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MAR 03 2005

FILE: WAC 03 044 53074 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:

SELF-REPRESENTED

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 California 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 an assisted living facility, with 4 employees. It seeks to hire the beneficiary as a manager. The director denied the petition based on his determination that the proffered position was not a specialty occupation and that the beneficiary was not qualified to perform the duties of 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) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The initial 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, a 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 manager. Evidence of the beneficiary’s duties includes: the Form I-129, with a November 4, 2002 letter of support from the petitioner; and the petitioner’s July 24, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner stated it required the services of a manager to “coordinate office services and revise office procedures for efficiency,” requiring the beneficiary to: gather and organize information and procedures; analyze data and make management recommendations, and develop procedures to implement recommendations; coordinate office services, including personnel, budget and records; prepare operating reports and suggestions; store and retrieve management data; issue and interpret policies; and direct maintenance and repair. However, in response to the director’s request for evidence, the petitioner expanded the scope of its proffered position to include the following additional responsibilities:

- Manage the facility and more of the details of daily operations, dealing with evolving integrated healthcare delivery systems, technological innovations and the increasingly complex regulatory environment;
- Assume a role in resident’s care, including admissions, scheduling of trips to doctors and dentists, family visitation and the residents’ participation in outings and recreational activities;
- Supervise caregivers, cook and other staff; and
- Maintain the efficiency of the petitioner’s facility and the quality of the healthcare provided.

The AAO will not, however, consider these additional duties as they appear to materially alter the employment described by the petitioner at the time of filing, broadening it beyond the administrative duties originally described to include the hands-on management of the petitioner’s facility.

The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot, therefore, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Accordingly, for its analysis of the proffered position under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO will rely only on the duties described by the petitioner at the time of filing.

To determine whether the duties described by the petitioner at the time of filing are those of a specialty occupation, the AAO first 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; 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 (DOL) *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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the duties of the proffered position to fall within the occupation of office and administrative support worker supervisors and managers, as described in the 2002-2003 edition of the *Handbook*. As the *Handbook* also noted that positions within this occupational title were normally filled from within by promoting clerical or administrative support workers, the director determined that the profession of manager did not impose a degree requirement on anyone seeking entry-level employment. He further concluded that the petitioner had failed to establish that its proffered position met any of the other criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Following its own review of the duties of the proffered position and the 2004-2005 edition of the DOL *Handbook*, the AAO withdraws the director's finding that the proffered position is that of an office and administrative support worker supervisor or manager. Instead, it concludes that the position is more closely aligned to that of an office manager, as described within the occupational title of secretaries and administrative assistants. The position's duties, as outlined at the time of filing, do not describe a hands-on supervisory role for the beneficiary, the characteristic unifying all positions falling under the occupational title of office and administrative support worker supervisors and managers. Nor do they appear analogous to that of first-line administrative services managers who also directly supervise a staff. Instead, the management responsibilities to be undertaken by the beneficiary appear most closely aligned to those assigned to administrative assistants:

As the reliance on technology continues to expand in offices across the Nation, the role of the office professional has greatly evolved. Office automation and organizational restructuring have led secretaries and administrative assistants to assume a wider range of new responsibilities once reserved for managerial and professional staff.... In the midst of these changes, however, their core responsibilities have remained much the same – performing and

coordinating an office's administrative activities, and storing, retrieving, and integrating information for dissemination to staff and clients.

Secretaries and administrative assistants are responsible for a variety of administrative and clerical duties necessary to run an organization efficiently. They serve as an information manager for an office...organize and maintain paper and electronic files, manage projects, conduct research, and provide information....

Secretaries and administrative assistants are aided in these tasks by a variety of office equipment.... In addition, secretaries and administrative assistants use personal computers to create spreadsheets...manage databases, and create presentations, reports, and documents...all tasks previously handled by managers and professionals.

Specific job duties vary with experience and titles...they may handle more complex responsibilities such as conducting research, preparing statistical reports, training employees, and supervising other clerical staff.

Having concluded that the proffered position is closely aligned to that of administrative assistant, the AAO turns to the *Handbook's* discussion of the educational requirements for this occupation to determine whether the attainment of a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the field:

High school graduates who have basic office skills may qualify for entry-level secretarial positions....

Secretaries and administrative assistants acquire skills in various ways. Training ranges from high school vocational education programs that teach office skills and keyboarding to 1- and 2-year programs in office administration offered by business schools, vocational-technical institutes, and community colleges. Many temporary placement agencies also provide formal training in computer and office skills. However, many skills tend to be acquired through on-the-job instruction by other employees or by equipment and soft-ware vendors.... Bachelor's degrees and professional certifications are becoming increasingly important as business continues to become more global.

