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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 04 007 50681 Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2006

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an independent contractor engaged in the business of supplying medical professionals to hospitals and other medical facilities. It desires to employ the beneficiary temporarily in the United States as a respiratory therapist, at an annual salary of \$32,281, for three years. The director determined that the beneficiary did not hold the required state licensure from the State of California, and therefore, was not qualified to perform the duties of the proffered position.

On appeal, counsel states that the license requirement is not an absolute rule for issuance of an H-1B visa. Counsel also states that the license requirement may be waived in order for the professional to take the state board examination for respiratory therapist. Counsel submits a brief to support his argument.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
  - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4) states:

(v) *Licensure for H classification* – (A) *General*. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure*. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The petitioner's foreign education has been determined by a credentials evaluation service to be equivalent to a Bachelor of Science degree in respiratory therapy from a regionally accredited institution of higher education in the United States. The State of California, the state in which the beneficiary would work as a respiratory therapist, requires that all respiratory therapists be licensed. *See* California Business and Professions Code, Section 3761. The record does not establish that the beneficiary possesses the required license, or is otherwise exempt from obtaining a license. The California Business and Professions Code does not allow the duties of the occupation to be performed with a temporary license. The beneficiary is, therefore, not qualified to enter the United States and immediately engage in employment as a respiratory therapist. 8 C.F.R. § 214.2(h)(4)(v)(A).

Counsel asserts that until the beneficiary acquires a state license, he will work under the supervision and training of a licensed respiratory therapist. Counsel does not, however, offer any evidence in support of that position. The record does not establish that the beneficiary is authorized to work as a "respiratory care practitioner applicant" under the supervision of a licensed respiratory care practitioner prior to obtaining a license. A graduate of an approved respiratory care program who has filed an initial respiratory care practitioner application with the Board may, between the dates specified by the board, perform as a respiratory care practitioner applicant under the direct supervision of a respiratory care practitioner licensed in the state. *See* California Business and Professions Code, Section 3739 and 3740. The record does not establish that the beneficiary is a graduate of a respiratory care program approved by the Board, or that the beneficiary has filed a respiratory care practitioner application. The record of proceeding contains a letter dated July 15, 2003 from the licensing unit of the Respiratory Care Board (RCB) of California that states that the beneficiary's application for California licensure was returned to him. The letter also states that in order to practice respiratory care in California, you must possess a current and valid license issued by the RCB. The beneficiary is not qualified to work as a respiratory therapist in the State of California prior to receiving a license under 8 C.F.R. § 214.2(h)(v)(A) or (C). As such, the beneficiary is not qualified to perform the duties of the proffered position as he does not possess required licensure for the position and is not authorized to otherwise work as a respiratory therapist.

Beyond the decision of the director, the position does not qualify as a specialty occupation. The regulation at 8 C.F.R. § 214.2(h)(4)(ii) provides that:

*Specialty occupation* means 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.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) establishes four standards, one of which an occupation must meet to qualify as a specialty occupation:

- (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) interpret 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.

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

The petitioner is seeking the beneficiary's services as a respiratory therapist. In determining whether a position qualifies as a "specialty occupation" for purposes of the nonimmigrant H-1B visa, CIS will examine whether there is a general requirement of specialized study for the position, coupled with whether the position has complex and discretionary duties normally associated with the position. *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999).

The beneficiary's specific duties are listed below:

1. Administers respiratory therapy care and life support to patients with deficiencies and abnormalities of the cardiopulmonary system, under the medical direction and supervision in the treatment, management, control, diagnostic, evaluation and care of individuals with deficiencies and abnormalities associated with the cardiopulmonary system.
2. Reads prescription, measures arterial blood gases and reviews patient information to assess patient condition and determine requirements for treatment, such as type and duration of therapy, medication and dosages.
3. Determines most suitable method of administering inhalants, cautions to be observed and modifications which may be needed that will be compatible with medical orders.
4. Sets up and operates devices, such as mechanical ventilators, therapeutic gas administration apparatus, environmental control systems, and aerosol generators.
5. Operates equipment to ensure specified parameters of treatment, such as volume, gas concentration, humidity and temperature to administer medicinal gases and aerosol drugs to patients.
6. Monitors patients physiological responses to therapy, such as vital signs, arterial blood gases and blood chemical changes.
7. Performs bronchopulmonary drainage and assists patient in performing breathing exercises.
8. Performs pulmonary function tests to be used by physician in diagnosis of case.
9. Observes equipment function and adjusts equipment to obtain optimum results to therapy.
10. Consults with physician in event of adverse reactions.
11. Maintains patient's charts that contain pertinent identification and therapy information.
12. Inspects and tests respiratory equipment to ensure equipment is functioning safely and efficiently and orders repairs when needed.
13. Demonstrates respiratory care procedures to trainees and other health personnel.

Counsel states that the petitioner has made a bachelor's degree in respiratory therapy a mandatory condition to perform the responsibilities as one of its respiratory therapists. 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).

The AAO turns first 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; 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 often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (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)).

The AAO routinely consults the (*Handbook*) for its information about the duties and educational requirements of particular occupations. The duties of the proffered position are those of a respiratory therapist. The *Handbook* notes that training to become a respiratory therapist is offered at the postsecondary level by colleges and universities, medical schools, vocational and technical institutes, and the Armed Forces. The *Handbook* also states that an associate degree has become the general requirement for entry into this field. Further, the petitioner has not demonstrated that to perform the duties of the proffered position, an individual requires a bachelor's degree. The California Business and Professions Code at section 3740 indicates that an associate degree in respiratory therapy is sufficient to obtain a license as a respiratory therapist. Thus, the information contained in the record of proceeding does not establish that the position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The record does not include any evidence that a degree requirement is common to the industry in parallel positions among similar organizations. The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position among similar organizations. Thus, the petitioner has not established that the position is a specialty occupation under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The petitioner has not established that the proposed duties require a bachelor's degree in respiratory therapy. The petitioner has not distinguished the position as unique from or more complex than a respiratory therapist, a position which the *Handbook* indicates requires an associate degree.

The petitioner asserts that it normally requires an individual with a bachelor's degree for entry into the proffered position. The petitioner offers no evidence to establish its past hiring practices for this position, and on appeal, counsel states that this is a new position created by the petitioner. Therefore, the petitioner has not

shown that persons holding bachelor's degrees in a specific specialty were previously routinely hired for the proffered position. The petitioner has not established the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, to the extent that they are depicted in the record, the duties of the proffered position are not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty. The *Handbook* shows that the duties of the proffered position are regularly performed by an individual with less than a baccalaureate level education. Therefore, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has not established the proffered position is a specialty occupation. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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