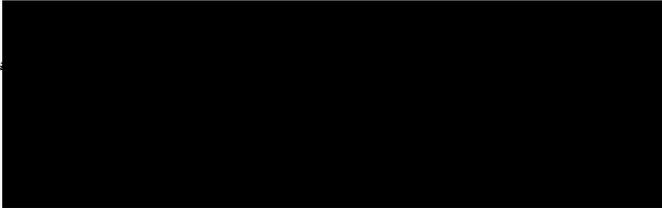


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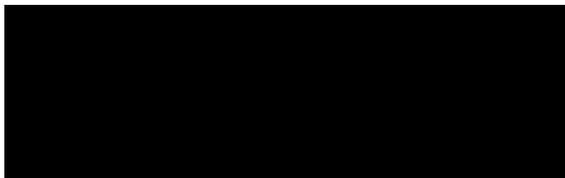


FILE: EAC 04 062 52742 Office: VERMONT SERVICE CENTER Date: JUN 30 2005

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:



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 acting director of the Vermont 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 hospital with 61 beds. It seeks to hire the beneficiary as a respiratory therapist. The acting director denied the petition because she determined the proffered position did not meet the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (3) the director's denial letter; and (4) Form I-290B, with letters from both counsel and the petitioner. The AAO reviewed the record in its entirety before reaching its decision.

The AAO first turns to the statements made by the director questioning the petitioner's intention to place someone who has no experience working in a U.S. medical facility in a senior respiratory therapy position. The AAO takes note of the beneficiary's completion of an advanced respiratory therapy program at the California College for Health Sciences, his certification as a Registered Respiratory Therapist by the National Board for Respiratory Care, and his licensing as a respiratory care practitioner by the State of Pennsylvania. The director's statements on this issue are withdrawn.

The remaining issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor 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 petitioner states that it is seeking the beneficiary’s services as a respiratory therapist. Evidence of the beneficiary’s duties includes: the Form I-129 and a December 18, 2003 letter of support from the petitioner. In its letter of support, the petitioner stated the beneficiary would be responsible for assessing, treating and caring for patients with breathing disorders, requiring him to:

- Assume primary responsibility for all respiratory care modalities, including the supervision of respiratory therapy technicians;
- Initiate and conduct therapeutic procedures;
- Maintain patient records; and
- Select, assemble, check and operate equipment.

To make its determination whether the employment just described qualifies as 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; 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 the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

Based on a review of the record and the discussion of the occupation of respiratory therapist in the 2004-2005 edition of the DOL *Handbook*, the AAO finds the description of the proffered position's duties, although general in nature, places it within the occupation of respiratory therapists who "evaluate, treat, and care for patients with breathing or other cardiopulmonary disorders." It, therefore, turns to the *Handbook* for its discussion of the educational requirements for employment as a respiratory therapist to determine whether the proffered position requires the beneficiary to hold a baccalaureate or higher degree, or its equivalent, as required for classification as a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With regard to the education and training of respiratory therapists, the *Handbook*, at page 305, states:

Formal training is necessary for entry into this field. Training is offered at the postsecondary level by colleges and universities, medical schools, vocational-technical institutes, and the Armed Forces. An associate degree has become the general requirement for entry into this field. Most programs award associate or bachelor's degrees and prepare graduates for jobs as advanced respiratory therapists. Other programs award associate degrees or certificates and lead to jobs as entry-level respiratory therapists

More than 40 States license respiratory care personnel

The National Board for Respiratory Care (NBRC) offers voluntary certification and registration to graduates of programs accredited by [the Commission on Accreditation of Allied Health Education Programs] or the Committee on Accreditation for Respiratory Care (CoARC). Two credentials are awarded to respiratory therapists who satisfy the requirements: Registered Respiratory Therapist (RRT) and Certified Respiratory Therapist (CRT). Graduates from accredited programs in respiratory therapy may take the CRT examination. CRTs who meet education and experience requirements can take two separate examinations leading to the award of the RRT credential. The CRT examination is the standard in the States requiring licensure.

