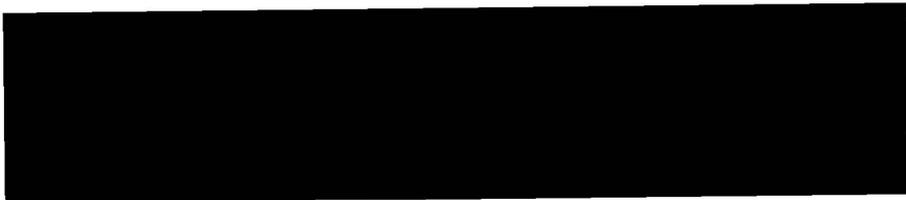




U.S. Citizenship
and Immigration
Services

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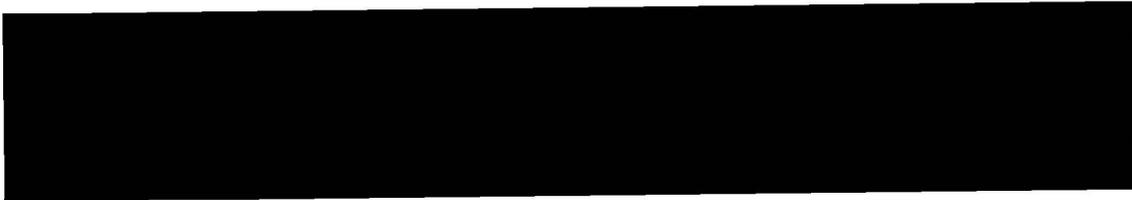
FILE: LIN 04 253 52330 Office: NEBRASKA SERVICE CENTER Date: JUL 14 2006

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The acting director of the Nebraska 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 nursing home, with 170 employees. It seeks to employ the beneficiary as a coordinator of nutritional services pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition based on his determination that the record did not establish the proffered position 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; (4) the director's denial; and (5) Form I-290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To establish a proffered position as a specialty occupation, a petitioner must prove 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 coordinator of nutritional services. Evidence of the beneficiary’s duties includes: the Form I-129; the job description, organizational chart and employee listing provided at the time of filing; and counsel’s December 3, 2004 response to the director’s request for evidence. The job description provided by the petitioner indicates that the beneficiary would be responsible for planning, organizing and directing all phases of its nutritional service operations, including menu planning, food preparation and meal services, budget development, cost contracts, administrative reporting and record keeping, educational analysis, appraisal of staffing requirements, and the safety and sanitation program. In carrying out these responsibilities, the beneficiary would be required to:

- Supplement the nurse’s knowledge so nutrition is an integral part of the health education programs;
- Advise and consult with staff regarding meal preparation and planning;
- Keep staff informed of scientific discoveries and research in nutrition, and interpret the practical application of this data;
- Confer with the registered dietitian in directing the development and maintenance of master menus and specialized and therapeutic dietary needs; and conduct on-going nutrition needs assessment and evaluation of services;
- Confer with the registered dietitian to ensure that menus and department policies conform to nutritional standards, government regulations and the petitioner’s regulations and procedures;
- Coordinate with educational personnel and other consultants to incorporate nutrition in the total educational program;
- Prepare educational material as needed and evaluate educational material for center use; and
- Participate in the development of budget requests and the monitoring of expenditures according to budget allocations/appropriations, and recommend and initiate cost saving measures.

To make its determination whether the employment just discussed 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 (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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the proffered position to be closely aligned to that of a food service manager, employment that does not impose a degree requirement on individuals seeking entry-level employment.¹ The AAO does not agree. It does not find the record's description of the proffered position's duties to be sufficiently consistent to determine the nature of the beneficiary's responsibilities.

