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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: DEC 29 2010

IN RE:

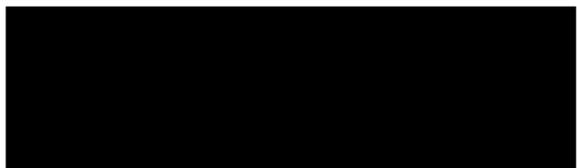
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, 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 describes itself as a healthcare service provider with 22 employees. It seeks to employ the beneficiary as a medical social worker 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, concluding that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation. Specifically, the director found that the petitioner failed to establish that the beneficiary is either licensed to work as a social worker in Illinois or exempted or excepted from having such a license.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief and evidence. The AAO reviewed the record in its entirety before reaching its decision.

The first issue to be discussed in this proceeding is whether the beneficiary is qualified to perform the duties of 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)(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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)(i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) 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, the 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license "prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation."

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(B), if a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall

examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

Where licensure is required in any occupation, 8 C.F.R. § 214.2(h)(4)(v)(E) specifies that the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. This regulation also provides that an alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year, unless he or she has (1) obtained a permanent license in the state of intended employment, or (2) continues to hold a temporary license valid in the same state for the period of the requested extension.

As previously stated, the director denied the petition because the petitioner failed to demonstrate that the beneficiary is licensed to work as a social worker in Illinois or exempted from having such a license.

The issue before the AAO is whether the beneficiary is qualified to work in a specialty occupation, which requires at least a bachelor's degree or equivalent in a specific specialty. On appeal, counsel for the petitioner states that a license is not required to perform the duties of the proffered position, and that the beneficiary is otherwise qualified to perform the duties of a specialty occupation. First, counsel argues that although the title of the proffered position is medical social worker, the proffered duties:

[n]ever allowed [the beneficiary] to perform any of functions of a Social Worker. . . . [The beneficiary] will never deal directly with patients as a Registered Social Worker. In fact, if you will examine her duties, it is more of assessment of the patients' needs and that she refers these patients to other Social Service providers.

Additionally, counsel for the petitioner argues on appeal that the petitioner is not required under Illinois law to employ or contract with a licensed clinical social worker to provide clinical social work. However, as will be discussed *infra*, this argument is not correct given the position title.

The proffered job description submitted in response to the RFE entails the following duties:

- Review patients' records and charts and evaluate whether problems exist that would require or benefit from the assistance of a social service agency;
- Secure information from medical records, doctors, and nursing staff, evaluate the patients' needs, and prepare a written evaluation and recommendation on how to assist the patient to be forwarded to the medical staff;
- Recommend to the medical staff whether the patient is eligible for financial assistance and assist in securing financial assistance for the patient;
- Provide in-service training to staff on social issues; and
- Refer cases beyond the scope of these duties to licensed social workers.

Additionally, the organization chart submitted in response to the RFE indicates that the beneficiary will work in the occupation of "Patient Relations." The job title of Medical Social Worker is listed elsewhere on the chart, but the beneficiary's name is not listed under that section.

The AAO takes note of the following discussion in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2010-11 online edition, regarding social workers:

Social work is a profession for those with a strong desire to help improve people's lives. Social workers assist people by helping them cope with and solve issues in their everyday lives, such as family and personal problems and dealing with relationships. Some social workers help clients who face a disability, life-threatening disease, social problem, such as inadequate housing, unemployment, or substance abuse. Social workers also assist families that have serious domestic conflicts, sometimes involving child or spousal abuse. Additionally, they may conduct research, advocate for improved services, or become involved in planning or policy development. Many social workers specialize in serving a particular population or working in a specific setting. In all settings, these workers may also be called licensed clinical social workers, if they hold the appropriate State mandated license.

Child, family, and school social workers provide social services and assistance to improve the social and psychological functioning of children and their families. Workers in this field assess their client's needs and offer assistance to improve their situation. This often includes coordinating available services to assist a child or family. They may assist single parents in finding day care, arrange adoptions, or help find foster homes for neglected, abandoned, or abused children. These workers may specialize in working with a particular problem, population or setting, such as child protective services, adoption, homelessness, domestic violence, or foster care. . . .

