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FILE: WAC 04 132 54902 Office: CALIFORNIA SERVICE CENTER Date: OCT 04 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 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, a residential home for developmentally disabled persons, seeks to employ the beneficiary as a utilization review coordinator. The petitioner therefore filed this H-1B petition in order 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 on the basis that the petitioner failed to establish that the proffered position met the requirements for a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). As discussed below, the AAO has determined that the director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief on appeal, submitted in the form of a three-page letter dated August 16, 2005.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner provided materially inconsistent information about the proffered position and its duties. While the Form I-129 (Petition for Nonimmigrant Worker) entitled the proffered position “Utilization Review Coordinator,” it provided this statement in response to the form’s requirement for a nontechnical description of the job:

The job duties are for an educational and vocational counselor. The clients at [the] Petitioner’s facility are developmentally challenged. They need to be taught basic academic and/or vocational skills, upto [sic] their mental capacities.

In contrast, the description of job duties submitted as part of counsel’s RFE response states:

Assess the extent to which health services are provided in compliance with standards set by the insurance agencies; Review patients’ medical records and cross-reference the records with medical insurance data bases to ensure that proper cost-effective treatment is not provided; Record patient’s medical information and vital signs; Responsible for collecting data on a quarterly and year-end basis to allow assessment and evaluation of the effectiveness of the Utilization Management Program; Determine areas where intervention and/or education may be appropriate.

In light of the inconsistent descriptions of the proffered position, its actual nature is questionable. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The evidence of record does not support the director's finding that the petitioner is proffering a home health aide position. However, the director's decision to deny the petition shall not be disturbed, as the evidence does not establish any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO is never bound by a decision of a service center or district director. *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 here exercises its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within our power to formulate. *Securities Com'n v. Chenery Corp.*, 318 U.S. 86 (1943); *Chae-Sik Lee v. Kennedy*, 294 F. 2d (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926.

The petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties. The utilization review coordinator duties described in the response to the RFE do not comport with any occupational category for which at least a bachelor's degree in a specific specialty is reported as a minimal entry-level requirement by the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which CIS recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations. Counsel presents no evidence to otherwise substantiate the proffered position as meeting the degree or degree-equivalent requirement of this criterion. The generalized and generic nature of the RFE response's description of duties is indicative of a health services administrative support position that does not require at least a bachelor's degree in a specific specialty. The assertions of counsel and the petitioner to the contrary have no weight, as they are not substantiated by evidence in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534.

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The record contains no attestations from other firms, individuals in the industry, or from a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). Such complexity, uniqueness, or specialization is not evident in the brief, generic, and generalized information provided in the record, and as already noted, the unsubstantiated opinions of counsel and the petitioner have no evidentiary weight.

Finally, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. The only evidence of the petitioner's hiring practice is the petitioner's assertion that it has previously hired as a utilization review coordinator an H-1B alien with a bachelor of science in nursing.

In light of the statutory and regulatory definitions of specialty occupation (cited earlier in this decision), this criterion has several evidentiary elements. First, the petitioner must demonstrate that it has an established history of hiring for the proffered position only persons with at least a bachelor's degree or equivalent. Second, this bachelor's degree or equivalent must be in a specific specialty that is characterized by a body of highly specialized knowledge. Third, the petitioner must also establish that both the nature and the level of highly specialized knowledge that the bachelor's degree or equivalent signifies are actually necessary for performance of the proffered position. The evidence of record satisfies none of these evidentiary elements.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that the certified labor condition application (ETA Form 9035E) that the petitioner submitted with this petition does not relate to the type of position that counsel asserts to be the subject of the petition. The certified labor condition application specifies "Educational Counsel/Activity Coordinator" as the job title, and 094 as the position's Occupational Code, a code which according to the ETA Form 9035CP (cover pages with instructions for completing the labor condition application) identifies the proffered position with the occupational group "Occupations in Education of Persons with Disabilities," and not with the occupational group 079 "Other Occupations in Medicine and Health" to which a utilization coordinator position would belong. As the certified labor condition application

does not relate to the proffered position, the petitioner has not complied with the certified labor application requirement at 8 C.F.R. § 214.2(h)(4)(iii)(B). For this reason also, the petition must be denied.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.