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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: EAC 03 126 53779 Office: VERMONT SERVICE CENTER

Date: SEP 02 2004

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.

Mari Johnson

RP Robert P. Wiemann, Director
Administrative Appeals Office

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 The director's decision will be withdrawn and the matter remanded to the director to determine whether the beneficiary is qualified to perform the duties of the proffered position.

The petitioner is an institution for children, adolescents, and adults with developmental challenges. It seeks to employ the beneficiary as an art therapist. 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 proffered position is not a specialty occupation. On appeal, counsel states that the proffered position qualifies as 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 an art therapist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning and implementing art therapy programs to rehabilitate emotionally disturbed children; providing home-based evaluations, therapy, and crisis intervention; reporting her finding to other treatment team members; devising art therapy programs to fulfill psychological needs and instructing students in the use of various art materials; assessing student work and recovery progress; attending systems meetings and hospital or residential meetings, or both; and maintaining documentation and reports about client participation, reactions, and progress. The petitioner stated that it required a candidate to possess at least a bachelor's degree or its equivalent in art, art therapy, or a related field.

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 stated that the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* did not establish that the proffered position required a bachelor's degree in a specific specialty. Referring to the DOL's *Occupational Outlook Handbook's (the Handbook)*, the director stated that the duties of a rehabilitation counselor, counseling people and evaluating school and medical reports, did not resemble those of the proffered position. The director further stated that a counselor did not seem to require a degree. According to the director, the Internet information from the American Art Therapy Association (AATA) was not persuasive; it did not indicate that the minimum educational level for an art therapist is a baccalaureate degree in art therapy. Finally, the director commented that although colleges offer programs in art therapy, this did not establish that a degree is required for an art therapist position.

On appeal, counsel states that the director misapplied the law and CIS policy. Referring to a prior AAO case, counsel claims that each position must be evaluated based on the nature and complexity of its actual duties. Counsel contends that the duties of the proffered position essentially mirror those performed with the prior employer. Citing an AAO case, counsel states that a petitioner's size, scope, and newness of operation are not relevant in determining whether a position is a specialty occupation. Counsel refers to the *DOT* to state that the position qualifies as a specialty occupation. Last, the petitioner submits expert opinion letters to support its assertion that the position requires a theoretical and practical application of a body of highly specialized knowledge. Counsel states that the beneficiary had an approved H-1B petition with another employer that provided similar services as the petitioning entity.

Upon review of the record, the petitioner has established that the proffered position qualifies as a specialty occupation.

Counsel's reliance on prior AAO decisions is not persuasive. Each petition filing 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).

The AAO first considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

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.

A careful review of the *Handbook* discloses that the duties of the proffered position resemble those performed by a mental health counselor who works with individuals, families, and groups to address and treat mental and emotional disorders and to promote optimum mental health. Counselors are trained in a variety of therapeutic techniques used to address a wide range of issues. They often work closely with mental health specialists such as psychiatrists, psychologists, clinical social workers, and school counselors.

The *Handbook* explains that for counselors based outside of schools, 47 states and the District of Columbia had some form of counselor credentialing, licensure, certification, or registration that governed their practice of counseling. Requirements typically include the completion of a master's degree in counseling, the accumulation of 2 years or 3,000 hours of supervised clinical experience beyond the master's degree level, the passage of a State-recognized exam, adherence to ethical codes and standards, and the satisfaction of annual continuing education requirements.

The evidence contained in the record supports the *Handbook's* statements. The petitioner's letter from Susan Spaniol, Associate Professor and Art Therapy Program Coordinator with Lesley University, stated that art therapists must possess a master's degree for entry into the profession. The application packet from the Art Therapy Credentials Board (ATCB) confirmed that a registered art therapist is required to possess a master's degree in art therapy from an approved program along with post-educational experience. Last, the brochure entitled "Art Therapy: the Profession" stated that "entry into the profession of art therapy is at the Master's degree level." Thus, this evidence evinces that a master's degree and some form of credentialing, licensure, certification, or registration is required for entry into the occupation.

The director's decision shall be withdrawn and this matter shall be remanded to the director who shall determine whether the beneficiary is qualified to perform the duties of the proffered position, art therapist. The director may obtain such evidence as he deems necessary in rendering that opinion.

ORDER: The director's April 25, 2003, decision is withdrawn. The matter is remanded to the director for entry of a new decision consistent with the directives of this opinion.