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U.S. Citizenship and Immigration Services

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[redacted]

APR 02 2007

FILE: WAC 04 261 50289 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

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:

[redacted]

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 service center director denied the nonimmigrant visa petition; subsequently withdrew his decision, pursuant to a motion to reopen and reconsider; and issued a new decision that denied the petition. The matter was then timely appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a corporation that functions as a staffing agency providing persons to perform home care services. In order to employ the beneficiary as its director of quality/utilization review, the petitioner 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 on the basis that the petitioner had failed to satisfy any of the specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that evidence of record establishes that the petitioner is proffering a specialty occupation position as defined at 8 C.F.R. § 214.2(h)(4)(iii)(A). In particular, counsel asserts that the director erred in failing to recognize that the subject of the petition is a medical and health services management position and that with regard to such positions the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) states: "A master's degree is the standard credential for most positions, although a bachelor's degree is adequate for some entry-level positions in smaller facilities."'

The AAO agrees with counsel that the director erred in characterizing the proffered position as that of an administrative services manager. However, for reasons discussed below, the AAO finds that the director's decision to deny the petition was correct, because the evidence of record does not establish that the proffered position qualifies as a specialty occupation in accordance with the Act and its implementing regulations on H-1B positions.

The AAO bases its decision on consideration of the entire record before it, which includes: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's 23-page brief in support of the appeal, with its attached Interoffice Memorandum from William R. Yates, Associate Director, Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2 (February 16, 2005) (hereinafter, the Yates Memo).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

> which [1] 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 [2] 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. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In its August 31, 2004 letter of support submitted with the Form I-129, the petitioner identified itself as a [redacted] provider that was founded in 1995, employs 60 persons, and has gross

annual revenues "in excess of $2.2 million." This letter states that as its director of quality/utilization review the beneficiary would:

- Examine medical records in order to rate overall service and quality of care rendered by an individual Provider.
- Report review outcomes.
- Provide first-level clinical review for all outpatient and ancillary services requiring authorization.
- Utilize decision-making and critical-thinking skills in the review and determination of coverage for medically necessary health care services.
- Answer Utilization Management directed telephone calls; managing them in a professional and competent manner.
- Process all prior authorizations to completion utilizing appropriate review criteria.
- Identify and review all quality issues.
- Provide first-level review of all outpatient and ancillary prior authorization requests for medical appropriateness and medical necessity using appropriate criteria, referring those requests that fail review to the director for second-level review and determination.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As evidenced by the above listing of proposed duties from the record of proceeding, the petitioner describes the position and its duties in exclusively generalized and generic terms that do not relate any concrete information about either the specific work that the beneficiary would do for the petitioner, or the content and educational level of specialized knowledge that the beneficiary would apply in that work. Likewise, the issues that would engage the beneficiary are presented in exclusively abstract terms that do not relate the level of theoretical and practical knowledge that would actually be applied in addressing them. As examples, the AAO notes that the record contains no substantive information about the scope of the examination of medical records; about the level of specialized knowledge that such examination entails; about the components of the reports on "review outcome"; about the matters upon which the beneficiary would "utilize decision-making and critical thinking skills;" and about what constitutes "first-level clinical review" for "medical appropriateness and medical necessity."

The petitioner did not provide the following information requested in the RFE's section requesting a more detailed description of the proposed work: the "percentage of time to be spent on each duty," "hours per week

of work," and "types of employees supervised." Instead, in his March 7, 2005 letter of reply to the RFE, counsel offered general comments that do not add detail about the work that the beneficiary would perform. Counsel states that the examination of medical records to rate service and quality of care "necessarily requires knowledge of quality of care standards" that is "normally associated with the attainment of at least a bachelor's degree," but he provides no evidence of those standards, or why their application to medical records review would require at least a bachelor's degree level of knowledge in a specific specialty. Likewise, counsel asserts, without reference to supporting evidence of record, that "reporting of review outcomes" also "requires a minimum of a Bachelor's degree." Counsel claims that a bachelor's degree is required to conduct "first-level clinical review" of outpatient and ancillary services requiring authorization, but does not delineate the work encompassed by this function. Without explanation and supporting evidence, counsel further asserts "providing first-level review of all outpatient and ancillary prior authorization request[s] for medical appropriateness and medical necessity clearly requires a high level of medical knowledge" commensurate with at least "a Bachelor's degree in the medical field." Because they are not substantiated by evidence of record, counsel's pronouncements merit no weight. 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)). 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).