The AAO agrees with counsel that the proffered duties as depicted in the record are not those of a licensed social worker, despite the position title. Instead, the AAO finds that the proffered position is that of a social and human services assistant, described as follows in the *Handbook*:

Social and human service assistants *help social workers, healthcare workers, and other professionals to provide services to people*. Social and human service assistant is a generic term for workers 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 skills counselor, social services aide, youth worker, psychological aide, client advocate, or gerontology aide. They usually work under the direction of workers from a variety of fields, such as nursing, psychiatry, psychology, or social work. The amount of responsibility and supervision they are given varies a great deal. Some have little direct supervision. For example, they may run a group home. Others work under close direction.

Social and human service assistants provide services to clients to help them improve their quality of life. They assess clients' needs, investigate their eligibility for benefits and services such as food stamps, Medicaid and welfare, and help clients obtain them. They also arrange for transportation, if necessary, and provide emotional support. They monitor and keep case records on clients and report progress to supervisors and case managers. . . .

(Emphasis added).

Nevertheless, although the AAO has determined that the proffered position is not that of a social worker based on the proffered duties as depicted in the record, the petitioner has titled this position as a Medical Social Worker, which therefore requires the beneficiary to have a license under Illinois law.

According to the Illinois Clinical Social Work and Social Work Practice Act (225 ILCS 20), persons can engage either in the practice for which they are authorized under any other Act or practice in an unregulated profession in human services without a social work license, “[p]rovided such practitioners do not represent themselves or use the title of clinical social worker or social worker.” 225 ILCS 20/4 (from Ch. 111, par. 6354). Therefore, because the petitioner uses the words “Social Worker” in the title of the proffered position, regardless of the position’s duties, the beneficiary is required to have a social work license under Illinois law. As such, the AAO finds that the petitioner has failed to establish that the beneficiary has the requisite license to hold the proffered position with the current title. Therefore, the director’s decision is affirmed and the petition will be denied.

Moreover, the petitioner submitted copies of the beneficiary’s diploma and transcripts indicating that she has a foreign degree in psychology, but the petitioner failed to submit an education evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). Therefore, the petitioner has failed to demonstrate that the beneficiary is qualified to perform in the duties of a specialty occupation.

Beyond the decision of the director, the AAO finds that the proffered position is not a specialty occupation. Notwithstanding the preceding discussion, which affirms the director’s finding that the beneficiary is not qualified to perform the duties of a specialty occupation requiring at least a bachelor’s degree or the equivalent in a specific specialty, the AAO finds that the proffered position is not a social worker but, rather, as was discussed previously, is a social and human service assistant.

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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means 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, a proposed position must also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

As was previously discussed, the proffered position description indicates that the duties will focus more on assistance of other professionals and performing administrative tasks than providing direct evaluations and assessments. Therefore, the AAO finds that the proffered position is closest to that of a social and human service assistant as described in the *Handbook*.

Regarding the training for a social and human service assistant, the *Handbook* reports:

A high school diploma is the minimum education requirement, but employers often seek individuals with relevant work experience or education beyond high school. . .

Given the brief description of duties and organization chart provided, which does not indicate that the beneficiary will work as a social worker, and counsel’s own admission that the beneficiary will not work as a social worker, it is not possible to determine based on the duties as described that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge, and the 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 petitioner in this matter has not provided evidence that the duties of the proffered position encompass the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor’s or higher degree, or the equivalent, in a specific specialty. 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 demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The petitioner has not submitted any documentation regarding other home health care agencies. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

Neither does the petitioner provide sufficient information to distinguish the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The petitioner does not identify which duties are more unique or specialized than the duties performed by non-degreed individuals in the same field. The record does not contain evidence that establishes either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Turning to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), whether the petitioner normally requires a degree for the position, the AAO notes that the petitioner has not provided evidence about other workers it has hired, if any, in similar positions. The critical element is not the title of the position or 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. As determined above, the proffered position is not that of a social worker and the petitioner has failed to demonstrate that the proffered duties require the theoretical and practical application of a body of highly specialized knowledge in a specific specialty. The petitioner has not submitted evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the description of the duties in the record does not substantiate that the duties are sufficiently specialized and complex to require knowledge usually associated with the attainment of at least a baccalaureate degree in a specific field of study. As already discussed, the proffered duties most closely resemble, and do not appear more specialized and complex than, those of a social and human service assistant – a type of position that for which the *Handbook* indicates that the constituent duties are not so specialized and complex as to be require knowledge usually associated with at least a bachelor's degree in a specific specialty. Further, neither the petitioner's descriptions of the proffered position nor any other evidence in the record of proceeding establishes that performance of the position requires the nature and educational level of knowledge needed to satisfy this criterion. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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