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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
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Washington, D.C. 20536



AUG 25 2003

File: WAC 02 211 50497 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: SELF-REPRESENTED

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an assisted living facility for elderly and handicapped persons. It has two employees and a stated gross annual income of \$96,000. The petitioner seeks to employ the beneficiary as a manager/caregiver for a three-year period. The director determined the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel submits a brief.

The term "specialty occupation" is 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.

The director determined that the petitioner had failed to establish that the proffered position requires a baccalaureate degree in a specific specialty. The director further determined the petitioner had not shown that it normally requires a bachelor's degree in physical therapy or its equivalent for the offered position.

On appeal, the petitioner's Director of Human Resources, [REDACTED] states that [REDACTED] has made it a policy to employ a manager/caregiver with a bachelor's degree in physical therapy or occupational therapy.

When determining whether a particular job qualifies as a specialty occupation, the Bureau considers the specific duties of the proffered position combined with the nature of the petitioning entity's business operations. In the initial I-129 petition, the

petitioner described the duties of the offered position as follows:

Manage the home and supervise employees. Caregiving for the clients.

In response to the director's request for additional evidence, the petitioner provided the following, expanded description of the job's duties:

Rehabilitation exercises and supervision account for 65 [percent] of the employee's time. The rest of the time is spent in various healthcare responsibilities. Charting, medicine administration, and providing for personal healthcare needs as they arise. The employee is to be a manager of the facility overseeing the care given to the patient's [sic].

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The petitioner initially identified the position as that of manager/caregiver of an assisted living facility. The petitioner indicated in the initial I-129 petition that it requires the services of an individual with a bachelor's degree in physical therapy because the holder of the position will spend 65 per cent of her time providing physical therapy to the facility's residents and supervising home health aides.

On appeal, the petitioner appears to be claiming that the position is actually that of a physical therapist. Nevertheless, the record does not contain sufficient evidence to warrant a finding that the proffered position is a physical therapist position or that the position requires the services of an individual with a bachelor's degree in physical therapy. The petitioner has not provided any information as to the number of patients cared for at the facility. While the petitioner indicates that 65 percent of the beneficiary's time would be spent on physical therapy and supervision of home health aides, no information has been provided as to what percentage of the beneficiary's time would be spent on each of these activities. According to the I-129 petition, the petitioner only has two employees. Although the director requested that the petitioner provide more specific information regarding its employees in a notice dated July 1, 2002, the petitioner failed to provide any information regarding the exact job titles and duties of its employees. Moreover, the record does not contain any evidence to show that the supervision of home health aides requires a bachelor's degree in physical therapy.

It is noted that the petitioner does not indicate a requirement of licensure as a physical therapist in the State of Arizona for the position being offered. According to the Department of Labor's *Occupational Outlook Handbook*, 2002-2003 edition, at page 259, all 50 States require physical therapists to pass a licensure examination after graduation from an accredited physical therapist educational program. If the beneficiary will be providing physical therapy services directly to the facility's residents, she is required to be licensed as a physical therapist in the State of Arizona. There is no indication in the record that the beneficiary holds such licensure. It is concluded the petitioner has not shown that the job is primarily that of a physical therapist or that the duties of the position require the services of an individual with a bachelor's degree in physical therapy.

Additionally, the petitioner has not shown that it required a bachelor's degree in physical therapy as part of the hiring process for the offered position.

In an attempt to demonstrate that the degree requirement is an industry standard, the petitioner submits three letters from officials of other assisted living facilities in Arizona. Although each of these individuals states that it is beneficial for assisted living facilities to have physical therapists on staff, none of them states that their facility requires such degree or that the degree requirement is an industry standard.

Finally, the petitioner has not shown 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 in a specific specialty.

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.

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that the beneficiary qualifies to perform services in a specialty occupation. The petitioner has not provided an evaluation of the beneficiary's foreign education. Additionally, the record contains no evidence to show that the beneficiary holds licensure as a physical therapist in the State of Arizona. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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.