

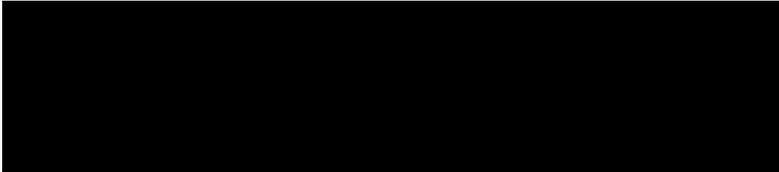
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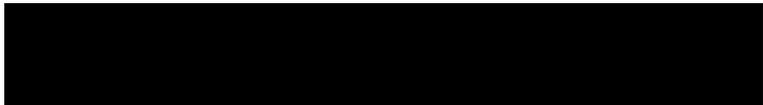


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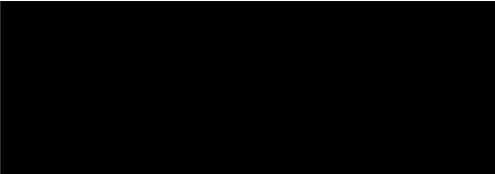
FILE: WAC 04 098 51291 Office: CALIFORNIA SERVICE CENTER Date:

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:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 long-term care facility that seeks to employ the beneficiary as a social worker and to classify her 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 proposed position is not a specialty occupation and on the basis that the petitioner failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. On appeal, the petitioner submits a brief and additional evidence.

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 bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

The record of proceeding before the AAO contains, in part: (1) Form I-129 with supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B with accompanying brief and additional documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as a social worker. Evidence of the beneficiary's duties includes the documentation submitted with the I-129, the response to the RFE, and the materials submitted on appeal. According to this evidence, the beneficiary's duties would include:

- evaluating and documenting residents' psychological needs on a regular basis according to current company guidelines;
- working in close coordination with physicians and other health care personnel in patient evaluation and treatment to further their understanding of significant social and emotional factors underlying the patient's health problems;
- helping patients and family through individual or group conferences to understand, accept and follow medical recommendations;
- giving general, non-medical progress reports to physicians, community agencies, or family members;
- documenting any psychological behavior of patient and referring to attending physician for further evaluation; and
- providing services planned to restore the patient to optimum social and health adjustment within the patient's capacity.

In the response to the RFE, the petitioner submitted a letter stating that it required its social workers to have an associate's degree in human services or a high school diploma or its equivalent with two years experience in human services or a health-related field. On appeal, the petitioner asserts that it requires its social workers to possess bachelor's degrees in their field.

The director denied the petition because it found that the proposed duties resembled the duties of a psychiatric aide more than those of a social worker and therefore did not meet the statutory definition of a specialty occupation. The director also denied the petition based on the petitioner's failure to demonstrate that the beneficiary was qualified to perform the duties of the proposed position. The director found that California requires social workers to possess appropriate interim, temporary, or permanent licensure and that the beneficiary did not possess that license.

On appeal, the petitioner asserts that the position is a specialty occupation based on the specialized nature of the position, the complexity of the proposed duties, and because it is common to the industry to require a bachelor's degree in a specialty for parallel positions in similar organizations. The petitioner asserts that the beneficiary qualifies to perform the duties of a specialty occupation because she holds a bachelor's degree in psychology, she participated in a workshop for social service certification, and because the state of California does not require social workers in facilities similar to the petitioner's to hold licenses.

The petitioner need only satisfy one of the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) to show that a position is a specialty occupation. Upon review of the record, the AAO concludes that the petitioner has failed to establish that the proposed position meets any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

In the response to the RFE, counsel asserted that CIS has already determined that the proposed position is a specialty occupation since CIS approved this beneficiary's H-1B petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the

documents submitted are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

In addition, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

To determine 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 bachelor's degree in a specific field of study as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* for information about the duties and educational requirements of particular occupations. After careful review of the proposed duties and the *Handbook*, the AAO finds that the proposed duties most closely resemble those performed by social and human service assistants, and not social workers. The proposed duties reflect those of social and human service assistants who, according to the *Handbook*, under varying degrees of responsibilities, monitor and keep case records on clients, assist clients in need of counseling or crisis intervention, and support the client's participation in a treatment plan, such as individual or group counseling or occupational therapy. Although the petitioner describes some of the duties of a clinical social worker, a specialty occupation that requires licensing, the petitioner's own assertions establish that the position only requires an associate's degree or high school diploma. The petitioner's earlier assertion that it requires an associate's degree or high school diploma for the position is directly contradicted by its assertion on appeal that it requires a bachelor's degree in a field related to social work. 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). On appeal, the petitioner makes no attempt to explain or reconcile its earlier assertion regarding its own degree requirements for the proposed position. Therefore, the AAO will consider the petitioner's earlier assertion in its determination about the nature of the proposed duties.

To determine whether the proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(I) – a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position – the AAO turns to the 2006-07 *Handbook's* discussion of the educational requirements for social and human services assistants. The *Handbook* does not indicate that employers normally impose a bachelor's degree requirement on any of these job applicants. Instead,

some employers may require their social and human services assistants to have bachelor's degrees and some only require two-year associate's degrees. In addition, individuals with experience may be hired based on a combination of formal education, training and/or experience. The *Handbook* also indicates that social and human services assistants possess bachelor's degrees in a variety of fields, not just social work or related fields. As individuals may enter these occupations with less than a bachelor's degree, or with degrees in a variety of fields, the petitioner fails to establish that the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Further, the AAO finds that, due to the petitioner's associate degree requirement for the proposed position, the position does not qualify as a specialty occupation under the first criterion. The petitioner asserted that the proposed position only required an associate's degree or high school diploma. Thus, the proposed position does not qualify as a specialty occupation under this criterion.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies "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 *Handbook* indicates that there is no industry-wide requirement for a social work-related bachelor's degree for social and human services assistant positions. The petitioner did not submit a letter from a national association, survey results, or other such documents to establish an industry-wide standard. The one letter submitted on appeal is not sufficient to establish an industry-wide standard for parallel positions in facilities similar to the petitioner. The letter does not describe the duties with sufficient particularity to determine if they are similar to the proposed position. In addition, the letter states that the employer prefers a bachelor's degree in a related field but does not require it. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the employer normally requires at least a bachelor's degree or its equivalent, in a specific field of study, for the position. 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 the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. There is no evidence in the record to suggest that the proposed position qualifies for classification as a specialty occupation under this criterion. In fact, the only evidence submitted to support this assertion is a statement from the petitioner that it does not require a bachelor's degree in a specialty but an associate's degree or high school diploma. As such, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. A petitioner satisfies the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to 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 bachelor's or higher degree in a specific field of study. On appeal, the petitioner asserts that the position is so specialized and the duties so complex that a bachelor's degree in social work or a related field is necessary for the job. This statement, however, contradicts the petitioner's earlier statement that it

required an associate's degree or high school diploma for the position. Since the petitioner did not attempt to explain or reconcile this inconsistency, the AAO finds that the proposed position is not a specialty occupation based on its complexity or uniqueness or the specialized nature of its duties under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4).

The director also found that the beneficiary would not be qualified to perform the duties of the proposed position if the job were a specialty occupation. As the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

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