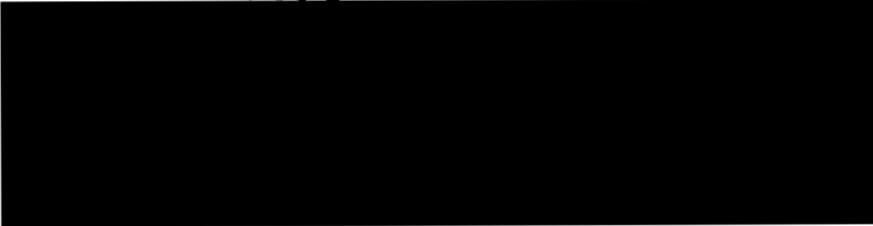




U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: WAC 04 244 52727 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2006

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 The director's decision will be withdrawn.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

The petitioner is an adult day care center that seeks to employ the beneficiary as a program director. The petitioner 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 proffered position does not qualify as a specialty occupation. On appeal counsel submits a brief stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

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

[A]n 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 are 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 record of proceeding before the AAO contains: (1) the 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) the Form I-290B with counsel’s brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a program director. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Develop an adult day care program in accordance with the needs of the participants served;
- Oversee implementation and coordination of the program;
Continuously evaluate the participants’ changing needs and make necessary program adjustments;
- Supervise ADHC staff and volunteers, and provide regular staff meetings, assignments and scheduling while being alert to individual staff needs and be available for consultation;
- Schedule and facilitate in-service education, emergency drills and pharmacist visits;
Assume responsibility for daily operational management and projection of participation;
- Represent the ADHC center in the community, attend meetings pertinent to ADHC operation, and function as liaison with other related agencies;
- Work as a member of the multidisciplinary team and utilization review committee;
- Facilitate team meetings;
Serve as staff to the center’s special advisory board preparing reports, agendas, minutes and maintaining membership records;
- Be available for on premises consultation with participants and their relatives;

- Meet regularly with the assistant administrator to consult on program operations and provide input to enhance programs;
- Meet periodically with the ADHC administrator to monitor service quality and State requirements, and discuss any major problems and provide an overview of the program;
- Assess staffing needs and discuss with the assistant administrator staffing changes;
- Participate in interviewing applicants;
- Assist in maintaining participants' health records; and
- Perform other tasks as necessary.

The petitioner requires a minimum of a master's degree in occupational therapy or a related discipline for entry to enter into the proffered position.

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. While the *Handbook* does not contain information about the specific occupation offered in this instance, the petitioner provided labor market information from the California Employment Development Department (CEDD) about the requirements of adult daycare occupations. The duties of the position are not consistent with those of an administrative services manager as stated by the director and discussed in the *Handbook*. According to the CEDD, program directors for day health care develop individual programs in accordance with the needs of the day care participant. These plans are based on the initial and continuing assessment of the participant by the multidisciplinary team members who determine the medical and social needs, and specific daily service plan needs of participants. Program directors implement and coordinate each program, working closely with physicians, nurses, physical therapists, activity coordinators, health aides and nutritionists, evaluating the participants' changing needs and making necessary program adjustments. Program directors coordinate in-service training for staff and volunteers and must be on the premises and available to participants and family members during program hours. According to the CEDD, the training requirement for the position is a bachelor's or master's degree in the fields of nursing, social work, psychology, or recreational, occupational, physical, or speech therapy, dietetics or gerontology. The California Code of Regulations provides that a program director shall be a qualified professional in the field of nursing, social work, psychology or recreational, occupational or physical therapy. Cal. Code Regs. tit. 22, § 54405 (1979). The proffered position does, therefore, qualify as a specialty occupation because program directors in California are required to have a degree in a specific specialty. The petitioner has established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The director did not comment on the beneficiary's qualifications to perform the duties of a specialty occupation as the petition was denied on another ground. The beneficiary possesses a master's degree in occupational therapy from the University of Southern California. It should be noted, however, that the California Business and Professions Code states that "no person shall practice occupational therapy or hold himself or herself out as an occupational therapist or as being able to practice occupational therapy, or to render occupational therapy services . . . unless he or she is licensed as an occupational therapist . . ."

California Business and Professions Code, § 270.3(a). In this instance the program director would be rendering occupational therapy services by evaluating patient needs and establishing and adjusting programs to meet those needs. It would appear, therefore, that the beneficiary must have an occupational therapy license to work in the proffered position. As such, this matter must be remanded to the director to determine whether the beneficiary qualifies to perform the duties of the proffered position. The director may request such additional evidence as he deems necessary in rendering his decision.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner is to be certified to the AAO for review.