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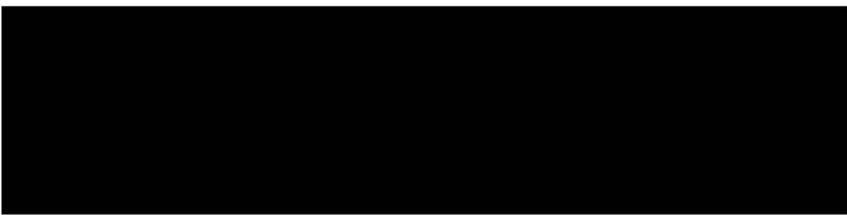


FILE: WAC 07 146 53109 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2008**

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.

*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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner operates 18 residential care facilities, including eight "Intermediate Care Facilities for Developmentally Disabled – Habilitative (ICF-DD-H)", which provide 24-hour non-medical care for adults who are unable to provide for their own daily needs. The petitioner seeks to employ the beneficiary as a part-time health services manager for its eight ICF-DD-H facilities, each of which is intended for six ambulatory individuals. 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 petitioner did not establish that the proffered position is a specialty occupation. The director also found that the petitioner had not submitted its last two quarterly wage reports that were accepted by the State of California, as requested in the director's request for evidence (RFE).

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's RFE; (3) counsel and the petitioner's responses to the RFE; (4) the director's denial letter; and, (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000).

The petitioner seeks the beneficiary’s services as a part-time health services manager. Evidence of the beneficiary’s duties includes: the petitioner’s March 1, 2007 letter in support of the petition and counsel’s July 26, 2007 response to the director’s RFE. As stated by the petitioner’s president in her March 1, 2007 letter, the proffered position does not involve patient care or clinical duties and is not subject to licensure requirements. She described the proposed duties as follows:

Direct the provision of medical, dental, pharmaceutical, audio or vision care for developmentally disabled adults; coordinate the provision of medical and pharmaceutical services as well as care delivery systems to the petitioner’s clients; direct and supervise outsourcing to medical, dental, or vision professionals who provide direct clinical, preventive, or supportive services; identify and establish program objectives, and develop plans and coordinate staff and other service providers to attain such objectives; review each patient’s file to ensure compatibility of medical and pharmacological treatments; coordinate efforts with other health and human service providers in order to develop additional resources for clients, achieve a continuum of care and services, and avoid duplication of efforts; devise and allocate

budgets for medical and pharmaceutical services and monitor the expenditure of funds; and collect data and maintain detailed records on program objectives.

In his July 26, 2007 response to the RFE, counsel for the petitioner described the breakdown of the proposed duties as follows:

- Direction and supervision of staff: 25%;
- Coordination and interaction of health care providers: 20%;
- Coordination of the dispensation of medications: 20%;
- Review of resident files for determination of appropriateness of program: 15%;
- Budgetary and program review functions: 10%; and
- All other: 10%.

The director found that the proposed duties are those duties of a personal home care aide, and do not require a bachelor's degree. Citing the Department of Labor's (DOL) *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 concluded 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, which entails coordinating and supervising medical professionals, is that of a health services manager, not a personal home care aide. Counsel also states that a health services manager position qualifies as a specialty occupation. As supporting documentation, counsel submits copies of previously submitted documentation.

Pursuant to the California Health and Safety Code § 1276.5(d)(1):

Except as otherwise provided by law, the administrator of an intermediate care facility/developmentally disabled, intermediate care facility/developmentally disabled habilitative, or an intermediate care facility/developmentally disabled – nursing shall be either a licensed nursing home administrator or a qualified mental retardation professional as defined in Section 483.430 of Title 42 of the Code of Federal Regulations.

The regulation at 42 C.F.R. § 483.430 describes the duties of a qualified mental retardation professional (QMRP) and specifically notes that the QMRP must have a baccalaureate degree in a specific specialty.

