

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dz

FILE: WAC 03 100 50067 Office: CALIFORNIA SERVICE CENTER Date: JUN 12 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 healthcare facility for children who have Down Syndrome. It seeks to extend its authorization to employ the beneficiary as a social worker. 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 additional evidence including a job posting and a letter from a psychiatric social worker.

The AAO will first address the director's conclusion that the position is not 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 social worker. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 14, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to the document entitled "Roster of Facility Staff/Job Descriptions" submitted by the petitioner, the beneficiary performs the following duties:

- Coordinates client's [sic] programs and activities to their Case Workers from TCRC (Tri-Counties Regional Ctr.);
- Implements individual service plans for the clients;
- Accompanies clients in their medical, dental & other appointments;
- Prepares documentation of medical and dental status of the clients;
- *Counseling clients as needed* [Emphasis added.];
- Dispenses medication;
- Ensures client's proper hygiene and grooming; and
- In-charge of taking care [of] business finances; clients' personal and incidental funds, etc.

The AAO notes that counsel's May 17, 2004 letter of reply to the director's request for evidence states that the position requires the beneficiary to use her "psychological background," that she would ensure that the facilities' residents are "properly socialized," and that she "will encourage positive self esteem." The petitioner indicated that the beneficiary is a qualified candidate for the job because she possesses a bachelor's degree in psychology.

The director found that the proffered position was not a specialty occupation because the job is not a social worker position; it is a psychiatric aide position. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 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 proffered position is that of a social worker, and is not a psychiatric aide worker position. Counsel states further that the beneficiary performs her duties under the supervision of a licensed clinical social worker and, therefore, she does not require a State license.

Upon review of the record, the petitioner has established that the proffered position is 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)).

A review of the *Handbook*, 2006-2007 edition, finds that a bachelor's degree in social work (BSW) is the most common minimum requirement to qualify for a job as a social worker, though majors in psychology, sociology, and related fields may qualify for some entry-level jobs. Further, all States and the District of Columbia have licensing, certification, or registration requirements regarding social work practice and the use of professional titles.

Pursuant to the Business and Professions Code of California, Chapter 14. Social Workers, Article 4. Clinical Social Workers § 4996(b):

It is unlawful for any person to engage in the practice of clinical social work unless at the time of so doing such person holds a valid, unexpired, and unrevoked license under this article.

Pursuant to the Business and Professions Code of California, Chapter 14. Social Workers, Article 4. Clinical Social Workers § 4996.9. Clinical Social Work and Psychotherapy Defined:

The practice of clinical social work is defined as a service in which a special knowledge of social resources, human capabilities, and the part that unconscious motivation plays in determining behavior, is directed at helping people to achieve more adequate, satisfying, and productive social adjustments. The application of social work principles and methods includes, but is not restricted to, *counseling* and using applied psychotherapy of a nonmedical nature with individuals, families, or groups . . . [Emphasis added.]

Counsel's statement on appeal that the beneficiary does not engage directly in the practice of clinical social work is not convincing. The full scope of the beneficiary's duties, including counsel's descriptions in his letter of reply to the request for evidence, fall within the definition of clinical social work in the California regulation submitted at appellate Exhibit E. Further, counsel's statement in his May 17, 2004 response to the director's request for evidence that the beneficiary "will not be counseling patients" conflicts with the duties described in the document entitled "Roster of Facility Staff/Job Descriptions," namely that the beneficiary would counsel clients as needed. 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).

Because the proposed duties provided by the petitioner plainly describe the beneficiary as counseling the petitioner's residents and indicate other activities within the California's regulatory definition of clinical social work, the proffered position entails the practice of clinical social work, which is a specialty occupation and requires licensure.

The record contains a letter from a psychiatric social worker from the City of Angels Medical Center, which is a short-term acute care hospital with 180 beds. The writer states, in part: "I am writing to confirm the common practice of employing unlicensed Social Workers. Our organization employs such as practice. . . ." The writer does not address the relevant issue, which is licensure requirements for *clinical* social workers. The writer does not analyze the use of unlicensed social workers in the context of this petitioner's business, which is, as opposed to a short-term acute care hospital, a 24-bed healthcare facility for children with Down Syndrome. Furthermore, the writer's confirmation of the common practice of employing unlicensed social workers is not supported by any evidence that would establish her authority to speak to industry-wide hiring practices. Moreover, this information is not convincing evidence that the proffered position is a social worker exempt of the state licensing requirement in this case, based on the discrepancies discussed above. 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.

It is noteworthy that, at Appellate Exhibit E, counsel excised from his excerpt of section 4996 of the California regulations the provisions that prohibit exercise of clinical social work by unlicensed persons.

The AAO notes that the submitted job posting fails to establish that the proffered position does not require state licensing. The job posting is from Child Protective Services, not a healthcare facility similar to the petitioner. Thus, the job posting is not probative. The AAO also notes that section 4996.14 of the California regulations submitted at Appellate Exhibit E expressly exclude from clinical social worker licensure requirements "persons employed in family or children services agencies."

The AAO also notes that CIS has approved another, similar petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition 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 the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). The AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director also found that the beneficiary was not qualified to perform the duties of a specialty occupation because she does not hold the required State license. No evidence contained in the record demonstrates that the beneficiary holds the required State license to perform the duties of the specialty occupation – a clinical social worker. For this additional reason, the petition may not be approved.

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.