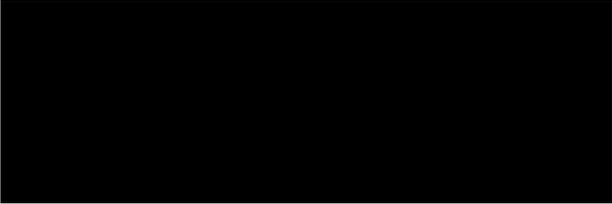


D2



U.S. Citizenship
and Immigration
Services



identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

FILE: WAC 04 135 50775 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005

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:



PUBLIC COPY

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

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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner operates five residential care facilities that seeks to employ the beneficiary as a qualified mental retardation professional (QMRP). 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 petitioner did not establish that the proffered position is a specialty occupation. On appeal, counsel submits a brief and additional evidence.

Section 214(i)(1) of the Immigration and Nationality Act (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; (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 qualified mental retardation professional (QMRP). Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that include performing annual individual reviews and semi-annual individual reviews; informing all members of the ID team several weeks prior to the scheduled review to attend; preparing the annual review in advance of the meeting; completing or updating the comprehensive functional assessment including personal preferences/desires; completing updated psychotropic medication consent, if applicable; completing updated behavioral programming consents for each behavioral objective; making changes to the individual service plan (ISP) and data collection; observing individuals, reviewing data and progress, and revising programs based on individual need and performance; ensuring consistency among external and internal programs and disciplines; ensuring service design and delivery program which provides each individual with an appropriate active treatment program; ensuring that any discrepancies or conflicts between programmatic, medical, dietary, and vocational aspects of the individual assessment and program are resolved; ensuring a follow-up to recommendations for services, equipment or programs; and ensuring that adequate environmental supports and assistive devices are present to promote independence.

The director issued a request for evidence that the proffered position qualifies as a specialty occupation. The director requested a copy of the beneficiary's permanent California counselor license, or certification. Alternatively, the director requested evidence that the alien may practice the profession without a license or under the direction of a licensed professional. The director requested evidence that the beneficiary has been certified to teach in the State of California. The director requested evidence to substantiate the information on the Form I-129 such as Form DE-6, federal income tax returns, an organizational chart, and detailed information about the petitioner's business.

In response, counsel for the petitioner provided additional information about the petitioner and asserted that it must have a QMRP in its employ. In support of its assertion counsel referred to the California Code of Regulations which indicates that facilities operating as an intermediate care facility for the developmentally disabled, such as the petitioner, must meet certain requirements. Counsel indicated that the regulations specifically state that an individual program plan that is developed by an interdisciplinary team and is under the direction of a QMRP "[s]hall be met if the facility is to be approved to provide services to developmentally disabled individuals."

Counsel asserted that there is no provision in the State of California that requires licensure of a QMRP. Additionally, counsel explained that the proffered position is neither a counselor nor a teacher. The petitioner provided its Form DE-6 for the quarter ending 12/31/02. Additionally, the petitioner provided a copy of its wage and tax register for the quarter ending March 31, 2004.

The director issued a second request for evidence specifically requesting evidence that the beneficiary has completed at least one year of experience working directly with persons with mental retardation or other

developmental disabilities, indicated as a requirement by 42 CFR § 483.430 for the position of qualified mental retardation professional. The director requested documentation to substantiate that the beneficiary has experience in the specialty through progressively responsible experience. In response, the petitioner submitted a letter from Mr. [REDACTED] the Commissioner, Commission on Disability for the City of Los Angeles, which stated that the beneficiary has worked as a volunteer for the petitioner for approximately six months. Additionally, the Commissioner wrote in his letter that the beneficiary has worked for several years as a volunteer for the Child and Family Guidance Center.

The director denied the petition. The director determined that an analysis of the proposed duties reveals that the position described by the petitioner reflect the duties of a psychiatric aide as listed under the title Nursing, Psychiatric, and Home Health Aides in the Department of Labor, *Occupational Outlook Handbook* (the *Handbook*). The director noted that the position of psychiatric aid does not require a baccalaureate degree in a specific specialty. Therefore, the director determined that the proffered position is not a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation, restates the above listed duties and contends that the director did not analyze the duties. Counsel asserts that the beneficiary is not part of the direct care staff and does not “dress, feed or bathe the patients.” Counsel refers to 42 C.F.R. § 483.430¹ which describes the duties of a QMRP and specifically states that a QMRP must have a baccalaureate degree in a specific specialty. Counsel asserts that the proffered position has specialized and complex job duties and requires at a minimum a bachelor’s degree.