Most employers require applicants for entry-level or generalist positions to hold the CRT or at least be eligible to take the certification examination. Supervisory positions and intensive-care specialties usually require the RRT or RRT eligibility.

Based on the above discussion, the AAO concludes that the petitioner's proffered position does not require the beneficiary to hold the minimum of a baccalaureate or higher degree. Accordingly, the petitioner cannot establish its employment as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response to the director's request for evidence and on appeal, counsel has asserted that, as the proffered position is that of a senior respiratory therapist, it requires the beneficiary to be certified at the RRT level just

discussed and to hold a baccalaureate degree. However, counsel's statements regarding the position's degree requirement are not persuasive. The assertions of counsel do not, in the absence of documentation, constitute evidence and, therefore, cannot satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Moreover, the *Handbook's* discussion of the educational requirements for employment as a respiratory therapist clearly indicates that entry-level employment is available to individuals with associate degrees and that both associate and baccalaureate degree programs prepare graduates for jobs as advanced respiratory therapists.

The AAO further finds that the NBRC materials submitted by counsel regarding the certification of respiratory therapists also establish that individuals do not need a baccalaureate degree to work in the field. As stated by the NBRC, applicants for the RRT examination need satisfy only one of the following educational requirements: be a CRT with an associate degree from an advanced level respiratory therapist educational program; be a CRT with a certificate of completion/graduate from an advanced level respiratory therapist educational program who enrolled in the education program prior to January 1, 2002; be a CRT credentialed by the NBRC who has four years of full-time clinical experience under licensed medical supervision, with 62 semester hours of college credit; be a CRT with a baccalaureate degree in an area other than respiratory care and two years of clinical experience; or be a Canadian RRT with credentials from the Canadian Society of Respiratory Therapists.

Subsequent to his filing of the Form I-290B, counsel has submitted the findings of *Matter of Panganiban*, 13 I&N Dec. 581 (D.A. Comm. 1970) in support of the proffered position's degree requirement. He contends that the conclusions reached in the 1970 decision -- medical technology is a profession requiring a degree -- should be applied to the instant case, as a senior respiratory therapist is a medical technologist. However, the findings of *Matter of Panganiban* are not probative for the purposes of this proceeding. The occupation of respiratory therapist is not that of a medical technologist. Each is a distinct occupation, and treated as such by the *Handbook*, the DOL resource on which the AAO relies for information on the classification of various types of employment.

As the proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO turns to a consideration of the three remaining regulatory avenues under which a petitioner may also establish its employment as a specialty occupation.

To qualify its employment as a specialty occupation under the second criterion, a petitioner must establish either that a specific degree requirement is common to its 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 the instant case, counsel has submitted a letter from a respiratory therapy supervisor at another hospital to establish the petitioner's degree requirement as the norm within the hospital industry. However, this letter does not meet the requirements of the first prong of the criterion. Although the letter comes from a hospital -- an organization similar to the petitioner -- it does not discuss the duties that would require a therapist to hold a baccalaureate degree and, therefore, cannot establish that this employment is parallel to the proffered position. However, even if the letter were responsive to the requirements of the second criterion, the AAO notes that a letter from a single hospital is insufficient proof to establish an industry-wide standard.

The AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) -- the position is so complex

or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, in the instant case, the petitioner, in response to the director's request for evidence, indicated that it has not previously employed a senior respiratory therapist. Therefore, the petitioner does not have the necessary documentation that might allow it to establish the proffered position as a specialty occupation based on its normal hiring practices.

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. In its January 15, 2004 response to the director's request for evidence, the petitioner stated that it was seeking the beneficiary's services as a senior respiratory therapist to provide patients with advanced therapy, noting the specialized and complex nature of such therapy, particularly with regard to advanced pulmonary care. However, the petitioner has offered no description of the duties of its position beyond that provided at the time of filing and this description does not support the petitioner's assertions regarding the specialized and complex nature of its employment. The duties of the petitioner's employment, as stated, do not appear to require the beneficiary to possess greater knowledge or skill than that required of any respiratory therapist caring for patients in a hospital setting. As a result, the AAO concludes that the record does not establish the proffered position as a specialty occupation under the requirements of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.