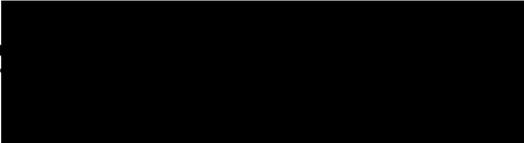


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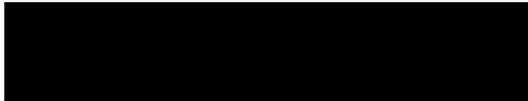


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FILE: WAC 02 234 50209 Office: CALIFORNIA SERVICE CENTER

Date: FEB 28 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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner provides a variety of services, including health-related services, to the gay and lesbian community. It seeks to employ the beneficiary as STD/HIV coordinator and to classify him 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 on the ground that the proffered position did not qualify as 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 the petitioner described the proffered position – STD/HIV (sexually transmitted diseases/ human immunodeficiency virus) Coordinator – as responsible for tracking and developing treatment for STD/HIV patients. In the job announcement, a copy of which accompanied the petition, the position was described as subordinate to and under the direct supervision of the director of the HIV Testing and Counseling Services (HTCS) Program and the director of the STD Program. In response to the RFE the petitioner listed the duties of the proffered position, and the percentage of time spent on each, as follows:

- 1) Complete county Morbidity Reporting – 25%

Requires a thorough knowledge of disease transmission, symptoms, and treatment of sexually transmitted diseases.

- 2) Complete monthly compilation report of HIV 5 data – 5%

Take part in HIV clinic data collection, data entry, and create report.

Data entry of the HIV behavioral risk assessment variables, to develop health education programs targeting the MSM (male homosexual) population.

Data is utilized to create reports of HIV prevalence (HIV rate).

Report also helps identify demographic disparities.

- 3) Perform in depth STD patient health assessment and preventative counseling – 35%

Behavioral interviews inquiring about high risk sexual behavior

Integrate the natural history of disease (disease onset, symptoms, diagnosis, treatment) and the behavioral interview to target possible mode of transmission.

- 4) Utilize Medical Manager Reporting system – 5%

Computerize medical manager program that is utilized to keep patient record, identify information, and schedule medical appointments.

- 5) Participate in the administration of research protocols – 25%

Strong medical knowledge required to assist in clinical trials, research recommended by the Centers for Disease Control and the Los Angeles County STD MSM sentinel surveillance system.

- 6) Compile and evaluate STD patient data – 5%

Take part in STD clinic data collection, data entry, and assist in the creation of reports for Los Angeles County's STD Program, and the City of West Hollywood.

Data entry of the STD behavioral risk assessment variables, develop health education programs targeting the MSM population.

Data is utilized to create reports of STD prevalence (STD rates).

Report also helps identify demographic disparities.

According to the petitioner the educational requirement for the position is a bachelor's degree with a medical focus including coursework in epidemiology. The record indicates that the beneficiary, a native of Mexico, earned a medical degree from the Universidad Autonoma de Puebla on April 6, 1990.

Based on the essential functions originally described in the job announcement, the director found that the proffered position reflected a combination of the duties of a medical assistant and a medical records and health information technician, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. Guided by the *Handbook's* recitation of the educational requirements for such positions, particularly medical assistants, the director determined that a baccalaureate degree is not the normal, industry-wide minimum for entry into either occupation or the proffered position in this case. The director found that the position's duties and level of responsibility did not indicate a complexity or level of authority beyond that normally encountered in the occupational field. Nor did the director view the duties of the position as so complex or unique that they could only be performed by an individual with a baccalaureate degree. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A).

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel contends that the service center decision listed all the duties of the proffered position (which were taken directly from the job announcement) without recognizing the time allocation for each. According to counsel 85% of the duties require medical knowledge and only 15% of the duties fall within the purview of a medical assistant or medical records and health information technician. Counsel argues that the director erred in relying on *Handbook* occupational categories that do not correspond to the proffered position. Counsel refers to a letter from Dr. Octavio Vallejo, program manager of the Pacific AIDS Education and Training Center in Los Angeles (Exhibit B of the appeal), declaring that the person performing the duties of the proffered position "must have in depth knowledge of the human physiology, anatomy, pathology and the basics of clinical interrogatory." Dr. Vallejo further stated that "only an individual [with] a medical degree or at the minimum a bachelor's degree with a medical background . . . would be properly equipped to perform the required duties." Based on Dr. Vallejo's letter and the other evidence of record, counsel asserts that a baccalaureate degree is the basic educational requirement for the proffered position.

The AAO will first address counsel's assertion that the director's categorization of the proffered position as a combination of medical assistant and medical records and health information technician was wrong. The *Handbook*, 2004-05 edition, at pages 340-41, describes the duties of medical assistants as follows:

Medical assistants perform many administrative duties, including answering telephones, greeting patients, updating and filing patients' medical records, filling out insurance forms, handling correspondence, scheduling appointments, arranging for hospital admission and laboratory services, and handling billing and bookkeeping.

