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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 03 218 51543 Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2005

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 adult residential facility that seeks to employ the beneficiary as a teacher for the developmentally disabled and 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 found that the proffered position was not a teacher position, but a mental health counselor position that required a master's degree. The director denied the petition on the basis that the beneficiary was not qualified to perform the service of the specialty occupation as she does not have a master's degree in counseling. On appeal, the petitioner asserts that it is not a mental health counselor position, but an education position for the developmentally disabled.

Section 214(i)(2) of the Immigration and Nationality Act (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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as a teacher for the developmentally disabled. Evidence of the beneficiary's duties includes Form I-129 with attachments and the petitioner's response to the

director's request for evidence. According to this evidence, the beneficiary's duties would include the development, implementation, and maintenance of life skills curricula for the petitioner's severely handicapped clients/patients, gathering data and analyzing it for each client to determine and facilitate the appropriate level of services necessary for each individual's social, mental, and intellectual needs, providing immediate counseling sessions for behavioral and attitudinal problems, designing and implementing a monitoring instrument for the facility's day program, assisting in the pre-admission evaluations of prospective clients, meeting with the clients and their families to discuss progress, and developing a training program for other direct care staff at the facility, including the development of continuing education programs.

The record reflects that the beneficiary has a foreign baccalaureate degree in elementary education, which has been determined to be the equivalent of a bachelor's degree in elementary education with a concentration in science, and health education. The beneficiary does not have a master's degree in counseling. Thus, the grounds of the director's decision have not been overcome.

Beyond the decision of the director, the AAO finds that the proffered position is not a specialty occupation. Upon review of the record, the AAO concludes that the petitioner has failed to establish that the position meets any of the four criteria outlined in 8 C.F.R. §214.2(h)(4)(iii)(A). Therefore, the position is not a specialty occupation.

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 AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) - a bachelor's degree or higher or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the particular position. To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the DOL *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO agrees with the petitioner that the duties of the proffered position do not reflect those of a mental health counselor, as described in the *Handbook*. However, the AAO also agrees with the director that the duties of the proffered position do not reflect those of a teacher.

There are four entries in the *Handbook* for teachers and the proffered position does not fit the description of any of them: 1) pre-school, kindergarten, elementary, middle, and secondary teachers; 2) special education teachers; 3) post-secondary teachers; and 4) adult literacy and remedial and self-enrichment education teachers. The first two describe teachers of children, not adults. According to a letter from a special education teacher submitted in support of the petition, teacher positions are distinguishable from the proffered position: "[t]he distinction is that teachers working with adult daycare and residential care programs are not working with minors in a public school setting." The first two teaching position entries in the *Handbook* also require state licensure.

Another fundamental distinction between the proffered position and the teaching positions described in the *Handbook* is the types of subjects taught and their level of complexity. Pre-school, kindergarten, elementary, middle, and secondary teachers:

help students learn and apply concepts in subjects such as science, mathematics, or English...Preschool, kindergarten, and elementary school teachers introduce children to mathematics, language, science, and social studies...Middle and secondary school teachers specialize in a specific subject, such as English, Spanish, mathematics, history, or biology.

*Handbook* at 232-233.

According to the *Handbook*, special education teachers usually work with children with some disabilities but not severe disabilities. A minority of special education teachers who do work with severely disabled children teach them basic skills, not specific academic subjects:

A small number of special education teachers work with students with mental retardation or autism, primarily teaching life skills and basic literacy. However, the majority of special education teachers work with children with mild or moderate disabilities, using the general education curriculum, or modifying it, to meet the child's individual needs.

*Id.* At 236.

In contrast, individuals in the proffered position help the petitioner's severely handicapped adult clients/patients in the development of "basic skills, motor skills, visual skills, and personal care skills."

The proffered position is distinguishable from adult remedial teachers and postsecondary teacher positions as well. Post-secondary teachers teach at the college and university levels. According to the *Handbook*, remedial or adult basic education (ABE) teachers “teach basic academic courses in mathematics, languages, history, reading, writing, science, and other areas, using instructional methods geared toward adult learning.” Based on the duties described for the proffered position, it is not a post-secondary teacher position or an adult basic or remedial education teacher position.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the duties of the position normally require a degree in a specific field of study. The critical issue is not the employer’s self-imposed standard, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor’s degree in a specific field of study as a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

A thorough review and analysis of the record shows that the duties of the proffered position most closely reflect those of a social and human service assistant, as described in the *Handbook*:

