

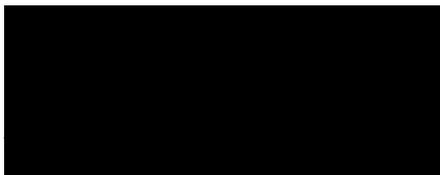
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U.S. Citizenship
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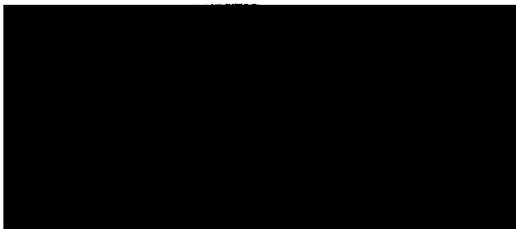
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FILE: WAC 02 230 52298 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2005

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 director of the 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 residential home that seeks to employ the beneficiary as a program director. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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 because the proffered position is not a specialty occupation. On appeal, counsel states that the proffered position is a specialty occupation.

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.

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 part-time program director. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to the petitioner's July 3, 2002 letter, the beneficiary will develop and implement individual programs, which include educational, occupational, and recreational activities, in accordance with the needs of day care participants; make an initial assessment of the participant, determining his or her needs, and prepare a specific service plan to meet those needs; arrange for special provisions for care and supervision, including safety and guidance of participants with disabilities and implement programs that restore functions, prevent loss of physical capacities, and maintain optimum performance; coordinate programs with the administrator, activity directors, coaches, team leaders, caregivers, family members, volunteers, and food service workers, and consult with medical staff; evaluate the participant's changing needs and make necessary program adjustments; be "on the floor" and available to participants and their families; recommend resident fees and the budget based on the program and staff involvement; and requisition supplies. The petitioner's April 17, 2003 letter amplified the job description. The July 3, 2002 letter from the petitioner stated that a candidate must possess a bachelor's degree in nursing or a related field of study, and the April 17, 2003 letter indicated that the proposed position requires a bachelor's or master's degree in nursing, social work, psychology, recreational or occupational therapy, physical therapy, speech therapy, dietetics, or gerontology. According to the petitioner, the beneficiary qualifies for the proposed position based on her bachelor of science in nursing (BSN) from Arellano University in the Philippine Islands.

Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director found the proposed position analogous to a medical records and health information technician, an occupation that does not require a baccalaureate degree. The director stated that most of the beneficiary's duties are very general and are performable by a person with less than a bachelor's degree, and that a degree in nursing is less than a baccalaureate-level degree. The proposed duties and level of responsibility, the director stated, do not indicate a complexity or authority that is beyond what is normally encountered in the occupational field for individuals who hold a degree in nursing.

On appeal, counsel narrates the beneficiary's duties and states that they require theoretical knowledge normally associated with a degree. Counsel quotes a passage in the *Handbook* that discusses a nursing degree, which is the degree that is held by 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 proffered position is not a specialty occupation.

The AAO first considers 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)).

In determining whether a 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 petitioner's the April 17, 2003 letter, submitted in response to the request for evidence, does more than provide a detailed job description of the work to be done; it materially alters the job description, and elevates it by including managerial responsibilities. About 30 percent of the duties in the April 17, 2003 involve managerial duties, which were not previously delineated in the initial job description. In the letter, these job duties are shown under the categories of training and risk management. The AAO will not consider the duties in the April 17, 2003 letter that diverge dramatically from the initial job description on the ground that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The AAO routinely consults the *Handbook* to provide a comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. A review of the *Handbook* reveals that the proposed position is similar to a recreational therapist. The *Handbook* states:

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. In addition, therapists help integrate people with disabilities into the community by teaching them how to use community resources and recreational activities.

The *Handbook* continues:

In 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. They also may provide interventions to prevent the client from suffering further medical problems and complications related to illnesses and disabilities.

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. In addition, therapists observe and document a patient's participation, reactions, and progress.

The *Handbook* reports:

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.

The *Handbook* reveals that a recreational therapist position, which is similar to the proposed position, does not require a bachelor's degree. Consequently, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into particular position.

No evidence has been submitted to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires that the petitioner establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. Furthermore, the petitioner fails to show that the particular position is so complex or unique that it can be performed only by an individual with a degree. As already discussed in this decision, the *Handbook* reveals that recreational therapists perform the proposed position's duties, which is an occupation that does not require baccalaureate-level education.

No evidence demonstrates that the petitioner normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner fails to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As discussed in this decision, the *Handbook* discloses that recreational therapists perform the proposed position's duties, which is an occupation that does not require baccalaureate-level education.

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