



U.S. Citizenship
and Immigration
Services

De

[Redacted]

FILE: WAC 03 042 56497 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted] *03/23/2004*
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]

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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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 health care agency that provides workers in a range of health care fields, including nurses, physical therapists, and home health aides, to work in Medicare programs and Health Maintenance Organizations. It seeks to employ the beneficiary as a medical records administrator. The director denied the petition because the position was determined not to meet the criteria required for classification as a specialty occupation. On appeal, counsel submits a brief.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a 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.

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 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 seeks the beneficiary's services as a medical records administrator. Evidence of the beneficiary's duties includes: the Form I-129; the November 19, 2002 support letter accompanying the Form I-129; and counsel to the petitioner's response to the director's request for evidence. The duties to be performed by the beneficiary are stated in the petitioner's support letter and, according to that document, she will be required to:

draft and implement policies and procedures for documenting, storing, and retrieving information, and for processing medico-legal documents, insurance data and correspondence requests, in conformance with federal, state, and local statutes.... will also have to supervise staff in preparing and analyzing medical documents. At times, she will participate in the development and design of computer software with medical staff and develops the criteria and methods of evaluation.

On May 29, 2003, the director requested further evidence, asking the petitioner to provide documentation of the position announcement, data to justify the petitioner's need for this particular position, and to establish that the proffered position met the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) -- a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position; that degrees are commonly required for parallel positions within the petitioner's industry or, in the alternative, that the particular position is so complex or unique that it can be performed only by an individual with a degree; that the petitioner normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized or complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

In response, counsel for the petitioner provided copies of the Labor Condition Application and a Certificate of Posting, as well as financial documentation related to the petitioner. As evidence that the petitioner's position qualified as a specialty occupation, counsel submitted a series of job announcements to support his assertion that the health care industry normally requires a bachelor's degree for parallel positions.

The director denied the petition on September 18, 2003 because the position, as described by the petitioner, did not meet the criteria for a specialty occupation. Citing from the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director found the description of the position to reflect the duties of medical records and health information technicians who usually have associate degrees from a community or junior college.

On appeal, counsel submits a brief. Counsel states, in part, the following: (1) the director erred in finding that the position described reflected the duties of medical records and health information technicians; (2) the director, in reaching his decision, failed to rely upon the *Dictionary of Occupational Titles (DOT)* and, therefore, did not consult the appropriate job description; (3) that the proffered position meets all four of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A); and (4) that the director has ignored related case law which speaks to whether an occupation is professional.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Citizenship and Immigration Services (CIS) does not simply rely on a position's title when determining whether a particular job qualifies as a specialty occupation. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors that CIS considers. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 210 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.

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; and 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 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)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. §214.2(h)(4)(iii)(A), that the director has failed to recognize that the duties to be performed by the beneficiary parallel those required of a medical records administrator as set forth in the 2002-2003 edition of the *DOT* at 079.167-014 and that he has failed to understand that the DOL rating of SVP 8 establishes it as requiring a baccalaureate or higher degree. However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation. It is, instead, the DOL *Handbook*, which provides a more comprehensive description of the nature of a particular occupation and education, and the training and experience normally required to enter into an occupation and advance within that occupation. It is the *Handbook* on which the AAO relies for the duties and educational requirements of particular occupations. As a result, the AAO is not persuaded by a claim that the proffered position is a specialty occupation because it parallels a job description in the *DOT* that has received a SVP rating of 8.

Instead, the AAO has reviewed the 2004-2005 edition of the *Handbook* and concludes that the director correctly identified the proffered position as most closely related to that of medical records and health information technicians. In describing the duties of such individuals, the *Handbook* states, in part:

Every time a patient receives healthcare, a record is maintained of the observations, medical or surgical interventions, and treatment outcomes.... Medical records and health information technicians organize and evaluate these records for completeness and accuracy.

Technicians also use computer programs to tabulate and analyze data to help improve patient care, to control costs, for use in legal actions, in response to surveys, or for use in research studies....

Medical records and health information technicians' duties vary with the size of the facility. In large to medium-sized facilities, technicians may specialize in one aspect of health information, or supervise health information clerks and transcriptionists.... In small facilities, a credentialed medical records and health information technician sometimes manages the department.

The *Handbook* further states that medical records and health information technicians entering the field usually have an associate degree from a community or junior college. Also noted is the practice of some hospitals in filling medical records and health information technician positions with promising health information clerks.

