is not a specialty occupation.

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 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 staff educator/in-service coordinator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the March 25, 2003 company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail acting as a member of the management team by assessing, developing, implementing, and monitoring a complete plan of educational development and continuing education for the staff. The petitioner implied that a suitable candidate for the proffered position would possess a bachelor's degree or its equivalent in physical therapy.

The director determined that the proffered position was not a specialty occupation. According to the director, the petitioner never indicated the required field of study for the proffered position, though it seemed to the director that the petitioner considers a bachelor's degree in a healthcare field such as physical therapy, occupational therapy, or nursing as sufficient. The director stated that based on the duties of the proffered position, the most closely related academic field would involve healthcare or hospital administration. The director considered the ambiguity of the qualifying field of study as the first basis for denying the petition. The director found that the submitted job advertisements, which were related to the proffered position, required two to five years of experience in addition to a bachelor's or master's degree. The director noted that since the petitioner did not require a candidate to have professional experience, the proffered position did not qualify as a specialty occupation. Finally, the director stated that the beneficiary was not qualified to perform the duties of the proffered position had it been determined to be a specialty occupation because the beneficiary did not have sufficient professional experience as a healthcare educator or manager, or both.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that a baccalaureate degree in the field of healthcare is common in the industry. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), counsel states that it reports that a "growing number of employers are using therapists to evaluate worksites, develop exercise programs, and teach safe work habits to employees in the hope of reducing injuries." Counsel states that since CIS had previously approved similar petitions, denying the instant petition is arbitrary and capricious. Counsel maintains that the beneficiary is qualified to perform the duties of the proffered position based on his education.

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 first considers 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel's July 3, 2003 letter, submitted in response to the request for evidence, described the duties of the proffered position. However, 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). Accordingly, the AAO will only consider the job duties as narrated by the petitioner in its March 25, 2003 letter.

The duties of the proffered position are performed by a training and development specialist. The *Handbook* states that training specialists "plan, organize, and direct a wide range of training activities," and mentions:

They consult with onsite supervisors regarding available performance improvement services and conduct orientation sessions and arrange on-the-job training for new employees. They help rank-and-file workers maintain and improve their job skills, and possibly prepare for jobs requiring greater skill. They help supervisors improve their interpersonal skills in order to deal effectively with employees.

The *Handbook* continues:

Planning and program development is an important part of the training specialist's job. In order to identify and assess training needs within the firm, trainers may confer with managers and supervisors or conduct surveys. They also periodically evaluate training effectiveness.

Finally, the *Handbook* explains that employers do not require a baccalaureate degree in a specific specialty for a training specialist position:

Because of the diversity of duties and levels of responsibility, the educational backgrounds of human resources, training, and labor relations managers and specialists vary considerably. In filling entry-level jobs, many employers seek college graduates who have majored in human resources, personnel administration, or industrial and labor relations. Other employers look

for college graduates with a technical or business background or a well-rounded liberal arts education.

Based on the information in the *Handbook*, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Nebraska Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the records of proceeding of the other cases, counsel's statements are not sufficient to enable the AAO to determine whether the original H-1B petitions were approved in error. Furthermore, 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, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Counsel also refers to submitted job advertisements to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. This evidence is not persuasive. Many of the companies are dissimilar in nature from the petitioning entity. Perceptron is in the machine technology industry; Raytheon is a technology company; NACCO Materials Handling Group, Inc. is an engineering and manufacturing company; AVIS is a car rental company; and The Galveston County Health District is a public entity. The Sisters of Providence Health System may be similar to the petitioning entity; however, it seeks a candidate with a bachelor of science in nursing which is different from the petitioner's degree requirement. Some of the organizations require licensure for their positions; thus, their positions are not parallel to the proffered position. For example, St. Joseph Mercy Oakland seeks a registered nurse with up to three years of experience and Foote Hospital seeks a candidate possessing a bachelor of science degree in nursing and licensure as a registered nurse. Two of the organizations, Massachusetts General Hospital and Partners Healthcare System, do not require a baccalaureate degree in a specific specialty. Finally, the duties of Select Specialty Hospital of Flint's position differ materially from the proffered position. The job advertisements, therefore, fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that employers do not require training specialists to possess a baccalaureate degree in a specific specialty.

The petitioner fails to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that it normally requires a degree or its equivalent for the position. In the July 3, 2003 letter, counsel stated that the petitioner "had a petition for a staff educator" (LIN 01 228 51211). Counsel's statement is vague and does not explain the previously submitted petition (LIN 01 228 51211) for a staff educator. Furthermore, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a

specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As previously stated, the *Handbook* explains that employers do not require a specific baccalaureate degree for a training specialist position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner's March 25, 2003 letter claimed that the petitioner is a home healthcare facility that provides professional services that includes physical therapists, occupational therapists, speech therapists, skilled nurses, and home health aides. Although the petitioner stated that the beneficiary, "a member of the management team," will be "assessing, developing, implementing[,] and monitoring a complete plan of educational development and continuing education to [sic] the staff," the petitioner never elaborated on the description of the "complete plan of educational development and continuing education." The AAO, therefore, cannot determine the particulars of the plan and whether it is for physical therapists, occupational therapists, speech therapists, nurses, home health aides, or all of the petitioner's employees. As such, the petitioner cannot establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Again, the *Handbook* explains that employers do not require a specific baccalaureate degree for a training specialist position.

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 on this ground.

The AAO will now discuss whether the director's conclusion that the beneficiary is not qualified to perform the duties of the position had it been determined to be a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is seeking the beneficiary's services as a staff educator/in-service coordinator. The petitioner implied that a suitable candidate for the proffered position would possess a bachelor's degree or its equivalent in physical therapy.

The director also found that the beneficiary was not qualified to perform the duties of the proffered position had it qualified as a specialty occupation. The director found that the beneficiary's education, training, and experience are equivalent to a U.S. bachelor's degree in physical therapy. However, the director stated that the beneficiary did not possess the necessary professional experience that the parallel positions in the job advertisements required. Consequently, the director determined that the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by the occupation. Counsel asserts that the beneficiary is qualified to perform the duties of the proffered position because the submitted credentials evaluation established that the beneficiary possesses the equivalent to a bachelor's degree in physical therapy.

Upon review of the record, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study; however, he does hold a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in physical therapy. However, the petitioner's job description is so vague

that the AAO cannot determine whether licensure is proper for the proffered position. In the July 3, 2003 letter, counsel claims that a candidate for the proffered position would not require licensure in the healthcare field. For example, counsel referred to the document entitled "Request for Prevailing Wage Form for Alliance Homecare Services, Inc." to state that the Michigan Department of Career Development does not require a license for a staff educator position. Counsel misread the form because the Michigan Department of Career Development provided the prevailing wage for the staff educator/in-service coordinator position; it did not indicate whether a license was required for the position. In light of the evidentiary record, the AAO cannot determine whether the beneficiary is qualified to perform the duties of the proffered position had it been determined to be a specialty occupation. Consequently, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.