Social and human service assistant is a generic term for people with a wide array of job titles, including human service worker, case management aide, social work assistant, community support worker, mental health aide, community outreach worker, life skill counselor, or gerontology aide. [They] *provide direct and indirect client services to ensure that individuals in their care reach their maximum level of functioning...they assist adults who need supervision with personal hygiene and daily living skills.* They review clients’ records, ensure that they take correct doses of medication, talk with family members, and confer with medical personnel and other caregivers to gain better insight into clients’ backgrounds and needs...[they] work with professional caregivers...*to help clients master everyday living skills, communicate more effectively, and get along better with others.* They support the clients’ participation in a treatment plan, such as individual or group counseling or occupational therapy.

*Handbook*. at 197-198. (emphasis added). With regard to the educational requirements of social and human service assistants, the *Handbook* states the following:

While a bachelor’s degree is usually not required for entry into this occupation, employers increasingly seek individuals with relevant work experience or education beyond high school. Some jobs may require a bachelor’s degree in human services or a related field...

*Id.* at 198. As noted above, in order for a position to be considered a specialty occupation, it must require a bachelor’s degree in a specialty as a minimum for entry into the occupation. Bachelor’s degrees are sometimes required but usually are not required for entry into social and human service assistant positions. Therefore, the petitioner failed to establish that a bachelor’s degree in education, psychology or a related field is normally the minimum requirement for entry into the proffered position.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - the degree requirement, in a specific field of study, is common to the industry in parallel positions among similar organizations. The documentation the petitioner submits in support of this assertion consists of one letter from the program director at the Evergreen Adult Development Center and one letter from a special education teacher. These letters both state that adult facilities similar to the petitioner's require four-year bachelor's degrees for their teachers for the developmentally disabled or social or human service assistants. They do not, however, specify that those bachelor's degrees must be in education, psychology or related fields. One letter states that "although my industry requires a four-year degree to work as a teacher [of the developmentally disabled], there is no requirement that the degree be in education." The special education teacher states that she has worked with "many people with varying backgrounds who work as teachers of the developmentally disabled. Although a [b]achelor's [d]egree is a uniform prerequisite to become a teacher of the developmentally disabled at all facilities [with which she is familiar] there is no specific college major that is required." Thus, the letters fail to establish that a degree requirement in a specific field of study is common for teachers for the developmentally disabled or social or human service assistants in parallel positions among similar organizations.

The AAO turns next to the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific field of study. Counsel asserts that the duties for the proffered position are so complex that a bachelor's degree is the minimum requirement for the job. Counsel, however, fails to state what specific field of study is needed for the bachelor's degree. The duty description the petitioner provided for the proffered position is not for a teacher, but for a human and social service assistant. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighena*, 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 petitioner has failed to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the employer normally requires a degree in a specific specialty or its equivalent for the position. The petitioner has not provided any proof that individuals in this position have possessed bachelor's degrees in a specific field of study, namely education or psychology. The only proof of past hiring practices the petitioner provided is proof that others have had H-1B petitions approved for this position. The petitioner did not provide proof of what degrees those individuals held. The service center director's decision to approve another petition has no bearing on the AAO's decision in this matter, as service center directors' decisions are not binding on this office. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The AAO does note, however, that if the facts in the record relating to the second petition were similar to the facts in this record, the service center director's approval of the petition would constitute gross error. The AAO is not required to approve a petition where eligibility has not been demonstrated, merely because of another approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Thus, the petitioner has not met its burden of proof in this regard.

Finally, the AAO turns to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree or higher in a specific field of study.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's degree in a specific field of study, such as education or psychology. The petitioner has not presented any evidence to establish that

the duties of its proffered position are distinguishable from those of other teachers of the developmentally disabled or social or human services assistants, which the record and the *Handbook* indicate do not require a degree in a specific field. The record includes two letters that state that the position requires a bachelor's degree, but not in any specific field. The record also contains a long list of duties, but does not break down those duties to show why a bachelor's degree in a specific field such as education or psychology is necessary to perform those duties. Many of the duties listed involve the training and oversight of staff. Other duties require the development, implementation, and maintenance of life skills curricula for severely handicapped adults. Those skills include basic skills, motor skills, visual skills, and personal care skills. There is nothing in the record to show what specific curricula the beneficiary would create that would require a bachelor's degree in education or psychology. 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)).

The petitioner has not established that the proffered position is a specialty occupation. For this additional reason, the petition may not be approved.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

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

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