Clinical duties . . . include taking medical histories and recording vital signs, explaining treatment procedures to patients, preparing patients for examination, and assisting the physician during the examination. Medical assistants collect and prepare laboratory specimens or perform basic laboratory tests on the premises, dispose of contaminated supplies, and sterilize medical instruments. They instruct patients about medications and special diets, prepare and administer medications as directed by a physician, authorize drug refills as directed, telephone prescriptions to a pharmacy, draw blood, prepare patients for x-rays, take electrocardiograms, remove sutures, and change dressings.

With respect to education and training, the *Handbook* clearly states that a baccalaureate degree is not normally required to become a medical assistant. The pertinent language, at page 341, reads as follows:

Most employers prefer graduates of formal programs in medical assisting. Such programs are offered in vocational-technical high schools, postsecondary vocational schools, and community and junior colleges. Postsecondary programs usually last either one year, resulting in a certificate or diploma, or two years, resulting in an associate degree.

As for medical records and health information technicians, the *Handbook*, 2004-05 edition, at page 323, describes the duties of the occupation as follows:

Every time a patient receives healthcare, a record is maintained of the observations, medical or surgical interventions, and treatment outcomes. This record includes information that the patient provides concerning his or her symptoms and medical history, the results of examinations, reports of x-rays and laboratory tests, diagnoses, and treatment plans. Medical records and health information technicians organize and evaluate these records for completeness and accuracy.

. . . They regularly communicate with physicians or other healthcare professionals to clarify diagnoses or to obtain additional information.

Medical records and health information technicians . . . consult classification manuals and also rely on their knowledge of disease processes.

Technicians also use computer programs to tabulate and analyze data to help improve patient care, to control costs, for use in legal actions, in response to surveys, or for use in research studies.

With respect to education and training, the *Handbook* again clearly states that a baccalaureate degree is not normally required to enter the field. The pertinent language, at page 323, reads as follows:

Medical records and health information technicians entering the field usually have an associate degree from a community or junior college. In addition to general education, coursework includes medical terminology, anatomy and physiology, legal aspects of health information, coding and abstraction of data, statistics, database management, quality improvement methods, and computer science.

The AAO agrees with the director that the duties of the proffered position fall under both of the foregoing occupational categories, though perhaps more predominantly in the latter category of medical records and health information technician. Counsel asserts that only 15% of the duties of the position fall within the two categories. Though he does not identify which duties they are, counsel is presumably referring to items 2, 4, and 6 on the list of duties submitted in response to the RFE since each of those items was identified as taking 5% of the employee's time. In the AAO's view, however, the petitioner has not demonstrated why the other items on the duty list could not also be performed by a medical records and health information technician and/or a medical assistant. More particularly, the petitioner has not shown why a baccalaureate degree in a specific specialty is required to perform the services of duty 1 (complete county Morbidity Reporting), duty 3 (perform in depth STD patient health assessment and preventative counseling) and duty 5 (participate in the administration of research protocols). Though Dr. Vallejo asserts that a bachelor's degree with a medical background is required because the position requires knowledge of human physiology, anatomy, pathology, and the basics of clinical interrogatory, the AAO notes that medical records and health information technicians may also be knowledgeable in these areas through coursework in medical terminology, anatomy, and physiology (as indicated in the *Handbook*) and on-the-job experience. The petitioner is also vague about exactly what role and level of responsibility the beneficiary would have in performing duties 1, 3, and 5. The job announcement clearly states that the proffered position is subordinate to and under the direct supervision of two program directors, whose qualifications and educational backgrounds are not identified. Lastly, the job announcement, while stating that a baccalaureate degree was required, did not indicate that the degree had to be in a specific specialty directly related to the position.

Based on the foregoing analysis, the AAO determines that the petitioner has not established that a baccalaureate or higher degree in a specific specialty is the normal minimum requirement for entry into the subject position. Accordingly, the position does not qualify as a specialty occupation under the first alternative criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With respect to the second alternative criterion of a specialty occupation, there is no evidence in the record that a baccalaureate or higher degree is common to the industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner shown that the position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree, as required to qualify it as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record indicates that the proffered position is newly created. Because there is no hiring history for the position, the petitioner cannot show that it normally requires a baccalaureate degree or its equivalent, as required for the position to meet the third alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3).

Lastly, the record does not establish that the duties of the subject position are so specialized and complex that knowledge associated with a baccalaureate or higher degree is required for an individual to perform the services of the job, as required for the position to meet the fourth alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Thus, the petitioner has failed to establish that the proffered position meets any of the regulatory criteria to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The record does not establish that the beneficiary will be performing services in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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