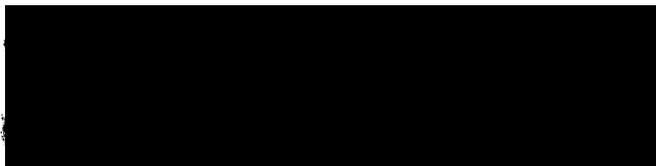


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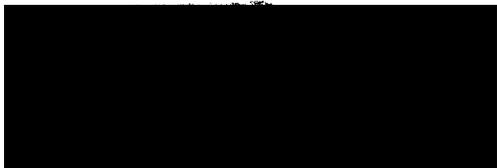
FILE: WAC 02 264 51812 Office: CALIFORNIA SERVICE CENTER Date: **APR 01 2005**

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 residential care facility for the elderly, with 10 employees. It seeks to hire the beneficiary as an activities director. The director denied the petition because he determined the proffered position did not meet any of the criteria required for classification 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) the petitioner's response to the director's request for evidence; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and additional 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, the 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 an activities director to oversee its ongoing activities and services for the 30 residents in its geriatric facility. Evidence of the beneficiary’s duties includes: the Form I-129; an August 8, 2002 letter of support from the petitioner submitted at the time of filing; and the petitioner’s May 13, 2003 response to the director’s request for evidence.

The petitioner has stated its activities director would be required to handle all aspects of “activities organization,” including:

- Assessing the recreational needs of the residents, based on a review of each resident’s medical and personal file, and individual interviews;
- Studying and analyzing resident’s physical and emotional needs;
- Assessing the resources;
- Assessing the resources at the petitioner’s disposal;
- Organizing activities and outings, including the budgeting and contracting for such activities and outings;
- Training and coordinating staff in implementing the programs;
- Working with professionals from various agencies and institutions to coordinate joint events; and
- Attending and overseeing activities and events.

To make its determination whether the employment just described 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 response to the director’s request for evidence, the petitioner characterized its proffered position as being included within the occupation of recreation worker, as discussed in the DOL *Handbook*. Accordingly, the AAO now turns to the description of that occupational title in the 2004-2005 edition of the *Handbook*, at page 393.

People spend much of their leisure time participating in a wide variety of organized recreational activities, such as aerobics, arts and crafts, the performing arts, camping, and sports. Recreation and fitness workers plan, organize and direct these activities in local playgrounds and recreation areas, parks, community centers, health clubs, fitness centers, religious organizations, camps, theme parks, and tourist attractions. Increasingly, recreation and fitness workers also are found in workplaces, where they organize and direct leisure activities and athletic programs for employees of all ages.

Although the director concurred with the petitioner’s description of its position as a recreation worker, the AAO does not find this occupational title to reflect the duties of the proffered position. Recreation and fitness workers organize activities primarily for the enjoyment of those who participate in them. However, as described by the petitioner, the activities to be organized by the beneficiary would be shaped to the individual needs of geriatric patients whose age and health require institutionalized care. The petitioner’s position is, therefore, not that of a recreation worker. Instead, the AAO finds it more closely aligned to the occupation of recreational therapists, as described on pages 299-300 of the *Handbook*.

Recreational therapists, also referred to as *therapeutic recreation specialists*, provide treatment services and recreation activities to individuals with disabilities or illnesses. Using a variety of techniques, including arts and crafts, animals, sports, games, dance and movement, drama, music, and community outings, therapists treat and maintain the physical, mental, and emotional well-being of their clients. Therapists help individuals reduce depression, stress, and anxiety; recover basic motor functioning and reasoning abilities; build confidence; and socialize effectively so that they can enjoy greater independence, as well as reduce or eliminate the effects of their illness or disability

[I]n long-term and residential care facilities, recreational therapists use leisure activities -- especially structured group programs -- to improve and maintain their clients’ general health and well-being

Recreational therapists assess clients on the basis of information the therapists learn from standardized assessments, observations, medical records, the medical staff, the clients’ families and the clients themselves. They then develop and carry out therapeutic interventions consistent with the clients’ needs and interests. For example, clients who are isolated from others or who have limited social skills may be encouraged to play games with

others, and right-handed persons with right-side paralysis may be instructed in how to adapt to using their unaffected left side to throw a ball or swing a racket. Recreational therapists may instruct patients in relaxation techniques to reduce stress and tension, stretching and limbering exercises, proper body mechanics for participation in recreation activities, pacing and energy conservation techniques, and individual as well as team activities