The AAO agrees that the record establishes that the proffered position is a qualified mental retardation professional, and is a specialty occupation. The petitioner has established that 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.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The AAO turns to 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 Department of Labor’s *Occupational Outlook Handbook* (*Handbook*) reports that the industry requires a degree; whether the industry’s

¹ Title 42, Public Health, Chapter IV, Centers For Medicare & Medicaid Services, Department of Health and Human Services, Part 483, Requirements for States and Long Term Care Facilities, Conditions of Participation for Intermediate Care Facilities for the Mentally Retarded.

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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The regulation at 42 C.F.R. § 483.430 describes the duties of a QMRP and specifically notes that the QMRP must have a baccalaureate degree in a specific specialty.

The petitioner is seeking the beneficiary's services as a QMRP. Counsel's January 8, 2004 letter states that the petitioner operates five state-licensed intermediate care facilities, which are nursing homes for the developmentally disabled. The record contains licenses issued for the facilities. On appeal, counsel asserts that the beneficiary qualifies as a QMRP as he possesses a degree in medicine, and that a physician's license is not required for a QMRP. Counsel points to the regulation at 42 C.F.R. § 483.430 to set forth the educational requirements of a QMRP. This regulation states that a QMRP must have at least one year of experience working directly with persons with mental retardation or other developmental disabilities; and is either a doctor of medicine or osteopathy, a registered nurse, or an individual who holds at least a bachelor's degree in a professional category specified in paragraph (b)(5) of this section. The regulation at 42 C.F.R. § 483.430(b)(5) states that professional program staff must be licensed, certified, or registered to provide professional services by the state in which he or she practices, and that the professional program staff that do not fall under the jurisdiction of state licensure, certification, or registration requirements, specified in section 483.410(b), must meet the following qualifications:

(i) To be designated as an occupational therapist, an individual must be eligible for certification as an occupational therapist by the American Occupational Therapy Association or another comparable body.

(ii) To be designated as an occupational therapy assistant, an individual must be eligible for certification as a certified occupational therapy assistant by the American Occupational Therapy Association or another comparable body.

(iii) To be designated as a physical therapist, an individual must be eligible for certification as a physical therapist by the American Physical Therapy Association or another comparable body.

(iv) To be designated as a physical therapy assistant, an individual must be eligible for registration by the American Physical Therapy Association or be a graduate of a two year college-level program approved by the American Physical Therapy Association or another comparable body.

(v) To be designated as a psychologist, an individual must have at least a master's degree in psychology from an accredited school.

(vi) To be designated as a social worker, an individual must--

(A) Hold a graduate degree from a school of social work accredited or approved by the Council on Social Work Education or another comparable body; or

(B) Hold a Bachelor of Social Work degree from a college or university accredited or approved by the Council on Social Work Education or another comparable body.

(vii) To be designated as a speech-language pathologist or audiologist, an individual must--
(A) Be eligible for a Certificate of Clinical Competence in Speech-Language Pathology or Audiology granted by the American Speech-Language-Hearing Association or another comparable body; or

(B) Meet the educational requirements for certification and be in the process of accumulating the supervised experience required for certification.

(viii) To be designated as a professional recreation staff member, an individual must have a bachelor's degree in recreation or in a specialty area such as art, dance, music or physical education.

(ix) To be designated as a professional dietitian, an individual must be eligible for registration by the American Dietetics Association.

(x) To be designated as a human services professional an individual must have at least a bachelor's degree in a human services field (including, but not limited to: sociology, special education, rehabilitation counseling, and psychology).

The record establishes that the proffered position is a qualified mental retardation professional, and is a specialty occupation. The petitioner has established that a baccalaureate or higher degree or its equivalent in a specialty 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. Therefore, the evidence establishes that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petition may not be approved, however, as the record does not reflect that the beneficiary is qualified for the specialty occupation. The petitioner submitted a copy of the beneficiary's certificate of graduation from the office of the registrar, California State University, Los Angeles certifying that the beneficiary received a Bachelor of Arts degree in Psychology in September 2002 and a copy of her transcript. The petitioner submitted a copy of its license to operate and maintain an intermediate care facility/developmentally disabled – nursing facility for five separate facilities. However, the record does not contain evidence that the petitioner requested a QMRP approval from the Department of Developmental Service (DDS), California as required². Therefore, the record is insufficient to establish that the beneficiary has QMRP approval from the Department of Developmental Service.

Upon review of the record, there is insufficient evidence in the record to determine that the beneficiary is qualified to perform the duties of a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). As the director did not rule on this issue, the petition will be remanded in order for the director to address the beneficiary's qualifications to perform the services.

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary

² "DDS must review and approve all QMRPs. Request for QMRP approvals must be submitted with your initial program plan. Any QMRP changes made after the initial program approval need to be reviewed and approved by the HFPS staff." www.dds.ca.gov/ICF/ICF-QMRP_Requirements.cfm.

is qualified to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 19, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.