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U.S. Citizenship
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Services

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FILE: WAC 07 148 54044 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 2008

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
Robert P. Wiemann, Chief
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 a registered “Housing With Services Establishment” in the State of Minnesota. It seeks to employ the beneficiary as a part-time recreational music therapist. 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) counsel’s response to the RFE; (4) the director’s denial letter; and, (5) the Form I-290B, with counsel’s brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 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.

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) consistently 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 petitioner seeks the beneficiary’s services as a part-time recreational music therapist. Evidence of the beneficiary’s duties includes: the petitioner’s March 30, 2007 letter in support of the petition and counsel’s August 22, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

Provide musical entertainment services and recreational activities to the petitioner’s residents to help them reduce depression, stress, and anxiety; socialize the petitioner’s residents to enhance their independence, reduce or eliminate the effects of their illnesses and disabilities, and improve their general health and well-being; develop and carry out musical therapeutic interventions that are consistent with the residents’ needs and interests; instruct the residents in musical relaxation techniques in order to reduce stress and tension; and document the residents’ participation, reactions, and progress.

In response to the director’s RFE, counsel further described the proposed duties and time allocations as follows:

25% or 5 hours per week. Preparation time including performing evaluations of each individual, preparing tools for activities, and preparing notes in order to document each individual’s progress/responsiveness to each activity/tool used during his/her session; and,

75% or 15 hours per week. Working on-site with clients one-on-one and in a group setting using music as a therapeutic purpose for the restoration, maintenance and improvement of their mental and physical health. The individuals are elderly seniors with Alzheimer's disease and/or mentally retarded individuals with developmental disabilities and speech, hearing, or psychological impairments.

The director found that the proposed part-time recreational music therapist duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, under the category of Recreational Therapists, 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 concluded 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 proposed duties are so specialized and complex as to require a baccalaureate or higher degree. Counsel also cites various decisions, including an unpublished AAO decision stating that the AAO has previously held that a recreational therapist is a specialty occupation, and a court decision stating that whether a position is professional is unrelated to the company's size, salary, or prior company history of maintaining the position. Counsel also states that, according to the *Handbook*, a bachelor's degree generally is the minimum educational requirement, and that the DOL has classified the position as a Job Zone 4, which is equivalent to the SVP Range of 7 to 8 (referring to the DOL's *O*Net* and the *Dictionary of Occupational Titles (DOT)*). Counsel states further that the AAO has found that several non-traditional occupations, such as senior pastry sous chefs, information systems engineers, telecommunications specialists, and directors of technology, qualify as specialty occupations.

The AAO acknowledges counsel's references to the DOL's *DOT* and the *O*Net*. Counsel's assertions about the relevance of information from the *DOT* and the *O*Net*, however, are not persuasive. Neither the *DOT*'s SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

In this case, the petitioner holds a Minnesota Department of Health Certificate of Registration as a "Housing With Services," for its facility located in Richfield, Minnesota, effective from August 1, 2007 through July 31, 2008.

Pursuant to the Minnesota Statute § 144D.01:

Subd. 4. Housing with services establishment or establishment.

(a) "Housing with services establishment" or "establishment" means:

- (1) an establishment providing sleeping accommodations to one or more adult residents, at least 80 percent of which are 55 years of age or older, and offering or providing, for a fee, one or more regularly scheduled health-related services or two or more regularly scheduled supportive services, whether offered or provided directly by the establishment or by another entity arranged for by the establishment; or
 - (2) an establishment that registers under section 144D.025.
- (b) Housing with services establishment does not include:
- (1) a nursing home licensed under chapter 144A;
 - (2) a hospital, certified boarding care home, or supervised living facility licensed under sections 144.50 to 144.56;
 - (3) a board and lodging establishment licensed under chapter 157 and Minnesota Rules, parts 9520.0500 to 9520.0670, 9525.0215 to 9525.0355, 9525.0500 to 9525.0660, or 9530.4100 to 9530.4450, or under chapter 245B;
 - (4) a board and lodging establishment which serves as a shelter for battered women or other similar purpose;
 - (5) a family adult foster care home licensed by the Department of Human Services;
 - (6) private homes in which the residents are related by kinship, law, or affinity with the providers of services;
 - (7) residential settings for persons with developmental disabilities in which the services are licensed under Minnesota Rules, parts 9525.2100 to 9525.2140, or applicable successor rules or laws;
 - (8) a home-sharing arrangement such as when an elderly or disabled person or single-parent family makes lodging in a private residence available to another person in exchange for services or rent, or both;
 - (9) a duly organized condominium, cooperative, common interest community, or owners' association of the foregoing where at least 80 percent of the units that comprise the condominium, cooperative, or common interest community are occupied by individuals who are the owners, members, or shareholders of the units; or

