



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: EAC 06 137 52992 Office: VERMONT SERVICE CENTER Date: SEP 21 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The 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 an adult family home with a special designation for dementia, mental illness, and developmental disabilities. It seeks to employ the beneficiary as a healthcare support worker. The petitioner endeavors to employ the beneficiary in the nonimmigrant classification as a 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 May 19, 2006, concluding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, submitted on April 3, 2006; (2) the director's request for additional evidence (RFE), dated April 14, 2006; (3) counsel's response, dated May 10, 2006, to the director's request for evidence and supporting documentation; (4) the director's denial letter, dated May 19, 2006; and (5) the Form I-290B, dated June 21, 2006, and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The 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 healthcare support worker. In a letter of support submitted in response to the director's request for evidence, the petitioner explained that the adult homes are licensed to care for mentally and developmentally disabled persons, and the beneficiary's proposed duties are as follows:

- Employee implements and documents treatment strategies as outlined in the physician patient treatment plan; observes, records and reports resident's symptoms and reactions; accompanies residents on visits to their doctors, psychiatrists, and psychologists, and receives and helps implement instructions given by such medical professionals.
- Provides for resident safety and comfort through attention to general health and assistance and guidance in cleanliness, grooming, rest activity and nourishment; helps residents manage stress and anxiety problems that occur daily.
- Maintains an attractive and comfortable work and living environment.
- Adapts case load to each resident's individual needs and requirements.
- Encourages, supervises, coordinates, and participates in group or individual recreational, social and related activities with residents diagnosed with dementia, mental illness, and

- developmental disabilities; helps such residents communicate in writing and/or speaking to residents, staff, friends, relatives, and general public; prepares and implements daily, weekly, monthly, quarterly activities for the residents; takes residents on outings (e.g. McDonald's, mall, Mt. Rainer, healthcare provider), providing safety and comfort on such trips; offers counseling and guidance in facing social obstacles; works towards rehabilitation of residents, including being more independent in areas of their daily living.
- Assists in the maintenance of, the inventory of, and the security of resident belongings.
- Management of the unit's supplies.
- Promotes better understanding of facility's policies in contacts with the residents' relatives.
- Interviews residents to obtain and compile personal data and social background; contacts friends, relatives, public and private agencies to secure information on the resident's background, personal history and social adaptability.
- Initiates and/or participates in the hiring, training and evaluation process of staff.

The petitioner also indicates that the minimum qualification to fill the position of healthcare support worker is a bachelor's degree in social work, recreation, or related fields.

The director denied the petition on May 19, 2006, concluding that the proffered position is not a specialty occupation.

On appeal, counsel asserts that the U.S. Citizenship and Immigration Services (CIS) approved the H-1B classification for the petitioner on two prior occasions for the same position. Counsel contends that the officer examining the present petition should have reviewed the prior H-1B petition filed by the petitioner on behalf of the beneficiary.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO find that the proffered position is not a specialty occupation.

On appeal, counsel for the petitioner noted that CIS approved other petitions that had been previously filed on behalf of the beneficiary, and the director's decision indicated that he did not review the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the duties that are contained in the current record, the approval would constitute material error on the part of the director. The AAO 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, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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 petitioner states that the duties of the position are most similar to those of a Social Worker, as indicated in the Department of Labor's Occupational Outlook Handbook (the *Handbook*). The duties of the position as listed by the petitioner, however, are not those of a social worker as listed in the *Handbook*. The primary duties of a social worker in the *Handbook* are to assess and treat individuals with mental illness or substance abuse problems, and such services include individual and group therapy, outreach, crisis intervention, social rehabilitation, and training in skills of everyday living. They also may help plan for supportive services to ease patients' return to the community. In reviewing the petitioner's description of the position, it does not appear that the beneficiary will participate in group therapy or crisis intervention, but instead will focus more on the day-to-day maintenance and living needs of the adults residents. As noted by the director, the position is for a healthcare support worker and not a social worker.

In determining whether a proposed 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 baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In reviewing the 2006-2007 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position, while generally described, are encompassed within the *Handbook's* entry for nursing, psychiatric and home health aides as discussed below.

In its discussion of the duties of nursing, psychiatric and home health aides, the *Handbook* states the following:

Nursing and psychiatric aides help care for physically or mentally ill, injured, disabled, or infirm individuals confined to hospitals, nursing care facilities, and mental health settings. Home health aides have duties that are similar, but they work in patients' homes or residential care facilities.

* * *

Home health aides help elderly, convalescent, or disabled persons live in their own homes instead of in a health care facility. Under the direction of nursing or medical staff, they provide health-related services, such as administering oral medications. (**Personal and home care aides**, who provide mainly housekeeping and routine personal care services, are discussed elsewhere in the *Handbook*.) Like nursing aides, home health aides may check patients' pulse rate, temperature, and respiration rate; help with simple

prescribed exercises; keep patients' rooms neat; and help patients to move from bed, bathe, dress, and groom. Occasionally, they change nonsterile dressings, give massages and alcohol rubs, or assist with braces and artificial limbs. Experienced home health aides also may assist with medical equipment such as ventilators, which help patients breathe.

Most home health aides work with elderly or disabled persons who need more extensive care than family or friends can provide. Some help discharged hospital patients who have relatively short-term needs.

In home health agencies, a registered nurse, physical therapist, or social worker usually assigns specific duties to and supervises home health aides, who keep records of the services they perform and record each patient's condition and progress. The aides report changes in a patient's condition to the supervisor or case manager.

