



U.S. Citizenship
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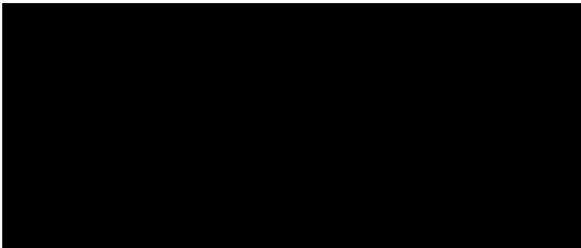
FILE: WAC 04 252 51007 Office: CALIFORNIA SERVICE CENTER Date: **SEP 07 2006**

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.

for *Michael T. Kelly*
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 The director's decision is withdrawn and the petition remanded for entry of a new decision.

The petitioner is a skilled nursing and rehabilitation facility. It seeks to employ the beneficiary as an occupational therapy. 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 submits additional and previously submitted evidence.

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) the 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) the Form I-290B and the appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an occupational therapist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would be supervised by a licensed occupational therapist and will share responsibilities in providing services that improve the motor functions and reasoning ability of facility residents and compensate for permanent loss of function. The petitioner's response to the request for evidence elaborated on the proposed duties. For the proposed position, the petitioner requires a bachelor's degree in occupational therapy.

In denying the petition, the director stated that the proposed duties are those of an occupational therapist assistant and aide as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* discloses that such occupations do not require a bachelor's degree in a specific specialty. In sum, the director's conclusion was that the petitioner satisfied none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel submits a letter from the petitioner which states that the proposed position is that of an occupational therapist as described in the *Handbook* and by the *American Occupational Therapy Association*.

Upon review of the record, the petitioner has established one 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) requires that the petitioner establish that a baccalaureate or higher degree (or its equivalent) in a specific specialty is the normal minimum requirement for entry into the particular position. The AAO finds that the proposed duties are similar to those of an occupational therapist as that position is depicted in the *Handbook*, and that an occupational therapist requires a baccalaureate degree in occupational therapy. As such, the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO will now address the beneficiary's qualifications for the proposed position of occupational therapist.

The *Handbook* reports that an occupational therapist requires a baccalaureate degree in occupational therapy, and the proposed position, which is located in the state of California, requires licensure. The AAO sets forth here section 2570.6 of the California Business and Professions Code, which relates to licensure of occupational therapists:

2570.6. An applicant applying for a license as an occupational therapist or certification as an occupational therapy assistant shall file with the board a written application provided by the

board, showing to the satisfaction of the board that he or she meets all of the following requirements:

(a) That the applicant is in good standing and has not committed acts or crimes constituting grounds for denial of a license under Section 480.

(b) (1) That the applicant has successfully completed the academic requirements of an educational program for occupational therapists or occupational therapy assistants that is approved by the board and accredited by the American Occupational Therapy Association's Accreditation Council for Occupational Therapy Education (ACOTE).

(2) The curriculum of an education program for occupational therapists shall contain the content specifically required in the ACOTE accreditation standards, including all of the following subjects:

(A) Biological, behavioral, and health sciences.

(B) Structure and function of the human body, including anatomy, kinesiology, physiology, and the neurosciences.

(C) Human development throughout the life span.

(D) Human behavior in the context of sociocultural systems.

(E) Etiology, clinical course, management, and prognosis of disease processes and traumatic injuries, and the effects of those conditions on human functioning.

(F) Occupational therapy theory, practice, and process that shall include the following:

(i) Human performance, that shall include occupational performance throughout the life cycle, human interaction, roles, values, and the influences of the nonhuman environment.

(ii) Activity processes that shall include the following:

(I) Theories underlying the use of purposeful activity and the meaning and dynamics of activity.

(II) Performance of selected life tasks and activities.

(III) Analysis, adaptation, and application of purposeful activity as therapeutic intervention.

(IV) Use of self, dyadic, and group interaction.

(iii) Theoretical approaches, including those related to purposeful activity, human performance, and adaptation.

(iv) Application of occupational therapy theory to practice, that shall include the following:

(I) Assessment and interpretation, observation, interviews, history, and standardized and nonstandardized tests.

(II) Directing, planning, and implementation, that shall include: therapeutic intervention related to daily living skills and occupational components; therapeutic adaptation, including methods of accomplishing daily life tasks, environmental adjustments, orthotics, and assistive devices and equipment; health maintenance, including energy conservation, joint protection, body mechanics, and positioning; and prevention programs to foster age-appropriate recommendations to maximize treatment gains.

(III) Program termination including reevaluation, determination of discharge, summary of occupational therapy outcome, and appropriate recommendations to maximize treatment gains.

(IV) Documentation.