- (10) services for persons with developmental disabilities that are provided under a license according to Minnesota Rules, parts 9525.2000 to 9525.2140 in effect until January 1, 1998, or under chapter 245B.

Upon its own independent review of the complete record of proceedings, the AAO finds that the petitioner has established none of the 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 find that the proffered position is that of a recreational therapist who, in acute health care settings, such as hospitals and rehabilitation centers, treat and rehabilitate individuals, usually in conjunction or collaboration with physicians, nurses, psychologists, social workers, and physical and occupational therapists, most of which, at the entry level, require a bachelor's degree with a major or concentration in therapeutic recreation. See the *Handbook*, 2008-09 edition. In the context of the petitioner's business, a "Housing with Services" facility with three employees and a projected gross annual income of \$221,064.00, the AAO finds that the part-time recreational music therapist duties are similar to those of an activity director of a nursing home, which may require an associate degree in recreational therapy, training in art, drama, or music therapy, or qualifying work experience. No evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for such a position. See the *Handbook*, 2008-09 edition. The *Handbook* does not indicate that a baccalaureate or higher degree, or its equivalent, is required for a recreational music therapist of the nature described in the instant petition. Of further note, although information on the petition reflects that the petitioner was established in 2005, has three employees and a projected gross annual income of \$221,064.00, the record contains no evidence in support of these claims, such as federal income tax returns and quarterly wage reports. Aside from the *Handbook* information, the evidence of record does not demonstrate that the particular position that is the subject of this petition is, as described in the record, one that normally requires at least a bachelor's degree in a specific specialty. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The AAO notes counsel's reference to a prior AAO decision to state that factors such as the petitioner's size and past hiring practices are irrelevant if the employer can describe a position involving professional duties. In its adjudication of the present appeal, however, the AAO does not rely on the nature or size of the petitioner to conclude that the proffered position does not meet any of the requirements for a specialty occupation; rather the AAO finds that the petitioner has not clearly documented the duties of the position in relation to its business. The complexity of the duties in relation to the petitioner's business must be analyzed. As discussed above, the petitioner has not established that the complexity of the proposed duties requires a baccalaureate degree in the specialty. Again, counsel's assertion on appeal that the proffered position is that of a recreational music therapist requiring a baccalaureate or higher degree is noted. However, 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. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *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).

Counsel also cites decisions that dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act, 8 U.S.C. § 1184(i). That statutory language effectively supersedes the cited decisions.

Regarding parallel positions in the petitioner's industry, counsel refers to an unpublished AAO decision and asserts that the AAO has previously held that a recreational therapist is a specialty occupation. Counsel has not furnished any evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, the record of proceeding does not contain a copy of the unpublished decision. It must be emphasized that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as an activity director. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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, “In keeping with industry practices, [the petitioner] requires a Bachelor’s degree or equivalent in therapeutic recreation, music or other related field.” The AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. 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 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The evidence of record does not establish this criterion.

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 the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel asserts that the nature of the proposed duties is so specialized and complex as to require a baccalaureate or higher degree. As indicated in the discussion above, the record of proceeding lacks evidence of specific duties that would establish such specialization and complexity. 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 in a specific specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, to the extent that they are established by the evidence of record. The limited extent to which the proposed duties are developed in this record does not establish a level of complexity and specialization that is usually associated with at least a bachelor’s degree in a specific specialty. Further, as indicated earlier in this decision, the petitioner’s unsupported claims regarding the basic information of its business do not establish a requirement for the level of knowledge requisite for this criterion. 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. 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.