

Case Scenario One

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A man who is working in a position as a recreation therapist at CDCR contacted a legal blog to ask for advice regarding his situation. He says, "When I was hired by the state 6 years ago I 100% qualified for the job based on the job description given by the state. CDCR is my agency. Now, the state is saying that I need more education to keep my job. This is because the state is out of compliance with business professions code 17505.2. There are more than a hundred of us in the state who received layoff letters saying we need to have the classes completed by Sept 1 and pass a test or we will be non-punitively laid off. How does this affect me? Do they have to pay for the school or give me work time to complete this training? It seems like any training required by the employer should be covered. This is troubling. I just bought a house and have a kid on the way. Now I might lose my job because the state messed up?"

The attorney responds, "Are you a member of a labor union? That's going to be the best place for you to start, since a union can represent all 100 people in your position."

Unfortunately, you're probably going to have to pay for the additional training if you want to keep your job, unless CDCR wants to keep you badly enough that they're willing to pay the bill.

If they CDCR wanted to bring you into compliance with the Business and Professions Code, they could simply modify your job title to "Recreation Leader" or something similar.

It sounds like CDCR has identified this loophole to cut costs. As you know, Federal courts have ordered the state prison system to drastically reduce the number of inmates, and CDCR's budget is one of the biggest expenses in state government.

Also, note that the "sole remedy" for a violation of Business and Professions Code §17505.2 is for a "person injured by a violation of this section" to file a lawsuit to recover \$1,500.00 for a first violation and \$2,500.00 for a second violation. It sounds like CDCR is trying to avoid lawsuits by inmates with nothing but time on their hands, but it's also hard to imagine how an inmate might be legally "injured" by your use of your job title.

Suing the state is unlikely to get you anywhere. Lawyers employed by the State of California are experts at prolonging lawsuits. When I was in law school, I clerked for a judge who was handling complex litigation related to a levee failure in 1986. It took nine years before any of the plaintiffs saw a dime.

Is there a violation of Section 17505.2?

What should happen with this person if he does not comply?

Should a civil law suit be filed? Who has standing in this case?

What is the injury?

What about the attorney advice? What do you think about the changing of the job title to cover up the violation? The attorney does not see the complexity of the situation. The state is obligated to provide services known as recreation therapy? Would this action constitute a second offense? Or possibly allow someone with standing to file a civil suit against the supervisor and CDCR for falsifying the credentialing of the person providing the services.

Case Scenario Two No questions. This just a very positive use of the law. The Administrative Appeals office should be commended.

Petition for a Nonimmigrant Worker Pursuant to Section 10 1 (

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. 5 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 5 103.5(a)(1)(i). B

Chief, 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 director's decision will be withdrawn and the matter remanded for further action.

The petitioner is a home health care service that seeks to employ the beneficiary as a recreational therapist. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 10 1 (a)(1 5)(H)(i)(b) of the Immigration and Nationality Act (the Act).

The director denied the petition on the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

It is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. 5 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [I] 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 [2] 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. tj 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.

In its March 26, 2007 letter of support, the petitioner stated that it is a provider of home health services. The petitioner stated that its business was developed for individuals with medical needs who prefer to remain in their homes while receiving skilled nursing; home health aide assistance; rehabilitative and recreational therapy; or medical social services. The petitioner stated that the duties of the proposed position would include the following:

Planning and leading individual activities; Maintaining and recording weekly and quarterly progress reports; Keeping daily statistics; Completing initial assessments, and analyzing and screening each patient's leisure, social, and recreational abilities, deficiencies, interests, barriers, life experiences, and needs in order to determine the need for, and type of care or treatment to be provided, and the need for further assessments; Providing treatment services designed to improve social, emotional, cognitive, and physical functional behaviors as necessary prerequisites to future leisure and social involvement; Monitoring the extent to which goals are achieved, relative to the use of leisure time and acquisition of socialization skills; Reassessing patients after significant changes to their condition; Periodically attending Plan of Care and Psychiatrist meetings; Attending in-service training sessions; and Performing any other duties relevant to job actions.

