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U.S. Citizenship and Immigration Services

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APR 25 2005

FILE: WAC 03 196 51850 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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 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 nonprofit care organization for the developmentally disabled that seeks to employ the beneficiary as a medical services manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and two Internet job postings.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 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-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a medical services manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 6, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: coordinating the provision of medical and physical therapy services and care delivery systems to the petitioner's clients; directing and supervising staff who provide direct clinical, preventive, or supportive services; identifying and establishing program objectives; developing plans and coordinating efforts of subordinate staff and other service providers to reach such objectives; reviewing patient files to ensure compatibility of medical and physical treatments; coordinating efforts with other health and human service providers in order to develop additional resources for clients, to achieve a continuum of care and services, and to avoid duplication of efforts; devising and allocating budgets for medical, physical, and pharmaceutical services; monitoring expenditure of funds; and collecting data and maintaining records of program activities and services. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in a health related field, such as medicine, physical or occupational therapy, or nursing.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex as to require a baccalaureate degree. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the director disregarded the petitioner's June 6, 2003 letter stating that it requires a baccalaureate degree in a health related field for the proffered position. Counsel states further that the degree requirement is consistent with the educational requirements described in the *Handbook* for medical services managers. Counsel also states that, as the medical services manager, the beneficiary would work "along side of the Administrators of two of the facilities, and work under the Clinical Director, to whom she would be answerable and assist." Counsel cites unpublished AAO decisions in support of the petition.

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 proffered position is not a specialty occupation.

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 *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 AAO does not concur with counsel that the proffered position is that of a medical and health services manager. In its *Handbook*, 2004-2005 edition, at pages 55-56, the DOL describes the job of a medical and health services manager as follows:

> The structure and financing of healthcare is changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. . . . Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of interrelated services, for example, those ranging from inpatient care to outpatient followup care.
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> In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

The petitioner has not persuasively established that the proposed duties are those of a health service manager, as described above. Information on the petition reflects that the petitioner has 15 employees. The petitioner's organizational chart reflects that the beneficiary would be subordinate to six of petitioner's employees, including the petitioner's clinical director and five board members who handle such duties as the petitioner's policy-making, monthly reports, and finances. Information on the organizational chart further reflects that the beneficiary would be "[d]irecting and supervising staff who provide direct clinical, preventive or supportive services," half of whom hold a high school diploma. In view of the foregoing, the petitioner has not demonstrated that the proposed duties are so complex as to require a baccalaureate degree. Furthermore, in a document entitled *LMC INC., Valley Forge Home – Level 4 – 1, Residential Program Design*, the medical manager's duties are described, in part, as providing "daily life skills sessions to residents in areas of personal care, exercise, social and recreational activities, and other life domains." This document further describes the medical manager's duties as providing workshops to the youth in health care, healthy relationships, medication, healthy diets, and exercise. This information, which indicates that the beneficiary would be providing direct care to the petitioner's clients, is inconsistent with the proposed duties provided in the petitioner's June 6, 2003 letter, which indicate that the beneficiary would be directing and supervising the staff who provide the direct care. 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of the foregoing, the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty is required for the proffered position.

Counsel cites unpublished AAO decisions in support of the appeal. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, counsel's commentary regarding both decisions does not sufficiently illustrate that they are similar to the proffered position.

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings on appeal for a director of clinical programs and a medical services director. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. One of the advertisements is for a Director of Clinical Programs for San Luis Obispo County, whose duties entail planning, organizing, and coordinating the provision of clinic-based health services, formulating policies and procedures, implementing new programs, and supervising the delivery of

outpatient services. The other advertisement is for a Medical Services Director for MHP [Metropolitan Health Plan], which is an HMO contracted with the Minnesota Department of Human Services. The petitioner has not demonstrated that the proposed duties of the proffered position are as complex as those described for the advertised positions. Thus, the advertisements have no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the director disregarded the petitioner's statement that it requires a baccalaureate degree in a health related field for the proffered position. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *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.[1] In this regard, the petitioner fails to establish that the medical services manager position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*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.

To the extent that they are depicted in the record, the duties 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 proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

The director also found that the beneficiary was not qualified to perform the duties of a specialty occupation because she does not hold a baccalaureate degree in a related area. As correctly stated in the director's decision, the proposed duties are not so complex as to require a baccalaureate degree. In this case, the record contains an evaluation from a company that specializes in evaluating academic credentials indicating that the beneficiary's foreign bachelor's degree in occupational therapy is equivalent to a bachelor's degree in occupational therapy awarded by a regionally accredited U.S. college. As such, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petition may

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

not be approved, however, because the proffered position is not 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 sustained that burden.

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