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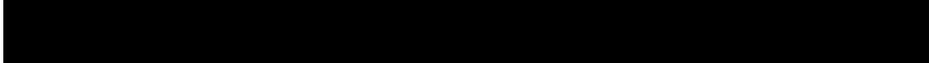
U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 056 50331 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 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 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 a skilled nursing facility that seeks to employ the beneficiary as an activity director. 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 basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary does not qualify to perform the duties of a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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) 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 proposed position.

In determining whether a proposed position qualifies as a specialty occupation, CIS does not rely simply upon the position’s title. The specific duties of the proposed 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 beneficiary and make a determination as to whether the proposed position in fact qualifies for classification as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s denial letter; and (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In the letter of support submitted with the I-129 filing, the petitioner described the duties of the proposed position as follows:

- [P]lan, develop, organize[,] and evaluate assistance programs and activities for our clients with mental, behavioral, emotional, psychological, physical, social[,] or cultural deprivation or burdens.
- [D]evise, formulate[,] and put together activities, outreach plans, and support materials to meet the individual needs of our residents, considering such factors as gender, emotional status, or degree of difficulties.
- [C]onfer with relatives, other social specialists, community workers, and allied service professionals to develop a personalized program for clients with individual and unique requirements.
- [O]rganize, direct, and coordinate the programs required for our residents’ independent subsistence and self-sufficiency such as in food, clothing, shelter, medical attention, schooling, and in social and religious activities involvement.
- [P]lan, develop, and help administer programs to develop our patients’ feeling of self-worth and self-confidence as productive members of the society.
- [L]ead, conduct, or organize tuition-oriented classes, games and music, counseling sessions, self-help orientations, community-oriented seminars[,] and vocational trainings to instill into our patients’ minds and hearts wholesome social values.
- [E]valuate and assess activities and programs for possible revisions, improvements, [and] expansion or integration of overlapping projects into a more comprehensive, economical, and feasible approach.
- [P]repare and submit written reports to project directors and activity administrators on the outcome of programs or activities in order to address problem areas to ensure the most efficient and highest quality of services rendered.
- [S]upervise programs, policies[,] and undertakings regarding participant involvement, operational requirements, would-be beneficiaries, and benefit coverage.
- [S]pearhead and oversee the preparation of our facility’s budget as well as in prioritizing financial allocations and in the sourcing of funds for social activity services department.

- [P]lay the lead role in the research and implementation of innovative methods of providing behavioral-modification and social activity services to our adult residents.
- [D]irect, supervise, monitor, and give specific job assignments to other social activity workers and allied group leaders and participate in the hiring and performance appraisals of other personnel in his department.

On appeal, counsel contends that the proposed position in fact qualifies as a specialty occupation, and that the director erred in denying the petition. Counsel asserts that in denying the petition, the director caused the “actual business needs vis-à-vis the real-world market competition” of the petitioner to “rigidly and summarily be buried into deep oblivion.” Counsel also contends that the director’s denial constitutes an abuse of discretion.

In determining whether a proposed 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 baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

A review of the duties of the proposed position finds them closely aligned to the responsibilities of recreational therapists. As discussed in the *Handbook*:

Recreational therapists, also referred to as *therapeutic recreation specialists*, provide treatment services and recreation activities to individuals with disabilities or illnesses. Using a variety of techniques, including arts and crafts, animals, sports, games, dance and movement, drama, music, and community outings, therapists treat and maintain the physical, mental, and emotional well-being of their clients. Therapists help individuals reduce depression, stress, and anxiety; recover basic motor functioning and reasoning abilities; build confidence; and socialize effectively so that they can enjoy greater independence, as well as reduce or eliminate the effects of their illness or disability. In addition, therapists help integrate people with disabilities into the community by teaching them how to use community resources and recreational activities. Recreational therapists should not be confused with recreation and fitness workers, who organize recreational activities primarily for enjoyment. (Recreation and fitness workers are discussed elsewhere in the *Handbook*.)

Recreational therapists assess clients on the basis of information the therapists learn from standardized assessments, observations, medical records, the medical staff, the clients’ families, and the clients themselves. They then develop and carry out therapeutic interventions consistent with the clients’ needs and interests. For example, clients who are isolated from others or who have limited social skills may be encouraged to play games with others, and right-handed persons with right-side paralysis may be instructed in how to adapt to using their unaffected left side to throw a ball or swing a racket. Recreational therapists may instruct patients in relaxation techniques to reduce stress and tension, stretching and limbering exercises, proper body mechanics for participation in

recreation activities, pacing and energy conservation techniques, and individual as well as team activities. In addition, therapists observe and document a patient's participation, reactions, and progress.

Community-based recreational therapists may work in park and recreation departments, special-education programs for school districts, or programs for older adults and people with disabilities. Included in the last group are programs and facilities such as assisted-living, adult daycare, and substance abuse rehabilitation centers. In these programs, therapists use interventions to develop specific skills, while providing opportunities for exercise, mental stimulation, creativity, and fun. Although most therapists are employed in other areas, those who work in schools help counselors, teachers, and parents address the special needs of students, including easing disabled students' transition into adult life.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

A bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation, is the usual requirement for entry-level positions. Persons may qualify for paraprofessional positions with an associate degree in therapeutic recreation or a healthcare-related field. An associate degree in recreational therapy; training in art, drama, or music therapy; or qualifying work experience may be sufficient for activity director positions in nursing homes.

These findings do not support counsel's contention that a bachelor's degree is required for entry into the occupation. The AAO finds that the duties of the position coincide with those of an activity director at a nursing home. The duties of the proposed position do not describe a recreational therapist with a four-year degree, providing therapy to reduce depression, stress, and anxiety; recover basic motor functioning and reasoning abilities; use interventions to develop specific skills, and the like. The *Handbook* reveals that an associate's degree, or work experience, may be sufficient for a position as an activity director in a nursing home. Consequently, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, counsel has presented no evidence to demonstrate that the proposed position qualifies under this prong.

Therefore, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those set forth in the *Handbook*, which states that the only requirement for employment as an activity director at a nursing home is an associate's degree or work experience. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner.

Therefore, the petitioner cannot establish that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

No evidence has been submitted to prove, nor has counsel asserted, that the proposed position qualifies as a specialty occupation under this criterion. Therefore, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) cannot be satisfied.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than activity director positions in other nursing facilities. As the *Handbook* reveals, such facilities do not normally impose a bachelor's degree requirement. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. As the position in this petition is not a specialty occupation, the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential to the outcome of the proceeding.

Finally, counsel raises the issue of the director's decision not to issue an RFE. In addressing the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel states that the petitioner would have submitted evidence to qualify under this criterion had the petitioner "been given his rightful chance and afforded due legal process rather than an instant denial of the subject I-129 petition."

However, counsel's contention fails. 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence only in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." The director is not required to issue an RFE in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact filed an appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel states that the petitioner "would have been willing" to establish that its degree requirement is an industry norm had the director issued an RFE. However, if such evidence exists, the petitioner should

have presented it on appeal. Without this, the only evidence documenting the claim that the petitioner's bachelor's degree requirement is an industry norm is the unsupported assertion that such is the case. Simply 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)). In these 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). Such a demonstration has not been made.

Although counsel asserts that the petitioner was not afforded "due legal process," he has not shown that any violation of the regulations resulted in "substantial prejudice" to the petitioner. See *De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to this case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, this assertion is without merit.

The proposed position does not qualify for classification as a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.

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