In determining whether a proposed position qualifies as a specialty occupation, USCIS 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 **Department of Labor's Occupational Outlook Handbook (the Handbook)** for its information about the duties and educational requirements of particular occupations.

With regard to the duties typically performed by recreational therapists, the 2008-2009 edition of the Handbook states the following:

Recreational therapists, also referred to as therapeutic recreation specialists, provide treatment services and recreation activities for 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 improve 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 and reduce or eliminate the effects of their illness or disability. In addition, therapists help people with disabilities integrate into the community by teaching them how to use community resources and recreational activities.

In acute health care 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.

Recreational therapists assess clients using information from observations, medical records, standardized assessments, the medical staff, the clients' families, and the clients themselves. They then develop and carry out therapeutic interventions consistent with the client's needs and interests. For example, they may encourage clients who are isolated from others or who have limited social skills to play games with others, and they may teach right-handed people with right-side paralysis how to use 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 recreational activities, pacing and energy conservation techniques, and team activities. As they work, 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 assisted-living, adult day care, 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. Those few who work in schools help counselors, teachers, and parents address the special needs of students, including easing disabled students' transition into adult life.'

With regard to the **educational credentials** required for entry into this field, the Handbook states the following:

A bachelor's degree with a major or concentration in therapeutic recreation is the usual requirement for entry-level positions. Some States regulate recreational therapists, but requirements vary.

Most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. People may qualify for paraprofessional positions with an associate degree in therapeutic recreation or another subject related to health care. 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.²

The Handbook finds that most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. The AAO agrees with the petitioner's assertion that the position being proposed in this petition is that of a recreational therapist. Accordingly, the AAO finds that the proposed position qualifies for classification as a specialty occupation under 8 C.F.R. 8 214.2(h)(4)(iii)(A)(I): that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Accordingly, the director's decision finding otherwise will be withdrawn. However, the petition may not be approved, as the record does not establish that the beneficiary qualifies to perform the duties of the proposed position. Pursuant to 8 C.F.R. 8 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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 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.

Further requirements for entry into this field are contained at section 17505.2 of the California Business and Professions Code:

(a) It is unlawful for a person to represent himself or herself as a recreation therapist, to represent the services he or she performs as recreation therapy, or to use terms set forth in subdivision (c) in connection with his or her services, name, or place of business, unless he or she meets all of the following requirements:

(1) Graduation from an accredited college or university with a minimum of a baccalaureate degree in recreation therapy or in recreation and leisure studies with a specialization in recreation therapy. Alternatively, a person who does not have one of the preceding degrees may qualify if he or she has a baccalaureate degree in a specialization acceptable for certification or eligible for certification by any accrediting body specified in paragraph (2).

(2) Current certification or eligibility for certification as a recreation therapist by the California Board of Recreation and Park Certification or by the National Council for Therapeutic Recreation Certification, Inc.

(b) No person shall represent himself or herself as a recreation therapist assistant, or represent the services he or she performs as being in any way related to recreation therapy, unless he or she at a minimum has current certification, or has eligibility for certification, by the California Board of Recreation and Park Certification or by the National Council for Therapeutic Recreation Certification, Inc., as a recreation therapist assistant.

(c) A person who does not meet the requirements of subdivision (a) or (b) may not use any of the following words or abbreviations in connection with his or her services, name, or place of business:

(4) Recreation therapist.

(e) Any person injured by a violation of this section may bring a civil action and may recover one thousand five hundred dollars (\$1,500) for the first violation and two thousand five hundred dollars (\$2,500) for each subsequent violation. This is the sole remedy for a violation of this section.

The beneficiary earned a bachelor's degree in physical therapy from Centro Escolar University, in the Philippines, in 2004. The record contains an evaluation from Morningside Evaluations, dated March 26, 2007, which equates the beneficiary's degree to a bachelor's degree in physical therapy awarded by an accredited institution of higher education in the United States.