- (v) Development and implementation of quality assurance.
- (vi) Management of occupational therapy service, that shall include:
 - (I) Planning services for client groups.
 - (II) Personnel management, including occupational therapy assistants, aides, volunteers, and level I students.
 - (III) Departmental operations, including budgeting, scheduling, recordkeeping, safety, and maintenance of supplies and equipment.
- (3) The curriculum of an education program for occupational therapy assistants shall contain the content specifically required in the ACOTE accreditation standards, including all of the following subjects:
 - (A) Biological, behavioral, and health sciences.
 - (B) Structure and function of the normal human body.
 - (C) Human development.
 - (D) Conditions commonly referred to occupational therapists.
 - (E) Occupational therapy principles and skills, that shall include the following:
 - (i) Human performance, including life tasks and roles as related to the developmental process from birth to death.
 - (ii) Activity processes and skills, that shall include the following:
 - (I) Performance of selected life tasks and activities.
 - (II) Analysis and adaptation of activities.
 - (III) Instruction of individuals and groups in selected life tasks and activities.
 - (iii) Concepts related to occupational therapy practice, that shall include the following:
 - (I) The importance of human occupation as a health determinant.
 - (II) The use of self, interpersonal, and communication skills.
 - (iv) Use of occupational therapy concepts and skills, that shall include the following:
 - (I) Data collection, that shall include structured observation and interviews, history, and structured tests.
 - (II) Participation in planning and implementation, that shall include: therapeutic intervention related to daily living skills and occupational components; therapeutic adaptation, including methods of accomplishing daily life tasks, environmental adjustments, orthotics, and assistive devices and equipment; health maintenance, including mental health techniques, energy conservation, joint protection, body mechanics, and positioning; and prevention programs to foster age-appropriate balance of self-care and work.
 - (III) Program termination, including assisting in reevaluation, summary of occupational therapy outcome, and appropriate recommendations to maximize treatment gains.
 - (IV) Documentation.
 - (c) That the applicant has successfully completed a period of supervised fieldwork experience approved by the board and arranged by a recognized educational institution where he or she met the academic requirements of subdivision (b) or arranged by a nationally recognized professional association. The fieldwork requirements shall be as follows:
 - (1) For an occupational therapist, a minimum of 960 hours of supervised fieldwork experience shall be completed within 24 months of the completion of didactic coursework.

(2) For an occupational therapy assistant, a minimum of 640 hours of supervised fieldwork experience shall be completed within 20 months of the completion of didactic coursework.

(d) That the applicant has passed an examination as provided in Section 2570.7.

(e) That the applicant, at the time of application, is a person over 18 years of age, is not addicted to alcohol or any controlled substance, and has not committed acts or crimes constituting grounds for denial of licensure or certification under Section 480.

No evidence in the record indicates that the beneficiary has licensure or has applied for a license as an occupational therapist by filing with the California Board of Occupational Therapy Board (the board) a written application showing that he meets all of the statutory requirements described in section 2570.6 of the California Business and Professions Code. Thus, the beneficiary does not establish that he qualifies for the proposed position under section 2570.6 of the California Business and Professions Code.

Sections 2570.4 and 2570.5 of the California Business and Professions Code allow for the practice, services, or activities of persons in the following situations involving occupational therapy:

2570.4. Nothing in this chapter shall be construed as preventing or restricting the practice, services, or activities of any of the following persons:

(a) Any person licensed, certified, or otherwise recognized in this state by any other law or regulation when that person is engaged in the profession or occupation for which he or she is licensed, certified, or otherwise recognized.

(b) Any person pursuing a supervised course of study leading to a degree or certificate in occupational therapy at an accredited educational program, if the person is designated by a title which clearly indicates his or her status as a student or trainee.

(c) Any person fulfilling the supervised fieldwork experience requirements of subdivision (c) of Section 2570.6, if the experience constitutes a part of the experience necessary to meet the requirement of that provision.

(d) Any person performing occupational therapy services in the state, if those services are performed for no more than 45 days in a calendar year in association with an occupational therapist licensed under this chapter, and the person is licensed under the laws of another state that the board determines has licensure requirements at least as stringent as the requirements of this chapter.

(e) Any person employed as an aide subject to the supervision requirements of this section.

2570.5. (a) A limited permit may be granted to any person who has completed the education and experience requirements of this chapter.

(b) A person who meets the qualifications to be admitted to the examination for licensure or certification under this chapter and is waiting to take the first available examination or awaiting the announcement of the results of the examination, according to the application requirements for a limited permit, may practice as an occupational therapist or as an occupational therapy assistant under the direction and appropriate supervision of an occupational therapist duly licensed under this chapter. If that person fails to qualify for or

pass the first announced examination, all privileges under this section shall automatically cease upon due notice to the applicant of that failure and may not be renewed.

(c) A limited permit shall be subject to other requirements set forth in rules adopted by the board.

The AAO finds that no evidence in the record reflects that the beneficiary qualifies to practice or provide services as an occupational therapist intern pursuant to section 2570.4 of the California Business and Professions Code. No evidence indicates that the beneficiary is pursuing a supervised course of study leading to a degree or certificate in occupational therapy at an accredited educational program; is a student or trainee; is fulfilling the supervised fieldwork experience requirements of subdivision (c) of Section 2570.6 (if the experience constitutes a part of the experience necessary to meet the requirement of that provision); or is licensed in another state and will perform services for no more than 45 days in a calendar year.

Further, no evidence in the record reflects that the beneficiary qualifies to practice or provide services as a temporary occupational therapist pursuant to section 2570.5 of the California Business and Professions Code. The record contains no evidence showing that the beneficiary holds a limited permit indicating completion of certain education and experience requirements; nor does it demonstrate that the beneficiary “meets the qualifications to be admitted to the examination for licensure or certification” and is “waiting to take the first available examination or awaiting the announcement of the results of the examination, according to the application requirements for a limited permit.”

The petition may not be approved at this time as no evidence contained in the record demonstrates that the beneficiary is qualified to perform the duties of the specialty occupation – an occupational therapist. As the director has not addressed this issue, the petition will be remanded in order for the director to make a determination regarding the beneficiary’s qualifications. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of an occupational therapist, and any other evidence the director may deem necessary. The director shall render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361.

ORDER: The director’s March 25, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.