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U.S. Citizenship
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FILE: WAC 04 133 51637 Office: CALIFORNIA SERVICE CENTER Date: APR 26 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 The director's decision is withdrawn and the petition remanded for entry of a new decision.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 provides rehabilitation services. It seeks to employ the beneficiary as an occupational therapy intern. 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 a brief.

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 asserts that it is seeking the beneficiary's services as an occupational therapy intern. 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 perform duties that entail:

- Evaluation of patients: evaluating patients and planning their treatment in accordance with the physician's referral; developing the treatment plan with the participation of the occupational therapy supervisor and other staff members; gathering data and administering assessments.
- Performance of treatments: reviewing the patient's program and potential and making recommendations to the physician about whether to continue the occupational therapy treatment.
- Program development: developing appropriate home or community programming to maintain and enhance the performance of patients in their own environment; collaborating with physicians and the treatment team to determine the needs of patients and to develop their plan of care.
- Record maintenance: documenting results of patient assessments; and documenting the progress of patients and adjusting their treatment accordingly.

The petitioner asserts that it requires a baccalaureate degree in occupational therapy for the proposed position.

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 states that the proposed position of occupational therapy intern is not similar to an occupational therapist assistant and aide. Counsel asserts that the beneficiary's duties require a baccalaureate degree in occupational therapy, and that the *Handbook* and section 2570.6 of the California Business and Professions Code, which pertains to the Occupational Therapy Practice Act, substantiate this educational requirement. Counsel maintains that the beneficiary, who will perform duties that are essentially the same as those of an occupational therapist, will be under the direct supervision of a licensed occupational therapist all of the time. Counsel points to letters from other rehabilitation facilities to demonstrate the requirement of a baccalaureate degree in occupational therapy for the proposed position. According to counsel, the petitioner normally requires a baccalaureate degree in occupational therapy for an occupational therapist intern. Counsel states that CIS previously found an occupational therapist intern qualified as a specialty occupation under the Act.

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 a specialty occupation.

The first 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 information in the 2006-2007 edition of the *Handbook* about occupational therapists indicates that the proposed duties are similar to those of an occupational therapist, and that an occupational therapist requires a baccalaureate degree in occupational therapy. As such, the petitioner has satisfied the first 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 therapy intern.

The *Handbook* reports that an occupational therapist requires a baccalaureate degree in occupational therapy and licensure. 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.

There is no evidence in the record showing 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.

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 the practice of occupational therapy is regulated, at all levels, by the California Business and Professions Code, and that the evidence of record has not established that the beneficiary is qualified to perform services in any specialty-occupation occupational therapy position identified in the Code. Specifically, the evidence does not establish that the beneficiary is qualified under section 2570.4 and 2570.5, that is, as either a licensed occupational therapist or as a person working to fulfill “the supervised fieldwork

experience requirements of subdivision c of subsection 2570.6,” as that section provides only for the performance of supervised fieldwork that is “approved by the board as 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 petition may not be approved at this time as no evidence contained in the record demonstrates that the beneficiary is qualified to perform specialty occupation duties in occupational therapy, whether by licensure, participation in the aforementioned board-approved fieldwork, or otherwise. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform in an occupational therapy specialty-occupation position in accordance with the California Professional Code, 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 November 8, 2004 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.