However, as was noted previously, the Handbook states that most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. The beneficiary, however, possesses no such degree. Although the Handbook does note that certain paraprofessional positions may be filled by individuals with an associate degree in a subject related to health care, the petitioner contends, and the AAO agrees, that the proposed position is not a paraprofessional position. As stated above, similar requirements are set forth in the California Business and Professions Code, which specifically prohibits an individual from representing her services as those of a recreational therapist unless she (1) possesses a bachelor's degree in recreational therapy, or in recreation and leisure studies with a specialization in recreation therapy; or (2) possesses current certification by, or is eligible for certification by, either the California Board of Recreation and Park Certification, or the National Council for Therapeutic Recreation Certification, Inc.

As such, the record of proceeding indicates that the beneficiary is not qualified to perform the duties of the proposed position, which is that of a recreational therapist. As the director did not address this issue, the petition will be remanded so that the director may address the issue of the beneficiary's qualifications to perform the duties of the proposed position.

Case Scenario Three

A woman who works for CDCR now as a recreation therapist has been contacted by her supervisor to provide credentials that meet the criteria established by Section 17505.2 California Business and Professions Codes. She has been employed for two years in a position of Recreation Therapist. She was a lateral transfer from another State of California Facility where she was a Rehabilitation Therapist. She needed to change jobs because her husband was transferred from his position at the State Hospital to a position at the CDCR facility. She had been qualified as a Rehabilitation Therapist (Music) and was a Board Certified Music Therapist. She provided her new employer with her resume and credentials and it was determined that her education, certification, and training was sufficient to meet the criteria for the classification of recreation therapist. She had provided activities and leisure assessments for the patients on her treatment units as prescribed by her physician and had training on the job in leisure assessment and planning. She used music therapy approaches with these patients that included some that she would be able to and did provide to the inmates. At CDCR she was not able to apply for a position of rehabilitation therapist (music) because the classification was not used at CDCR. However, she was qualified to be a recreation therapist. She was able to make a convincing argument that she had the bachelor's degree in a helping profession, the internship, certifications appropriate to her specialty, and that in the past and present she functioned the same regarding treatment of the patients, or inmates. She just did not have the recreation therapy courses, and internship under supervision of a certified therapist (NCTRC or CBRPC) to meet the criteria for certification by NCTRC or CBRPC certification. She was willing to take the standardized test and be certified but she was unwilling to complete her core courses again in recreation therapy. She just did not see the point to separation from her position on a technicality. She had a degree that was as good if not better than a recreation therapy degree.

Is there a violation of Section 17505.2?

What should happen with this person if she does not comply?

Should a civil law suit be filed? Who has standing in this case?

What is the injury?

Case Scenario Four

The case of the previously certified (dually CBRPC and NCTRC) practitioner.

This is the case of a professional who was academically trained as a recreation therapist with a graduate degree. She also had minors in two areas that are acceptable as alternate education by both certification boards. She had completed three academic internships under the supervision of certified recreation therapists of both CBRPC and NCTRC. She had test certified with both organizations. She had a graduate degree in Recreation Therapy and had completed nearly twenty years of recertification cycles of both CBRPC and NCTRC. Due to severe illness she had failed to recertify and was now attempting to return to the workforce. She approached both certification boards. She presented her application for reentry. In both cases she was outside of the limits of time allowed for direct entry through test certification. This alone was going to cost nearly \$1000 to accomplish. She was told to reapply and send the fees, transcripts, and original documentation of internships. She did this and learned that her core courses for her graduate degree were disallowed by NCTRC because the course titles were not in keeping with the current by-laws of NCTRC and she would need to provide original course outlines and evidence of the content of the courses. If she did not provide them then she would need to retake the courses and reapply. This means that she would be taking twenty quarter hours of classes. This was going to cost nearly \$10,000.

There was a good possibility that CBRPC would accept the coursework and degree and allow her to reenter through test certification. However, she had better hurry because by laws changes were anticipated because of the Recreation Therapy Title Law and the need to establish equivalent criteria. The woman wanted to continue as a recreation therapist and might want to do some consulting in the future outside of state of California and Texas. She was considering states where licensure existed and the NCTRC certification test (passing grade) and a credentials review were prerequisite. She could provide documentation of this but not certification.

What should she do?

What if any would violate Section 17505.2?

What conditions would she need to meet not to violate the law, credentialing, in and out of California?