The AAO finds that the record establishes that the proffered position is an administrator of the "Developmentally Disabled – Habilitative," which is a specialty occupation and must either be a licensed nursing home administrator or QMRP, as defined in section 1276.5(d) of the California HSC. The petitioner has established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and a degree requirement is common to the industry in parallel positions among similar organizations.

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 AAO turns to the criteria at 8 C.F.R. § 214.2(h)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is normally the 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)).

The petitioner seeks to employ the beneficiary as a part-time health services manager/administrator for its eight ICF-DD-H facilities. The record contains licenses issued for the facilities. On appeal, counsel asserts that the beneficiary qualifies for a health services manager position, as she possesses the equivalent of an accredited U.S. college or university baccalaureate degree in an applicable discipline.

As discussed above, pursuant to the California HSC § 1276.5(d)(1), except as otherwise provided by law, the administrator of an ICF-DD-H shall be either a licensed nursing home administrator or a QMRP as defined in Section 483.430 of Title 42 of the Code of Federal Regulations.

Pursuant to the California Health and Safety Code § 1416.22, a licensed nursing home administrator must meet the following requirements:

(a) To qualify for the licensing examination, an applicant must be at least 18 years of age, be a citizen of the United States or a legal resident, be of reputable and responsible character, demonstrate an ability to comply with this chapter, and comply with at least one of the following requirements:

(1) Have a master's degree in nursing home administration or a related health administration field. The master's program in which the degree was obtained must have included an internship or residency of at least 480 hours in a skilled nursing facility or intermediate care facility.

(2) (A) With regard to applicants who have a current valid license as a nursing home administrator in another state and apply for licensure in this state, meet the minimum education requirements that existed in this state at the time the applicant was originally licensed in the other state.

(B) The minimum education requirements that have existed in California are as follows: Prior to 7/1/73 - None; From 7/1/73 to 6/30/74 - 30 semester units; From 7/1/74 to

6/30/75 - 45 semester units; From 7/1/75 to 6/30/80 - 60 semester units; From 7/1/80 to 1/1/02 - Baccalaureate degree.

(3) A doctorate degree in medicine and a current valid license as a physician and surgeon with 10 years of recent work experience, and the completion of a program-approved AIT Program of at least 1,000 hours.

(4) A baccalaureate degree, and the completion of a program-approved AIT Program of at least 1,000 hours.

(5) Ten years of recent full-time work experience, and a current license, as a licensed registered nurse, and the completion of a program-approved AIT Program of at least 1,000 hours. At least the most recent five years of the 10 years of work experience shall be in a supervisory or director of nursing position.

(6) Ten years of full-time work experience in any department of a skilled nursing facility, an intermediate care facility, or an intermediate care facility developmentally/disabled with at least 60 semester units (or 90 quarter units) of college or university courses, and the completion of a program-approved AIT Program of at least 1,000 hours. At least the most recent five years of the 10 years of work experience shall be in a position as a department manager.

(7) Ten years of full-time hospital administration experience in an acute care hospital with at least 60 semester units (or 90 quarter units) of college or university courses, and the completion of a program-approved AIT Program of at least 1,000 hours. At least the most recent five years of the 10 years of work experience shall be in a supervisory position.

(8) If the applicant and the preceptor provide compelling evidence that previous work experience of the applicant directly relates to nursing home administrator duties, the program may accept a waiver exception to a portion of the AIT program that requires 1,000 hours.

(b) The applicant shall submit an official transcript that evidences the completion of required college and university courses, degrees, or both. An applicant who applies for the licensing examination on the basis of work experience shall submit a declaration signed under penalty of perjury, verifying his or her work experience.

The regulation at 42 C.F.R. § 483.430 sets forth the educational requirements of a QMRP. This regulation states that a QMRP must have at least one year of experience working directly with persons with mental retardation or other developmental disabilities; and is either a doctor of medicine or osteopathy, a registered nurse, or an individual who holds at least a bachelor's degree in a professional category specified in paragraph (b)(5) of this section. The regulation at 42 C.F.R. § 483.430(b)(5) states that professional program staff must be licensed, certified, or registered to provide professional services by the state in which he or she practices,

and that the professional program staff that do not fall under the jurisdiction of state licensure, certification, or registration requirements, specified in section 483.410(b), must meet the following qualifications:

(i) To be designated as an occupational therapist, an individual must be eligible for certification as an occupational therapist by the American Occupational Therapy Association or another comparable body.

