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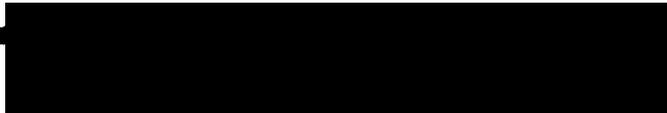
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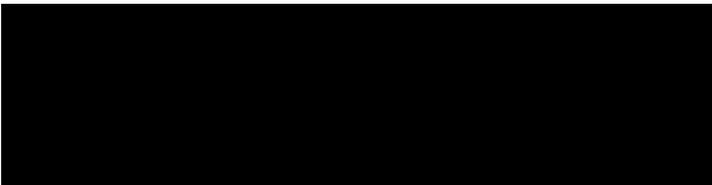
FILE: LIN 03 198 51700 Office: NEBRASKA SERVICE CENTER Date:

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 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 is a skilled-nursing provider of services, including physical therapy, that are delivered in the homes of disabled, aging or ill patients. The company seeks to hire the beneficiary as a physical therapy assistant and, therefore, 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 on the grounds the proffered position is not a specialty occupation. On appeal counsel has filed a brief and some additional evidence. The record of proceeding before the AAO contains: (1) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first discuss whether the proffered position is 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.

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.

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 petitioner is seeking the beneficiary's services as a physical therapy assistant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to the letter in support of the petition, the beneficiary would assist in treatments and rehabilitation designed to improve mobility, relieve pain, increase strength and prevent deformity. He would also help develop treatment plans and document progress. While the beneficiary is licensed as a physical therapist in his native country, he would need to work under a therapist's supervision here because he lacks one in the state of his residence. Still, the petitioner maintains he would perform duties that "require no less than an individual with a degree in physical therapy." Additionally the beneficiary is to monitor company records for billing and to ensure that the treatment given matches the treatment ordered. In fact, in his response to the request for additional evidence, the petitioner estimated that tracking these records would consume a large percentage of the beneficiary's time. The petitioner relates that the beneficiary has work experience in physical therapy in his native country.

The director determined that the proffered position was not a specialty occupation. The petitioner, in response to the director's request for evidence, asserted that the physical therapy assistant position, as practiced in the petitioner's business, was more correctly that of a quality assurance coordinator or medical-records administrator, as defined by the *Dictionary of Occupational Titles (DOT)*. The director noted that the petitioner materially changed the job duties in the response to the RFE, and confined his discussion to the duties outlined in the initial petition, which he said did not require a bachelor's degree or higher in the specific specialty. The director thus determined that the position of physical therapy assistant was adequately described in the Department of Labor's (DOL) *Occupational Outlook Handbook (The Handbook)*, which found no requirement for a physical therapy assistant to have a bachelor's degree in physical therapy.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that the amended petition merely changed the title of the proffered position. Counsel submits that the petitioner should not be confined to the job duties as described in the *Handbook*, that instead the additional duties for the proffered position, while not in the *Handbook*, are more fully described in the DOL's *Dictionary of Occupational Titles (DOT)*.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors often considered by CIS when determining this criterion includes: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, CIS 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the *Handbook* discloses that the duties of the proffered position are those that a physical therapy assistant normally performs. The *Handbook* states that such assistants help licensed physical therapists with patients in need of physical therapy. Such assistants refer any questions regarding treatment or other related information to a physical therapist; establish and maintain patient treatment records; prepare insurance claim forms and correspond with third-party insurance providers; and, under the supervision of a physical therapist, provide the patient with exercises, massages, electrical stimulation, baths, traction and ultrasound. The *Handbook* reports that an assistant records the patient's responses to treatment and reports the outcome of each treatment to the physical therapist. Because the *Handbook* reveals that a physical therapy assistant does not require a bachelor's degree, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position of physical therapy assistant.

In response to the RFE, counsel indicated he was expounding on the duties of physical therapy assistant as set forth in the initial petition. Instead, he proceeded to change the primary duties of the position from that of physical therapy assistant to quality assurance coordinator and medical records administrator for the physical therapy department. The AAO agrees with the director that the petitioner materially altered the terms of the employment, and changed the nature of the job from primarily a hands-on physical therapy assistant to primarily a records oriented employee. The AAO notes that approximately 70% of the revised duties listed by the petitioner in the response to the RFE would be in documentation rather than in assisting in the actual physical therapy. The certified LCA documents the job title as physical therapy assistant. While the AAO agrees with counsel that the duties of the position determine whether a job is a specialty occupation, and not its title, the duties of the position also must be adequately reflected in the certified LCA. 8 C.F.R. § 214.2(h)(4)(B)(1) requires that the petitioner obtain a certification from the Department of Labor in the occupational specialty in which the alien will be employed. If the petitioner would like to hire a quality assurance coordinator or records administrator, it must obtain a new certified LCA.

A petitioner may not materially alter the terms of a Form I-129 H-1B petition without filing an amended or new petition, with fee. 8 C.F.R. § 214.2(h)(4)(E). Further, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO will consider the job duties considered by the director in his decision.

As a result, as noted in the *Handbook* for the physical therapy assistant -- an occupation that does not require a degree as a minimum requirement for entry into the occupation -- the petitioner's evidence does not satisfy the requirements of the first criterion.

Second, counsel argues under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that parallel positions in the industry show these jobs are either unique or so complex that they can only be performed by a specialized, degree-holder.

Instead of pointing to the job title physical therapy assistant, however, he lists the job duties of a medical records administrator and quality assurance coordinator. These job duties are not parallel to those of the physical therapy assistant. The petitioner has failed to satisfy the requirements of the second criterion.

Third, counsel argues, under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), that the petitioner normally requires a specific specialty degree or its equivalent because the petitioner has in the past filled both other physical therapy assistant positions with people holding bachelor's degrees in physical therapy. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As noted in the *Handbook*, the position of physical therapy assistant does not encompass duties requiring the application of a body of highly specialized knowledge. The petitioner has failed to establish this criterion.

Fourth, counsel asserts under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) that the petitioner satisfies the fourth criterion because the chief financial officer swears to the position's complexity and need for a specialized bachelor's or higher degree. The duties of the position as described in the petition and the supporting letter accompanying the petition do not involve such complex duties that a physical therapist assistant cannot routinely perform them. As discussed above, these duties do not require a specialized degree.

The petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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. The petition is denied.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.