

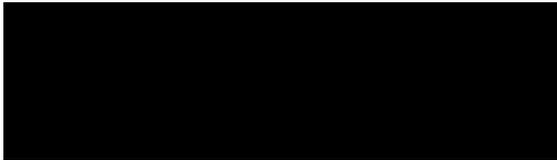
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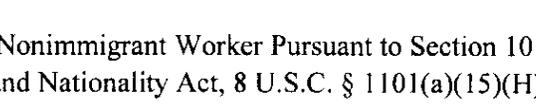
U.S. Citizenship
and Immigration
Services

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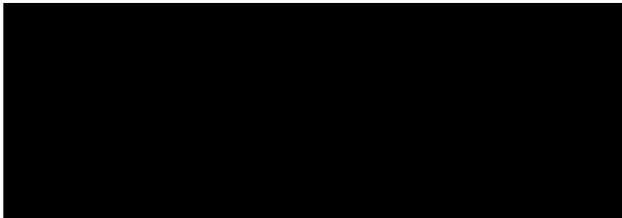


FILE: WAC 04 003 54603 Office: CALIFORNIA SERVICE CENTER Date: **SEP 02 2005**

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 of the California 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 health organization that provides health related services to senior citizens. It seeks to hire the beneficiary as a services program director. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) petitioner's responses to the director's requests for evidence; (3) the director's denial letter; and (4) Form I-290B, with petitioner's brief and supporting documents. 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, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 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 (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 petitioner states that it is seeking the beneficiary’s services as a services program director. Evidence of the beneficiary’s duties includes: the Form I-129; and the petitioner’s January 26, 2004 response to the director’s request for evidence.

In response to the director’s request for additional information, the petitioner stated that the beneficiary would be responsible for planning, organizing and coordinating programs with groups concerned with social problems of the community; promoting and coordinating activities of groups and individuals to meet identified needs; studying and assessing strengths and weaknesses of existing resources; interpreting needs, programs and services to groups and individuals involved and providing assistance; preparing reports and disseminating information and maintaining contacts with other organizations to exchange and update information on resources and services available; possibly assisting in budget preparation and presentation; working with elderly persons, physically or mentally handicapped; possibly directing or coordinating activities of volunteers; and supervising case workers. The petitioner indicated that the various duties involved in the job are interrelated to each other and the specific percentage of time spent on each duty is difficult to determine. The petitioner indicated that the proffered position requires a bachelor’s degree. Additionally, the petitioner submitted an affidavit from the beneficiary’s former employer attesting that the beneficiary has experience as a program coordinator. The petitioner referred to the Department of Labor’s *Dictionary of Occupational Titles (DOT)* occupation, service program coordinator, which indicated an SVP level of 8, in support of its assertion that the proffered position requires a bachelor’s degree.

The director issued a second request for information about the petitioner’s business and for evidence that competitors with a similar number of employees and annual income, have in the past hired or are now using the services of a service program director and that a degree is required for closely related positions. In response, the petitioner provided quarterly wage statements, Form 990 Return for Organizations Exempt from Income Tax for tax year 2001 indicating program service revenue of \$1,743,614 and salaries paid of \$1,034,659, and an organizational chart. The petitioner indicated that the services program coordinator position “is the most important position directly under the director of ADHCC.”

The director noted that the petitioner stated that it is customary for non-profit organizations involved in community health-related services to senior citizens to employ the services of a program coordinator. The director found that the petitioner did not provide any evidence for this assertion, thus he was unable to determine whether or not a bachelor's degree requirement is common to the industry in similar organizations. The director stated he could not conclude that there is a bona fide position that could be considered a specialty occupation.

On appeal, the petitioner provides additional information to support its contention that the proffered position is a specialty occupation, including a letter from another adult day care facility and internet job postings and regulations governing adult day care centers in the State of California. The petitioner submits a copy of the beneficiary's certification as an Activities Coordinator. Additionally, the petitioner states that the beneficiary "plays a pivotal role in supervising program aides and nurses' aides, with whom she coordinates and oversees the implementation of the patient care instructions of the registered nurse, occupational therapist, physical therapist, speech therapist and social worker."

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal 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 Department of Labor's *Occupation Outlook Handbook* (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*, 812 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

In determining 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 baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are most similar to those of a paraprofessional, or activity director, as described in the *Handbook* under the occupation, recreational therapist. The *Handbook* describes the some of the duties of a recreational therapist as including:

In acute healthcare settings, such as hospitals and rehabilitation centers, recreational therapists treat and rehabilitate individuals with specific health conditions, usually in conjunction or collaboration with physicians, nurses, psychologists, social workers, and physical and occupational therapists. In long-term and residential care facilities, recreational therapists use leisure activities—especially structured group programs—to improve and maintain their clients’ general health and well-being. They also may provide interventions to prevent the client from suffering further medical problems and complications related to illnesses and disabilities.

The *Handbook* further describes the employment of recreational therapists as:

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.

The described duties of the proffered position do not rise to the level of a recreational therapist. As described in the record, the incumbent in the proffered position is not implementing interventions to develop specific skills or treating and rehabilitating individuals with specific health conditions. The duties of the proffered position do not describe providing opportunities for exercise, mental stimulation, creativity, and fun. The duties of the proffered position are generally described as “promoting and coordinating activities of groups and individuals to meet identified needs” and “planning, organizing and coordinating programs with groups concerned with social problems of the community.” The proffered position resembles a paraprofessional working in the field of recreational therapy as described in the *Handbook*.

With respect to the educational qualifications required of paraprofessionals working in the field of recreational therapy, the *Handbook* states:

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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the services program coordinator position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on four internet job postings. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. One listing indicates that an associate’s degree and three years experience would be sufficient

for the position. Additionally, the petitioner did not provide evidence that the advertising organizations are similar in nature and size to the petitioner.

The petitioner submits a letter from another adult day health care center. The program director from the Yasmin Adult Day Health Care Center stated that the center requires that the service program coordinator “have a bachelor’s degree with an activity coordinator certificate or 2 or more years of experience in a similar facility with the activity coordinator certificate.” This letter indicates that a baccalaureate degree in a specific degree is not the minimum requirement for the position. Consequently, the postings and letter fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that 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 baccalaureate or higher degree. The petitioner refers to regulations of the State of California, Adult Day Care Facilities, Title 22, Division 6, Chapter 3. The petitioner highlighted several sections including one entitled Planned Activities. However, this section does not state that the person coordinating the activities or programs must have a baccalaureate degree in a specific specialty. This section indicates that the licensee should provide opportunities for planned activities, such as activities that require group interaction, daily living skills, and physical activities. The petitioner contends that the description of planned activities described in the regulation demonstrate the complexity of the job. The petitioner indicated that the beneficiary would supervise program aides and nurses’ aides, with whom the beneficiary coordinates and oversees the implementation of the patient care instructions. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The duties parallel those in the *Handbook* for a paraprofessional in the field of recreational therapy, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall 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.