(ii) To be designated as an occupational therapy assistant, an individual must be eligible for certification as a certified occupational therapy assistant by the American Occupational Therapy Association or another comparable body.

(iii) To be designated as a physical therapist, an individual must be eligible for certification as a physical therapist by the American Physical Therapy Association or another comparable body.

(iv) To be designated as a physical therapy assistant, an individual must be eligible for registration by the American Physical Therapy Association or be a graduate of a two year college-level program approved by the American Physical Therapy Association or another comparable body.

(v) To be designated as a psychologist, an individual must have at least a master's degree in psychology from an accredited school.

(vi) To be designated as a social worker, an individual must--

(A) Hold a graduate degree from a school of social work accredited or approved by the Council on Social Work Education or another comparable body; or

(B) Hold a Bachelor of Social Work degree from a college or university accredited or approved by the Council on Social Work Education or another comparable body.

(vii) To be designated as a speech-language pathologist or audiologist, an individual must--

(A) Be eligible for a Certificate of Clinical Competence in Speech-Language Pathology or Audiology granted by the American Speech-Language-Hearing Association or another comparable body; or

(B) Meet the educational requirements for certification and be in the process of accumulating the supervised experience required for certification.

(viii) To be designated as a professional recreation staff member, an individual must have a bachelor's degree in recreation or in a specialty area such as art, dance, music or physical education.

(ix) To be designated as a professional dietitian, an individual must be eligible for registration by the American Dietetics Association.

(x) To be designated as a human services professional an individual must have at least a bachelor's degree in a human services field (including, but not limited to: sociology, special education, rehabilitation counseling, and psychology).

The record establishes that the proffered position is an administrator of the “Developmentally Disabled – Habilitative,” and is a specialty occupation. The beneficiary must either be a licensed nursing home administrator or QMRP as defined in section 1276.5(d) of the California HSC. The petitioner has established that a baccalaureate or higher degree or its equivalent in a specialty is the normal minimum requirement for entry into the particular position and a degree requirement is common to the industry in parallel positions among similar organizations. Therefore, the evidence establishes that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petition may not be approved, however, as the record does not reflect that the beneficiary is qualified for the specialty occupation. The petitioner submitted a copy of the beneficiary’s foreign Bachelor of Science in Physical Therapy degree. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Science degree in Physical Therapy from an accredited institution of higher education in the United States. The petitioner submitted copies of its licenses to operate and maintain eight ICF-DD-H facilities. However, the record does not contain evidence that the beneficiary is a licensed nursing home administrator or that the petitioner is qualified as a QMRP.<sup>1</sup>

Upon review of the record, there is insufficient evidence in the record to determine that the beneficiary is qualified to perform the duties of a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(I). As the director did not rule on this issue, the petition will be remanded in order for the director to address the beneficiary's qualifications to perform the services.

The director’s decision will be withdrawn and the matter remanded for entry of a new decision. 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 the specialty occupation as a licensed nursing home administrator or QMRP as defined in section 1276.5(d) of the California HSC. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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<sup>1</sup> The record does not contain evidence that the petitioner requested a QMRP approval from the Department of Developmental Services (DDS), California as required. “DDS must review and approve all QMRPs. Request for QMRP approvals must be submitted with your initial program plan. Any QMRP changes made after the initial program approval need to be reviewed and approved by the HFPS staff.” [www.dds.ca.gov/ICF/ICF-QMRP\\_Requirements.cfm](http://www.dds.ca.gov/ICF/ICF-QMRP_Requirements.cfm).

**ORDER:** The director's August 14, 2007 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.