Based on the *Handbook's* discussion of the education and training that may prepare individuals for employment as administrative assistants, the AAO concludes that the proffered position does not require the beneficiary to hold a baccalaureate or higher degree, or its equivalent, and, therefore, does not meet the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

A review of the record finds the petitioner to have provided no evidence to establish its position as a specialty occupation under any of the remaining criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Although the petitioner, in its response to the director's request for evidence, stated that the complexities of the proffered position and its many responsibilities required the beneficiary to have a degree in business administration or management, this statement does not establish that the proffered position meets the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(4). The record contains no discussion of the position's complexities nor does it specifically identify them. Further, although the petitioner states that the responsibilities of the position include "constant communication and interaction with physicians, social workers as well as personnel in healthcare agencies who conduct regular inspection and visitation," such responsibilities were not among the position duties identified at the time of filing and, as already discussed, will not be considered by the AAO in this proceeding. Accordingly, the AAO, like the director, concludes that the petitioner has failed to establish its proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner raises the approval of an H-1B petition previously filed on behalf of the beneficiary. It contends that the employment covered by the prior petition is the same as that it now offers the beneficiary and requests that CIS approve the instant petition in light of its previous decision. However, the March 1, 2000 approval of an H-1B petition for this beneficiary does not constitute a basis for the approval of the instant petition. CIS is not bound to approve a petition where eligibility has not been demonstrated simply because it previously approved a petition for the same beneficiary. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, CIS is not required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Finally, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. The previous approval of a nonimmigrant visa petition on behalf of this beneficiary does not bind the AAO to follow that decision in this proceeding. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248, F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO now turns to a consideration of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position, had it been determined to qualify as a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In his denial, the director noted the beneficiary had the equivalent of a U.S. bachelor's degree in business administration, but that a degree of generalized title, like that of business administration, could not be used to establish his eligibility to perform the duties of a specialty occupation. The AAO will now review the record to determine whether the evidence submitted by the petitioner meets any of the four requirements just noted.

The AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1) and (2) -- whether the beneficiary has a degree required by the specialty occupation from an accredited U.S. college or university, or a foreign degree that has been determined to be the equivalent of a U.S. baccalaureate or higher degree required by the specialty occupation.

While the beneficiary does not hold a U.S. baccalaureate degree from an accredited U.S. college or university in the specialty, the petitioner seeks to establish that he possesses a foreign degree that is the equivalent of the U.S. degree required by the proffered position. To meet its burden of proof, the petitioner, in response to the director's request for evidence, submitted copies of a translated certificate from The University of the East in Manila, The Philippines identifying the beneficiary as holding a Bachelor of Science degree in business administration, a transcript detailing the courses taken and credits earned by the beneficiary in satisfying the University's requirements, and an academic evaluation of the beneficiary's college transcript prepared by the Foundation for International Services, Inc. The evaluation finds the beneficiary to possess the equivalent of a bachelor's degree in business administration from an accredited college or university in the United States.

The AAO has reviewed both the beneficiary's undergraduate transcript and the evaluation provided by the Foundation for International Services, Inc. and finds the beneficiary to hold a foreign degree that is the equivalent of a U.S. baccalaureate degree in business administration. However, as already noted by the director, a degree of generalized title, including that of business administration, is not a degree "required by the specialty occupation," as stipulated by the second criterion.

A job that can be performed by individuals with a range of degrees or degrees of generalized title, without further specification, does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As a petitioner cannot establish a position as a specialty occupation based on a degree requirement in business administration, neither can it establish a beneficiary as qualified to perform the duties of a specialty occupation based on a business administration degree. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary is eligible to perform the duties of a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2).

The AAO next turns to the third criterion – whether the beneficiary holds a license to practice in the proffered position. There is, however, no requirement that an individual working as an administrative manager in a healthcare business be licensed or certified. Accordingly, the petitioner cannot establish the beneficiary's eligibility to perform the duties of a specialty occupation based on the beneficiary's possession of a license or certification.

Finally, the AAO considers the fourth criterion -- whether the beneficiary has the education, specialized training, and/or progressively responsible experience that would be the equivalent of a U.S. baccalaureate or higher degree in the specialty occupation and has had his expertise in the specialty recognized through progressively responsible positions directly related to the specialty.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Other than the academic evaluation already discussed, the record contains no evidence that responds to the evidentiary requirements of the first four criteria. Therefore, the AAO turns to an analysis of whether the beneficiary can meet the requirements at 8 C.F. R. § 214.2(h)(4)(iii)(D)(5) – the beneficiary has acquired the equivalent of a degree in the specialty occupation through a combination of education, specialized training and/or work experience in areas related to the specialty and that the beneficiary has achieved recognition of her expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In its November 4, 2002 letter of support, the petitioner discussed the beneficiary's employment history, noting that he had worked as a manager for another healthcare business and for a radio station in The Philippines. However, the petitioner's statements regarding the beneficiary's past employment cannot serve as evidence of that employment, nor of the duties performed by the beneficiary for previous employers. Simply going on record without supporting documentation is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

To qualify a beneficiary under the fifth criterion, a petitioner must establish that the beneficiary's experience included the theoretical and practical application of specialized knowledge required by the specialty occupation. However, as just noted, there is nothing in the record before the AAO that can serve as evidence of the beneficiary's previous employment. Further, there is nothing in the record to indicate that the beneficiary's work experience was gained while working with peers, supervisors or subordinates who have

degrees or the equivalent in the management of healthcare businesses, or resulted in any recognition of his expertise in his field. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary has the equivalent of a degree required by the position based on a combination of education, specialized training, and/or work experience in areas related to the proffered position per the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

For reasons related in the preceding discussion, the petitioner has failed to establish that its proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the AAO, although it reached a different conclusion regarding the occupational title most closely aligned to the proffered position, 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.