At the time that it provided the job description discussed above, the petitioner also submitted a copy of its organizational chart and a list of the individuals filling the positions indicated on that chart, with brief descriptions of each position's duties. The duties of the position of coordinator of nutritional services are listed as follows:

Reports to Food Service Director. Assumes food service director's position when absent. Evaluate[s] and assess[es] resident needs and recommends diet and nutrition of residents compatible with resident[s'] health and diagnoses. Responsible for all clinical aspects of nursing home residents' care plan. Attends care plan conference and ensures resident assessments are accurate and follows physician orders. Recommends nutritional options to physicians.

This description does not conform with the petitioner's contention that the beneficiary's work in relation to the nutritional needs of nursing home residents would be supervisory in nature, that she would not act as the petitioner's dietitian or have the duties of a dietitian, but would confer with a dietitian to ensure that menus and policies conform to nutritional standards. The coordinator described in connection with the petitioner's organizational chart appears to have a hands-on role in relation to the dietary/nutritional needs and regimens of the petitioner's residents, i.e., the role of a dietitian. Accordingly, the AAO does not find the record to establish how the beneficiary would be employed within the petitioner's organization, i.e., whether she would function as the nutritional coordinator described by the petitioner at the time of filing or would perform the duties of a dietitian, as described in the organizational chart materials provided in response to the director's request for evidence.² It is incumbent upon the petitioner to resolve any inconsistencies in the record by

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos024.htm.

² To work as a dietitian, the beneficiary would require a license, certification that the petitioner has asserted

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).

Moreover, although the organizational chart submitted by the petitioner indicates that it employs a contract dietitian, the individual filling this position is not identified by name, nor are the duties of the position described. Instead, the chart and accompanying material provide only the name of the consultant supplying the contract dietitian. The petitioner's other positions, however, are identified both by the name of the individual in that position and their duties. Accordingly, the record also fails to demonstrate that the petitioner employs the contract dietitian on which it has indicated that beneficiary would rely.

To make a determination regarding the nature of a proffered position and its degree requirements, if any, the AAO requires information as to the actual responsibilities of the position. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO cannot determine whether the tasks to be performed by a beneficiary on a day-to-day basis are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent, as required for classification as a specialty occupation. In the instant case, the inconsistent descriptions of the proffered position's duties found in the record prevent the AAO from determining the specific nature of the beneficiary's employment. Accordingly, the petitioner may not establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove 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 instant case, counsel asserts that the proffered position qualifies as a specialty occupation under the second prong of the criterion as it requires the theoretical and practical application of highly specialized knowledge and the educational background held by the beneficiary. Counsel's statements are not, however, persuasive as they are not supported by the record, e.g., statements from industry groups or professional associations indicating a degree requirement. Without supporting documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Moreover, without a reliable description of the proffered position's duties, the petitioner cannot establish that the position is more complex or unique than similar, but non-degreed employment.

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 the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

is not required since the beneficiary would only coordinate nutritional services.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually 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. In response to the director’s request for evidence, counsel indicated that the petitioner had not previously hired anyone for the position who did not possess the required professional credentials and submitted the petitioner’s organizational chart as proof of this claim. However, while the organizational chart and materials accompanying it indicate that the position of coordinator of nutritional services must hold a baccalaureate degree, they do not establish the petitioner’s hiring practices regarding the position. Although the petitioner has been incorporated for more than ten years, it has failed to provide the names of any of the individuals previously employed in the position or to indicate the degrees held by these individuals. Further, the AAO notes that the materials accompanying the organizational chart indicate only that the position of nutritional service coordinator requires a baccalaureate degree, not a degree in a specific field of study directly related to the position, as required for classification as a specialty occupation. Accordingly, the record does not establish the proffered position as a specialty occupation based on the petitioner’s normal hiring practices. Moreover, without a specific description of the duties of the position, the petitioner may not establish that it has previously employed degreed individuals to perform such duties.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. However, as the record does not provide a reliable description of the proffered position’s duties, it does not establish them as being of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Accordingly, the appeal will be dismissed.

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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 met that burden.

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