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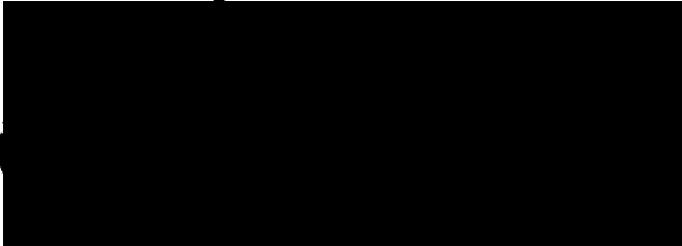


FILE: WAC 04 068 50281 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2005

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.

Robert P. Wiemann, Director
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 appeal will be dismissed. The petition will be denied.

The petitioner is an intermediate care facility for the developmentally disabled-nursing. It seeks to employ the beneficiary as a qualified mental retardation professional (QMRP). 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 on the ground that the beneficiary is not qualified to perform the proffered position. On appeal, counsel states that the beneficiary is qualified for the proffered position and submits additional and previously submitted evidence.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (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. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an QMRP. Counsel's January 8, 2004 letter states that the petitioner operates four state-licensed intermediate care facilities, which are developmentally disabled nursing homes. The record contains licenses issued for the facilities. On appeal, counsel asserts that the beneficiary qualifies as a QMRP as he possesses a degree in medicine, and that a physician's license is not required for a QMRP. Counsel points to the regulation at 42 C.F.R. § 483.430¹ to set forth the educational requirements of a QMRP. This regulation states that a QMRP has 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--

¹ Title 42, Public Health, Chapter IV, Centers For Medicare & Medicaid Services, Department of Health and Human Services, Part 483, Requirements for States and Long Term Care Facilities, Conditions of Participation for Intermediate Care Facilities for the Mentally Retarded.

(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).

Included in the record of proceeding is a copy of an educational evaluation from International Education Consultants, dated January 8, 2004, indicating that the beneficiary's doctor of medicine is the educational equivalent to a U.S. degree of doctor of medicine, and a document from the Department of Developmental Services, Health Facilities Program Section, located in Sacramento, California, relaying that on March 19, 2004, the Department of Development Services approved an application which sought to qualify the beneficiary as QMRP for the petitioner's facility located at [REDACTED], Antioch, California.

The AAO notes that the instant petition was filed on January 9, 2004. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the beneficiary is qualified to perform a particular specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). In the instant proceeding, the petition was filed on January 9, 2004. However, the Department of Developmental Services did not qualify the beneficiary as a QMRP until March 19, 2004, which is a date after the filing of the petition. The beneficiary, therefore, did not qualify as a QMRP at the time the petition was filed. The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to qualify the beneficiary for the proposed position pursuant to any of the criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(C).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO notes that the record contains no evidence of or a citation to a statute or regulation describing the duties performed by a QMRP. No evidence discusses whether the petitioner is required to have an approved program plan that requires the services of a QMRP.

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.