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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-01-232-50326 Office: Vermont Service Center Date: Jan 21 2003

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IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a non-profit organization providing in-home care and assistance to the mentally retarded with 150 employees. It seeks to extend the employment of the beneficiary as a direct care human services specialist for a period of two years and ten months. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a statement.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree. On appeal, counsel objects to the denial of the current H-1B visa extension when the Service had previously approved the initial petition for the same position on behalf of this beneficiary. Counsel argues that it would be an extreme hardship for the petitioner and its clients to be deprived of the beneficiary's services.

Counsel's statements on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> The Human Services Specialist will provide direct care to individuals suffering from mental retardation. This care will be provided at the home of the clients. He will counsel patients, assist in evaluating their needs and will make certain that administrative and clinical

policies of Multicultural Community Services are fulfilled.

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.

The duties that the petitioner endeavors to have the beneficiary perform are primarily those of a social and human service assistant. In its Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 158, the Department of Labor (DOL) describes the position of a social and human service assistant as follows:

> Social and human service assistant is a generic term for people with various job titles, including human service worker, case management aide, community outreach worker, life skill counselor, or gerontology aide. They usually work under the direction of professionals from a variety of fields, such as nursing, psychiatry, psychology, rehabilitative or physical therapy, or social work. The amount of responsibility and supervision they are given varies a great deal. Some have little direct supervision; others work under close direction.
>
> Social and human service assistants provide direct and indirect client services. They assess clients' needs, establish their eligibility for benefits and services, and help clients obtain them. They examine financial documents such as rent receipts and tax returns to determine whether the client is eligible for Food Stamps, Medicaid, welfare, and other human service programs. They also arrange for transportation and escorts, if

> necessary, and provide emotional support. Social and human service assistants monitor and keep case records on clients and report progress to supervisors and case managers. They also may transport or accompany clients to group meal sites, adult daycare centers, and doctors' offices; telephone or visit clients' homes to make sure services are being received; or help solve disagreements, such as those between tenants and landlords. They also may help some clients complete insurance or medical forms, as well as applications for financial assistance, and may assist others with daily living needs.
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> Social and human service assistants play a variety of roles in a community. They may organize and lead group activities, assist clients in need of counseling or crisis intervention, or administer a food bank or emergency fuel program. In halfway houses, group homes, and government-supported housing programs, 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. Social and human service assistants also provide emotional support and help clients become involved in their own well-being, in community recreation programs, and in other activities.
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> In psychiatric hospitals, rehabilitation programs, and outpatient clinics, social and human service assistants work with professional care providers, such as psychiatrist, psychologists, and social workers, to help clients master everyday living skills, to teach them how to communicate more effectively, and to get along better with others. They support the client's participation in a treatment plan, such as individual or group counseling or occupational therapy.

A review of the Handbook at page 159, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a social and human service assistant. Employers increasingly seek individuals with relevant work experience or education beyond high school. Certificates or associate degrees in subjects such as social work, gerontology, human services, or one of the social or behavioral sciences meet most employers' requirements. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a

specific specialty for the offered position. The petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed 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.

With respect to counsel's objection to denial of this petition in view of the previous approval of a petition filed by the petitioner on behalf of the beneficiary, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petition and its supporting documents. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F. 3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.