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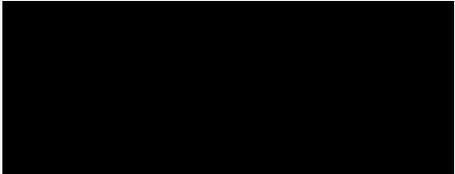
JUN 20 2005

FILE: WAC 03 193 50301 Office: CALIFORNIA SERVICE CENTER Date:

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:



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 appeal will be dismissed. The petition will be denied.

The petitioner is a healthcare service provider that seeks to employ the beneficiary as a health services manager. 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 submits a brief.

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 health services manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the 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 managing the day-to-day activities of all of the facilities of the group; setting up the medical records for patients of the facilities; making sure that all needs are attended to in terms of monitoring their medicine and food intake and coordinating the same with the attending CNAs and nutritionists; developing a program of activities for patients and customers, taking into consideration the individual personality of each; monitoring on a daily basis the condition and situation of each patient paying particular attention to each individual's state or condition; monitoring submission of requests and/or for medical services made by the facilities to outside professional and medical clinics; managing the taking of specimens and laboratory samples from patients, and the submission of same for laboratory testing by outside medical providers and professional; providing regular review of patient records, and coordinating the same with the individual physicians attending to the patients; providing oversight review of patient files before they are filed to assure that nothing vital and important is left out or forgotten.

The petitioner stated that it requires the applicant to have a minimum of a bachelor's degree in psychology or nursing.

The director issued a request for evidence, specifically, a more detailed description of the work done and the percentage of time to be spent on each duty. Additionally, the director requested information about the petitioner such as an organizational chart, federal income tax returns, and Forms DE-6 quarterly wage reports.

In response counsel for the petitioner restated the job duties provided in the petitioner's letter of support. Counsel noted that this is the first time the petitioner is hiring an individual to fill the position of health services manager but explained that "the duties and responsibilities, as well as the nature of the position to be filled reasonably and clearly indicates that a baccalaureate level degree is the educational requirement appropriate for the proffered position."

Counsel indicated that the duties and responsibilities found in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) are similar to the proffered position. Counsel indicated that the beneficiary has earned the equivalent of a Bachelor of Science degree in psychology and has almost completed a Master's of Arts in guidance counseling. Additionally, the petitioner contended that the degree requirement is common to the industry in parallel positions among similar organizations and referred to the *Handbook* to support its contention.

The director determined that the proffered position was not a specialty occupation. The director found that the duties of the proffered position are for a nursing, psychiatric and home health aid. The director referred to the *Handbook* which indicated that the nature of work, training and other qualifications of the Nursing, Psychiatric and Home Health Aid are:

Nursing and psychiatric aides help care for physically or mentally ill, injured, disabled, or infirm individuals confined to hospitals, nursing and personal care facilities, and mental health settings. Home health aides duties are similar, but they work in patients homes or residential care facilities. . .

In many cases, neither a high school diploma nor previous work experience is necessary for a job as a nursing, psychiatric, or home health aide. A few employers, however, require some training or experience. Hospitals may require experience as a nursing aid or home health aid

...

The director determined that the information from the *Handbook* indicates that a baccalaureate degree is not the minimum requirement for entry into the occupation. The director further noted that it is not sufficient for a petitioner to merely state that it will employ an individual to perform duties that are characteristic of those found in a particular specialty occupation. The director indicated that there must be a reasonable and credible offer of employment that is consistent with the needs of the petitioning organization. The director determined that the petitioner did not provide such evidence and therefore concluded there was not a bona fide position which could be considered a specialty occupation. The director found that the position does not meet any of the preceding criteria for classification as a specialty occupation.

On appeal, counsel refers to previously submitted documents and notes that the petitioner operates two residential care facilities and is affiliated with another facility. Counsel submits a copy of a Medi-Cal Participation Agreement that counsel contends obligates the petitioner to provide services and related care in accordance with all federal and state programs and regulations, including record-keeping documenting services to Medi-Cal recipients. Counsel indicates that one of the duties of the proffered position is to administer the Medi-Cal requirements and coordinate the services of outside professionals. In support of this, the petitioner submits four separate invoices, two of which are billed to Regula Home located at 17231 Reguleus Drive in Yorba Linda, California and two of which are billed to Rose Lu Ann Home located at 17231 Reguleus Drive in Yorba Linda. The invoices are from four different consultants: occupational therapy, speech pathology, physical therapy and a dietician.

Counsel refers to the *Handbook* under the heading Medical And Health Care Managers to support his contention that the employment of health services managers “appears quite normal and common for residential care facilities such as the petitioner.”

Counsel contends that although the petitioner’s size may be one factor in the reasonable exercise of the Service’s discretion when determining whether companies of similar size employ health services managers, neither the relevant statute nor regulation legally require such information for petition approval. Counsel finds that the director’s decision has completely “disregarded the high degree of modern legal regulation surrounding residential care facilities and the constant need to safeguard patients against preventable medical risks and other danger.”

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

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 thorough review of the *Handbook* discloses that few of the duties of the proffered position are those of a medical and health services manager. The occupation encompasses all individuals who plan, direct, coordinate, and supervise the delivery of healthcare. They improve efficiency in healthcare facilities and the quality of healthcare provided. They may optimize efficiency of a variety of interrelated services – for example, those ranging from inpatient care to outpatient follow-up care. The *Handbook* states that large facilities may have assistant administrators to aid the top administrator and to handle daily decisions. The *Handbook* states that assistant administrators may direct activities in clinical areas such as nursing, surgery, therapy, medical records, or health information.

Even assuming the duties of the proffered position are those of a medical and health services manager for a small residential facility, the petitioner fails to establish the first criterion. The *Handbook's* treatment of this occupation indicates that, depending upon the size and complexity of the particular health services operation involved, a particular health services manager position's educational requirements may range from a master's degree, on the high end of the spectrum, to on-the-job experience in lieu of formal education, on the low end at a physician's office and other facilities. The evidence of record, including the staff configuration, position description, and business context in which the health services manager would operate, does not establish the proffered position among those that would require a degree in specific specialty. The *Handbook* thus does not 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 of health service manager.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to the *Handbook*. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

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. 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. Counsel explains the beneficiary "is required to coordinate the services of numerous outside professional consultants to the petitioner's patients." Counsel contends that the petitioner now requires a

health services manager “to handle the growing volume of complex operations involved in the day-to-day management of petitioner’s business.” Counsel’s assertions are not persuasive. The petitioner has not provided evidence of the number of patients that it cares for. The petitioner has provided no evidence of its complex operations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As described by the petitioner, the duties of the proffered position are not 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 has not presented duties that are more complex than routinely required by a health services manager in a small facility position.

Beyond the decision of the director, the AAO notes that the petitioner stated that it operates two residential care facilities and is affiliated with another. It provided a corporate tax return for the tax year 2001 with the same federal tax identification number as the one listed on the Form I-129. This tax return indicated gross receipts of \$139,572 and total salaries and wages at \$16,900 and no compensation for officers. The petitioner indicated the Form I-129 that it had 16 employees. Additionally, the four invoices for consultants submitted by the petitioner were for a facility in Yorba Linda that was not indicated on the Form I-129 and was not listed on the Department of Labor’s Labor Condition Application, which requires the listing of every job site for the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*.

Therefore, for the 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.