

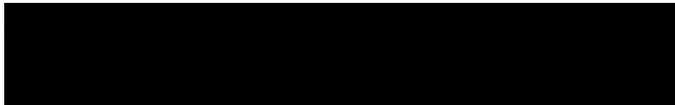


U.S. Citizenship
and Immigration
Services



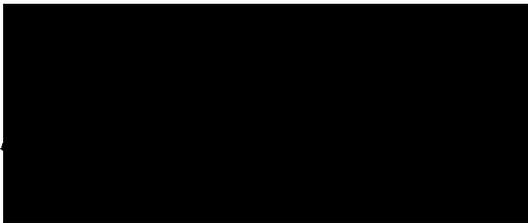
FILE: WAC 02 212 50538 Office: CALIFORNIA SERVICE CENTER Date:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

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 provided evidence for the elderly, non-profit employer that beneficiary is a residential care counselor. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(I)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(I)(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 a residential care counselor. Evidence of the beneficiary's duties include: the Director's decision, the beneficiary's response to Form I-290B, and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail evaluating/assessing residents' mental health; formulating and implementing individualized recreational/therapeutic plans for maintaining residents' mental well being; formulating and implementing individual care plans based on investigating and interacting with residents; interacting, consulting, and discussing residents with other professionals; and recording residents' behavior and well being. The petitioner stated that a candidate must possess a bachelor's degree in psychology or social science.

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 duties of the proffered position resemble those performed by a program activity leader as described in the California Code of Regulations. According to the director, the applicable regulatory section indicates that a program activity leader is not required to possess a bachelor's degree; however, a position as an occupational, art, music, dance, or recreational therapist requires a degree, as does an occupational therapist assistant. The director mentioned that the petitioner does not normally require applicants for the position to possess a baccalaureate or higher degree. Finally, the director stated that the proposed duties and associated level of responsibility do not indicate a complexity or authority beyond that normally encountered in the occupational field.

On appeal, counsel states that the complex nature of the job duties requires knowledge usually associated with the attainment of a baccalaureate or higher degree. Counsel contends that the job duties are not performed by an activity program leader because the petitioner's facility is not a skilled nursing facility as described in the regulatory code; it is a non-medical residential care facility. Counsel furthermore contends that the activity program leader position is responsible for psycho-social assessment tests with residents. Counsel states that a position qualifies as a specialty occupation as long as its job duties require:

[S]pecialized training that is normally attained through high education of a type for which at least a bachelor's degree can be obtained, regardless of the occupations specified in Title 22 of the Social Security of the California Code of Regulations.

Counsel relies on excerpts from *New Lifestyles, An Area Guide to Senior Residences and Care Options* to state that residential care facilities employ professionals with bachelor's degrees as a minimum educational requirement. According to counsel, the bachelor's degree requirement is common to the industry in parallel positions among similar organizations. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), counsel claims that formal education is necessary to gain employment as a counselor; that a gerontological counselor provides services to elderly persons who face a changing lifestyle because of health problems; and that a multi-cultural counselor helps employers adjust to a diverse workforce.

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 examined the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2) and determined whether the proffered position is a specialty occupation by determining whether a particular 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.

The AAO notes that there is an inconsistency in the evidence regarding the proffered position's title. The petitioner's June 1, 2002 letter to the beneficiary stated that the proffered position's title is "administrative counselor"; however, the other documents contained in the record of proceeding stated that the title is "residential care counselor."

According to the evidence contained in the record of proceeding, the petitioner holds a license to operate and maintain a residential-elderly facility for six non-ambulatory residents, ages 60 years and older. Thus, counsel correctly stated that the California Code of Regulations would not apply to the instant petition.

A careful review of the *Handbook* discloses that the duties of the proffered position are performed by social and human service assistants. These workers usually work under the direction of professionals from a variety of fields, such as nursing, psychiatry, psychology, rehabilitative or physical therapy, or social work. Social and human service assistants monitor and keep case records on clients and report progress to others. The *Handbook* reports they may organize and lead group activities and assist clients in need of counseling or crisis intervention; assist adults who need supervision with personal hygiene and daily living skills; review clients' records; talk with family members, and confer with medical personnel and other caregivers to gain better insight into clients' backgrounds and needs. Social and human service assistants also provide emotional support and help clients become involved in their own well-being, in community recreation programs, and in other activities.

According to the *Handbook*:

While a bachelor's degree usually is not required for entry into this occupation, employers increasingly seek individuals with relevant work experience or education beyond high school. Certificates or associate degrees in subjects such as social work, human services, gerontology, or one of the social or behavioral sciences meet most employers' requirements. However, many employers also seek candidates with a bachelor's degree in a field such as counseling, rehabilitation, or social work.

The petitioner therefore fails to establish the first criterion because the *Handbook* states that for social and human service assistants positions, many employers increasingly seek candidates with relevant work experience or education beyond high school and that certificates or associate degrees in subjects such as social work, human services, gerontology, or one of the social or behavioral sciences meet most employers' requirements. Accordingly, 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.

Counsel claims that the duties of the position resemble those performed by a counselor. This claim is not persuasive. According to the *Handbook*, for a counselor position 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 petitioner did not state that candidates must have the qualifications as described in the passage quoted above; thus, the proffered position does not resemble that of a mental health, gerontological, or multi-cultural counselor.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on an excerpt from *New Lifestyles, An Area Guide to Senior Residences and Care Options*. This evidence merely described various assisted living residences; some of the descriptions mentioned whether the residence had staff. In fact, the excerpt never mentioned the specific duties associated with the residences' titled positions or indicated whether a residence had a residential care counselor job. Thus, the petitioner fails to establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the 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. None of the beneficiary's proposed duties exceed the scope of those performed by a social and human services director as provided by 42 C.F.R. 412.103(a)(1). The duties are not specialized and complex in nature. Accordingly, the petitioner fails to establish the fourth criterion at 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.