On appeal, counsel provides information on a broad range of additional administrative duties for which the beneficiary will be responsible, duties that were not previously discussed in the petitioner's support letter or counsel's response to the director's request for evidence. While counsel states that the director's request for evidence did not ask for additional information or clarification regarding the duties to be performed, a review of the attachment to the Form I-797 clearly shows that the petitioner was asked to provide evidence that the proffered position met any of the criteria for classification as a specialty occupation, including evidence that would show the unique, specialized or complex aspects of the position or its duties. Therefore, the petitioner was informed of the need for additional evidence regarding the duties of the proffered position and given a reasonable opportunity to provide it for the record before the petition was adjudicated. When a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept such evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Accordingly, the AAO will not consider the information counsel provides on the additional duties associated with the position.

However, even if counsel had provided information on these additional administrative duties in his response to the request for evidence, the director could not have considered it. Whether responding to a request for evidence or submitting an appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the petitioner's organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the

petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248,249 (Reg. Comm. 1978). The beneficiary's additional duties described by counsel on appeal constitute a material change to the position described by the petitioner in its support letter at the time of filing. As a result, the AAO will not consider this evidence for any purpose and will adjudicate this portion of the decision based on the evidence of record before the director.

Based on this evidence, the AAO concludes that the petitioner has not met the requirements of the first criterion, that the minimum requirement for entry into the proffered position requires a baccalaureate or higher degree, or its equivalent. The position is closely aligned to that of a medical records and health information technician for which a bachelor's or higher degree or its equivalent is not required.

To establish the second criterion, a petitioner must document that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In counsel's response to the director's request for evidence, he included copies of Internet job postings, as well as copies of advertisements for medical records administrators in support of his assertion that a baccalaureate degree was required by the health care industry for positions similar to that being offered by the petitioner. On appeal, counsel asserts that because the petition's position has great complexity and responsibility, it can only be performed by a person with the necessary qualifications and that these qualifications can only be gained through the attainment of a bachelor's degree or its equivalent.

After reviewing the evidence offered by the petitioner, the AAO concludes that the petitioner has not met the requirements imposed by the second criterion. The various job postings submitted by counsel do not constitute evidence that businesses similar to the petitioner's require the services of individuals with baccalaureate degrees in parallel positions. Based on the information provided in the submissions, it is not possible to determine whether these businesses and organizations have the types of operations, numbers of employees, and gross annual income similar to that of the petitioner. Further, the assertions of counsel that the position satisfies the requirements of the second criterion do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

Although on appeal, counsel has stated that the petitioner's position meets all four criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A), the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533,534 (BIA 1988). Absent counsel's statement, the record provides no information about the petitioner's past hiring practices, i.e., whether the petitioner normally requires a degree or its equivalent for the position. Therefore, the petitioner has not met its burden of proof with regard to the third criterion.

The fourth criterion 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. As noted previously, the duties of the proffered position have been determined to be analogous to those of medical records and health information technicians. The AAO finds no evidence in the record that was before the director at the time of his decision to show that the duties of the proffered position rise beyond this level. Such positions require an associate degree from a community or junior college rather than a bachelor's degree. Consequently, the petitioner has failed to establish eligibility under the fourth criterion.

Finally, the AAO turns to counsel's assertion that the director ignored related case law in reaching his decision when CIS has consistently used these sources in evaluating whether a position is professional in nature. In raising this concern, counsel cites *Matter of Mapili*, 13 I&N Dec. 668 (Reg. Comm. 1971); *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1969); *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988); *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989). Further, counsel refers to an AAO decision dated February 3, 1995 that, he states, concludes that the petitioner's size, scope and newness of operations are irrelevant to the determination of whether to grant an H-1B visa.

The AAO does not find counsel's assertions to be convincing. First, the issue before the AAO is not whether the proffered position is professional in nature, but whether it is a specialty occupation within the meaning of Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Second, the cases referenced by counsel bear little or no evidentiary value as they involve decisions reached on issues distinct from that now before the AAO. *Matter of Mapili* 13 I&N Dec. 668 (Reg. Comm. 1971) focuses on the lack of labor certification for an agriculturist position. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1969) addresses whether a degree in business administration was sufficient to qualify a petitioner as a member of the professions. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) discusses the evidentiary burden on the petitioner. In *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989), the court concludes that the former Immigration and Naturalization Service (INS) failed to consider the specific responsibilities of a graphic designer position and, therefore, erred in determining that the position did not require a professional. Additionally, counsel's reference to a previous AAO decision regarding the issues of a petitioner's size, scope and newness of operations is not persuasive as these issues are not now before the AAO.

For reasons related in the preceding discussion, 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.