Psychiatric aides, also known as mental health assistants or psychiatric nursing assistants, care for mentally impaired or emotionally disturbed individuals. They work under a team that may include psychiatrists, psychologists, psychiatric nurses, social workers, and therapists. In addition to helping patients to dress, bathe, groom themselves, and eat, psychiatric aides socialize with them and lead them in educational and recreational activities. Psychiatric aides may play games such as cards with the patients, watch television with them, or participate in group activities, such as sports or field trips. They observe patients and report any physical or behavioral signs that might be important for the professional staff to know. They accompany patients to and from examinations and treatment. Because they have such close contact with patients, psychiatric aides can have a great deal of influence on their patients' outlook and treatment.

Therefore, based upon its reading of the *Handbook*, the AAO concludes that the duties of the proposed position, as described by the petitioner in its letter of support and in its response to the director's request for additional evidence, includes the duties of nursing, psychiatric and home health aides, described in the *Handbook*. The majority of the duties proposed for the beneficiary are encompassed within this grouping. Having made such a determination, the AAO next turns to the *Handbook* to determine whether these occupations normally require applicants for employment to have the minimum of a baccalaureate or higher degree, or its equivalent, in a specific field.

The *Handbook* states the following regarding the educational requirements for nursing, psychiatric and home health aides:

In many cases, a high school diploma or equivalent is necessary for a job as a nursing or psychiatric aide. However, a high school diploma generally is not required for jobs as home health aides. Hospitals may require previous experience as a nursing aide or home health aide. Nursing care facilities often hire inexperienced workers, who must complete a minimum of 75 hours of mandatory training and pass a competency evaluation as part of a State-approved training program within 4 months of their employment. Aides who complete the program are known as certified nurse assistants (CNAs) and are placed on

the State registry of nursing aides. Some States also require psychiatric aides to complete a formal training program. However, most psychiatric aides learn their skills on the job from experienced workers.

Nursing and psychiatric aide training is offered in high schools, vocational-technical centers, some nursing care facilities, and some community colleges. Courses cover body mechanics, nutrition, anatomy and physiology, infection control, communication skills, and resident rights. Personal care skills, such as how to help patients to bathe, eat, and groom themselves, also are taught.

The *Handbook's* discussion of the education and training requirements for the occupation does not support a finding that a bachelor's degree is normally required for entry into the occupation. It is clear that a bachelor's degree, or its equivalent, is not the normal minimum requirement to fill this occupational grouping.

For all of these reasons, the AAO finds that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as 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.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the seven job postings submitted by counsel in response to the director's request for evidence. However, counsel has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

There is no information in the record to establish that the companies advertising their vacancies in the submitted job postings are similar in size, scope, or scale of operations, business efforts, or expenditures to the petitioner. Simply 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. at 165. According to the business licenses submitted by the petitioner, it runs two homes with the capacity to hold a maximum of 11 adults. The petitioner did not provide evidence of the size and scale of operations of the businesses listed in the job descriptions. Without documentary evidence to support the claim, the

assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 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). The AAO has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner.

Moreover, the majority of the classified advertisements are for social workers or case management positions, which do not parallel the proffered position. The job advertisements are for a day program instructor, two social worker positions, case manager/RN consultant, and an aging and adult case manager. The duties listed on the advertisements mainly consist of social work services, comprehensive medical and psychological assessments, development and implementation of service plans and designing of behavioral management plans, which are duties that are more advanced than the duties described for the proffered position. The fact that the positions may share one or two similar duties with the petitioner's proposed position does not establish that they are in fact parallel positions.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. There has been no demonstration that the proposed position is more complex or unique than the general range of duties performed by nursing, psychiatric and home health aides positions, which would normally not require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of duties in such positions.

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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. Although the director requested information of the other individuals who have been employed in this position and their educational credentials, the petitioner did not submit this documentation. Again, 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. at 165.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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. To interpret the regulations in any other way would lead to absurd

results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. The position as described in the current record does not establish that the petitioner normally requires a baccalaureate degree in a specialty, or that such degree is required.

Accordingly, the petitioner has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

The AAO refers to the *Handbook* excerpts quoted previously in this decision, which state that a bachelor's degree in a specific specialty is not the normal minimum entry requirement for positions such as the one proposed here. The duties of the proposed position do not appear more specialized and complex than those of the corresponding positions as set forth in the *Handbook*. The AAO finds nothing in the record to indicate that the beneficiary, in her role as a healthcare support worker for the petitioner would face duties or challenges any more specialized and complex than those outlined in the *Handbook* for nursing, psychiatric and home health aides. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform the services of the proposed position. The petitioner indicated that the minimum requirement to fill the position is a bachelor's degree in social work, recreation or a related field. The petitioner submitted an educational credentials evaluation indicating that the beneficiary was awarded a Bachelor of Science in Education, which is the equivalent to a bachelor's degree from an accredited institution of higher education in the United States. The credential evaluation also reviewed the beneficiary's work experience in order to determine that the beneficiary has completed the equivalent of a bachelor's degree in social work. A credentials evaluation service may evaluate academic credentials only. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the record establishes that the beneficiary has only obtained the equivalent of a U.S. bachelor's degree in education. For this additional reason, the petition may not be approved.

Therefore, for the reasons related in the preceding discussion, the proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Further, the record does not establish that the beneficiary is qualified to perform the duties of a social worker. Accordingly, the AAO will 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.