With regard to the educational preparation needed to perform the duties of a recreational therapist, the *Handbook*, page 300, states:

A bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation, is the usual requirement for entry-level positions. Persons may qualify for paraprofessional positions with an associate degree in therapeutic recreation or a healthcare-related field. An associate degree in recreational therapy; training in art, drama, or music therapy; or qualifying work experience may be sufficient for activity director positions in nursing homes.

In light of the above discussion, the AAO concludes that, as the beneficiary would be employed as an activities director in a geriatric facility or nursing home, the position is not one that imposes a baccalaureate or higher degree, or its equivalent, on those seeking entry-level employment. As a result, the petitioner is unable to establish that its employment meets the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is 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. A review of the record finds that the petitioner has not attempted to establish its position as a specialty occupation based on the degree requirements of other residential care facilities, nor has it submitted evidence to establish that it has a history of employing degreed applicants for the proffered position. Also, the evidence of record does not establish that the proffered position is so unique or complex that its duties could be performed only by a person with at least a bachelor's degree in a specific specialty.

To determine whether the petitioner can establish the proffered position as a specialty occupation under the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO has again reviewed the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of a recreational therapist or, perhaps, represent an amalgam of jobs that require different skills and qualifications. In assessing these responsibilities, the AAO has considered the petitioner's statements regarding the complex nature of its position, offered in response to the director's request for evidence:

The responsibilities required of the Activities Director demand knowledge of psychology, clear reasoning, analysis, and exceptional organization skills. The Activities Director will review each resident's medical and personal file, and interview each person to accurately study and assess his/her needs. These tasks require understanding of psychological issues and terminology, as well as knowledge of psychological testing. She must then evaluate the resources at [the petitioner's] disposal in line with each and every individual's physical, emotional and psychological needs and abilities before organizing activities and outings that are compatible and responsive to the needs of all [the petitioner's] guests. The broad range of interests, physical and mental disabilities, and personalities involved, as well as various liability considerations make this a daunting and complicated task. Competent performance of these duties requires basic understanding of behavioral and psychological issues affecting our clients.

Upon devising activities schedules, the Activities Director must then coordinate the staff in implementing the programs; work with professionals from various agencies and institutions to coordinate joint events; and attend and supervise the activities. These duties also entail strong organization and communication skills, and understanding of individual and group behavioral issues

[T]he Activities Director will handle all aspects of activities organization, which include budgeting and contracting. Budgeting and contracting are both complex tasks, which require analytical prowess and intellectual confidence for competent performance

Although the AAO does not find the coordination, budgeting or contracting activities generically described by the petitioner to be so specialized and complex as to be associated with the attainment of a baccalaureate or higher degree, it notes that the individual assessment of geriatric residents' activities needs is a potentially complex undertaking. However, while this responsibility could be viewed as employment reflecting a higher degree of knowledge and skill than would normally be required of a recreation worker, the proffered position is not that of a recreation worker. Instead, the employment described by the petitioner is that of a recreational therapist whose responsibilities routinely require similar assessments in determining clients' activity needs. As a result, this aspect of the proffered employment does not set it apart from other recreational therapists who work with individuals whose health or age require individualized recreational planning. Accordingly, the AAO concludes that the petitioner's description of its position does not meet the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel contends that the petitioner has stated it requires a bachelor's degree or its equivalent as a prerequisite for the position of activities director and that its statements must be given due weight in establishing the company's normal hiring practices. However, while the AAO acknowledges the petitioner's desire to hire an individual with a bachelor's or higher degree to fill the proffered position, it is not the petitioner's preferences that dictate whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). That determination can only be made through the application of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS limited solely to accepting a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States

to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

For reasons related in the preceding discussion, the petitioner has failed to establish that its proffered position is a specialty occupation. Accordingly, the AAO, although it differs with the director on the occupational title most closely aligned to the proffered position, 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.