The record does not support counsel's contention that the proffered position belongs to the medical and health services manager occupation as described in the *Handbook*. Qualification as a specialty occupation is not determined by a position's title or how closely a petitioner's description of the position approximates the *Handbook's* description of an occupation. Neither the Act nor the implementing regulations support a formulistic approach that would allow specialty occupation status without substantive evidence of specific work into which a position's duty descriptions would translate when actually executed in the context of the petitioner's business. To determine whether a particular job qualifies as a specialty occupation, CIS focuses on the record's evidence of specific work involved in actual performance of the job. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In order for a petitioner to rely on the *Handbook's* reporting of an occupation's degree requirement, the evidence of record must develop the performance aspects of the proffered position in terms sufficiently concrete to manifest the same degree requirement reported by the *Handbook*. Such is not the case here. Neither the duty descriptions nor any other evidence of record identify specific substantive work that the beneficiary would perform that would normally require at least a bachelor's degree of knowledge in a specific specialty. In this regard, the AAO also notes that the *Handbook*

The specialty-occupation qualifying criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) requires that the record of proceeding establish that the particular position in question is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. As discussed above, the present petition does not satisfy this requirement. Neither the duty descriptions nor any other evidence of record identify specific substantive work that the beneficiary would perform for this petitioner that would normally require at least a bachelor's degree level of knowledge in a specific specialty.

The petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which assigns specialty occupation status to a position that requires at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

There are no submissions from professional associations, individuals, or firms in the petitioner's industry. As discussed in this decision's section on the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the *Handbook's* information on the medical and health services manager occupation is not probative in this case, as the evidence of record about the proffered position does not demonstrate that it would be performed at the educational level that the *Handbook* indicates as generally required for this position.

The job advertisements from other employers are not persuasive. The information about the duties and responsibilities of both the advertised positions and the one proffered here is too general to support a meaningful comparison between them, or a conclusion that the positions are parallel in their actual performance and knowledge requirements. In contrast to the regulatory requirements that the evidence submitted on this criterion relate to employers similar in organization to the petitioner, the content of the advertisements indicate that Kaiser Permanente and WellCare (the sources of three of the six advertisements) are organizations significantly larger and more complex than the petitioner. The number of advertisements is not sufficient to establish an industry-wide practice, and there is no independent evidence that they accurately reflect an industry standard of recruiting and hiring for the type of position that is the subject of this petition.

As reflected in the discussion of the first criterion, the record's information about the proffered position and its duties, which is consistently general and generic, does not convey the complexity, uniqueness, or specialization required to qualify a position as a specialty occupation under either the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) or the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The evidence of record fails to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) by developing the proffered position as possessing uniqueness or a level of complexity that necessitates a person with at least a bachelor's degree in a specific specialty.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) because the evidence of record does not establish that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. As already discussed, the record provides no evidence of the substantive nature of any specific duties. As the level of specialized

knowledge required for the proffered position is not evident, no normal association with any specialty degree has been established.

Next, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

The petitioner must demonstrate that it has an established history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree or equivalent. The record does not include documentary evidence establishing the history of the petitioner's recruiting practices. The record does not contain documentary evidence (such as copies of former employees' educational credentials) to establish the petitioner's history of hiring for the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. 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*, *Matter of Laureano*; *Matter of Ramirez-Sanchez*. Further, as reflected in this decision's earlier discussions of the evidence, the petitioner has not established that any degree requirement it has imposed was necessitated by the work the employees performed.

The Yates Memo does not affect the outcome of this appeal. The appeal opportunity has provided counsel the means to address any procedural or substantive deficiencies that it perceives in the director's adjudication of this case. The Yates Memo does not establish a new standard of proof for the adjudication of H-1B petitions. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not satisfied this standard.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision on this issue shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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