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U.S. Citizenship
and Immigration
Services

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Handwritten initials 'DQ' and a date stamp 'MAR 15 2005'

FILE: WAC 04 036 52216 Office: CALIFORNIA 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded to the director to determine whether the beneficiary is qualified to perform the proffered position.

The petitioner provides health care services and operates assisted living facilities. It seeks to employ the beneficiary as a director of rehabilitation services (rehabilitation manager). The petitioner, 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 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 petitioner is seeking the beneficiary's services as a director of rehabilitation services (rehabilitation manager). 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 this evidence, the beneficiary would be the primary point of contact for patient's rehabilitation and therapy, and will direct and coordinate nurses, physicians, nurses' aides, physical therapists, and recreational administrators to ensure patients recover and rehabilitate quickly. Upon admission of patients, the beneficiary will assess their physical, occupational, and speech therapy requirements; in conjunction with the physician, the beneficiary will direct the creation of patients' rehabilitation plans which cover the patients' schedule and need for physical therapy, recreational activities, family and social visits, and other activities which contribute to the rehabilitative plan; ensures insurance covers the rehabilitative plan, and that the rehabilitative plan is in the patients' file and is followed; reviews the rehabilitative plan for effectiveness, and makes changes as required; regularly communicates with the family members of patients; investigates the availability of outside programs which may assist in the patient's rehabilitation and recovery; serve as a supervisor and director of junior rehabilitation team members; assist in scheduling, staffing, supervising, and reviewing the activities of the patient's care team; assist with forecasted scheduling and hiring, marketing and advertisement, and compliance with regulation; and attend management team meetings. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in physical therapy.

The director stated that the petitioner submitted a job description worthy of a rehabilitation manager in an effort to establish that a baccalaureate degree is normally required. The director stated that a true rehabilitation manager position is a specialty occupation, and that the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. The director referenced the court's decision in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), and stated that the critical element is 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, the director stated, 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. The director referenced another case to state that the mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does

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.

not establish eligibility. Citing to the *Adjudicators Field Manual*, the director stated that CIS is authorized to inquire about an employer's legitimate need for a specialty occupation worker, even if CIS has determined that the proffered position is a specialty occupation. The director concluded that the petitioner did not explain, or provide adequate evidence, to justify the services of a full-time rehabilitation manager. The director found the submitted job postings unpersuasive in establishing that the proffered position is a specialty occupation.

On appeal, counsel states that although the director conceded that the proffered position is a specialty occupation, a rehabilitation manager, the director found that the petitioner did not require the services of a rehabilitation manager. Counsel contends that the petitioner did not have an opportunity to respond to the director's concern. Counsel asserts that due to the petitioner's expansion plans, it requires the services of a director of rehabilitation services (rehabilitation manager). Counsel describes the staff that the beneficiary will direct and supervise. Counsel states that the beneficiary will coordinate the activities of physical therapists, that hold bachelor's degrees in physical therapy, and are brought in on an as needed basis to provide services, and that the physical therapy assistants assist these professionals. According to counsel, the beneficiary holds a previously approved H-1B petition based on the same job with the petitioner.

Upon review of the record, the petitioner has established that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) requires that the petitioner establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position. In determining the duties and educational requirements of particular occupations, the AAO routinely refers to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). Some of the beneficiary's duties are performed by a physical therapist as described in the *Handbook*. The *Handbook* indicates that physical therapists examine patients' medical histories and then test and measure the patients' strength, range of motion, balance and coordination, and posture. They then develop treatment plans for patients, and physical therapist assistants, under the direction and supervision of a physical therapist, and may be involved in implementing treatment plans with patients. As treatment continues, physical therapists document the patient's progress, conduct periodic examinations, and modify treatments when necessary. Physical therapists often consult and practice with a variety of other professionals, such as physicians, dentists, nurses, and occupational therapists.

As described by the petitioner, the beneficiary will assess the physical, occupational, and speech therapy requirements of patients, and in conjunction with the physician, the beneficiary will direct the creation of patients' rehabilitation plans which cover the patients' schedule and need for physical therapy; review the rehabilitative plan for effectiveness, making changes as required; and supervise and direct junior rehabilitation team members such as licensed physical therapists and physical therapy assistants. These duties coincide with the *Handbook's* description of a physical therapist.

The *Handbook* reports that, after graduating from an accredited physical therapist educational program, all states require physical therapists to pass a licensure exam before they can practice. Consequently, the

proffered position qualifies as a specialty occupation, requiring a baccalaureate degree in physical therapy and licensure.

As related in the discussion above, the petitioner has established that the proffered position is a specialty occupation.

There is insufficient evidence in the record to determine whether the beneficiary is qualified to perform the proffered position. The *Handbook* indicates that all states require physical therapists to pass a licensure exam before they can practice, and graduate from a physical therapy educational program. Included in the record is a copy of the beneficiary's bachelor's degree in physical therapy granted by the Fatima Medical Science Foundation, Inc., Philippine Islands, which Josef Silny & Associates, Inc., a credentials evaluation service, determined to be the equivalent to a U.S. degree of bachelor of science in physical therapy awarded by a regionally accredited institution of higher education in the United States. However, no evidence establishes that the beneficiary possess proper licensure to practice as a physical therapist. Consequently, the director's decision will be withdrawn and this matter shall be remanded to the director who shall determine whether the beneficiary is qualified to perform the duties of the proffered position. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of the proffered position, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requires for eligibility.

Counsel asserts that CIS has already determined that the beneficiary is qualified for the proffered position since CIS has approved another, similar petition filed by the petitioner on behalf of the beneficiary in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the document submitted by counsel is not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 24, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.