U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS. 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 02 080 51700 Office: CALIFORNIA SERVICE CENTER Date: JAN 06 2004

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)

ON 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 which 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 Citizenship and Immigration Services (CIS) 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

JAN0604_D2101

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

The petitioner operates a residential care facility providing rehabilitative services for non-ambulatory patients. The office has nine employees and a gross annual income of $463,872. The petitioner seeks to employ the beneficiary as a rehabilitation and recreation director. The director determined that the proffered position did not qualify as a specialty occupation.

On appeal, counsel states that the offered position qualifies as a specialty occupation and submits a copy of a classified advertisement for the position. Specifically, counsel asserts that: a baccalaureate or higher degree is normally the minimum requirement for entry into the position; and the petitioner normally requires a degree or its equivalent for the position.

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), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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.

When determining whether a particular job qualifies as a specialty occupation, the AAO considers the specific duties of the offered position, combined with the nature of the petitioning entity's business operations. The duties of the proffered position were detailed as follows, with the filing of the I-129 petition:

> [The beneficiary] is being offered the position of Rehabilitation and Recreation Director. [The petitioner] explains [the beneficiary's] position as follows:
>
> [He will utilize] his academic skills in human anatomy and physiology. He will be responsible in keeping the physical fitness of the elderly people in the facility. He will also train the staff in dealing with the daily physical challenges they encounter in caring for the elderly patients.
>
> The focus of the job in rehabilitation is on the residents who have suffered stroke, suffers from rheumatoid arthritis, Parkinson's disease, and muscular dystrophy. The rehabilitation and recreation director is also responsible for designing and implementing recreational programs which help residents afflicted with dementia, Alzheimer's disease, or other mental disability to enable them to participate in programs like table tennis, aquatic rehabilitation, aerobic

> exercises, and community outreach activities. It is also important to coordinate with medical providers, social workers, and family members so that the treatment becomes more productive.

Subsequent to the filing of the I-129 petition, the director requested additional evidence from the petitioner. Specifically, the director asked that the petitioner provide: a detailed description of the work to be performed; specific job duties; a statement as to the level of responsibility for the beneficiary; a list of the types of employees the beneficiary would supervise; the minimum education, training and experience necessary to perform the job; evidence that the position satisfies one of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A); evidence that the petitioner and its competitors normally require a degree for the position; evidence that the petitioner's competitors normally require a degree for closely related positions; employment histories including names and dates of employment of employees with degrees who previously held the offered position; and copies of the petitioner's present and past job announcements/advertisements for the position.

In response to that request, the petitioner provided a more detailed job description:

> Led by a physiatrist (a medical doctor specializing in Physical Medicine and Rehabilitation) or licensed physical therapist who oversees and directs the treatment plan, St. Peter's Guest Home rehabilitation team includes individuals with bachelor's degree[s] in physical therapy, occupational therapy, speech/language pathology, and psychology or social work. Although 24-hour nursing services are not required, a rehabilitation nurse is on duty to provide medical management when needed.
>
> These professionals work with the most important team members - the patient and family - to develop a physical rehabilitation program that will best meet the individual needs and goals of the patient.
>
> In the program, patients participate in a minimum of three hours of therapy per day, three days a week. Each patient's schedule is individualized to their [sic] own therapeutic needs. The patient will work on reaching goals set in areas such as mobility, self-care, psycho-social adjustment and independent living. The "team" meets regularly to review progress and ensure that optimal advancement is made. Sometimes goals or the treatment plan may need adjustment to facilitate a successful outcome.

. . . .

The Rehabilitation and Recreation Director will be supervising other employees who have bachelor's degrees in Physical Therapy, Nursing, and Psychology or Social Work. This team will ensure compliance with programs designed by licensed health care professionals for afflictions and conditions and rehabilitation and recreation programs such as:

- Neurologic disorders including stroke, traumatic brain injury, spinal cord injury, Parkinson's Disease, Multiple Sclerosis, and balance disorders[;]

- Orthopedic Disorders including sprains/strains of muscles and joints, back/neck pain, post surgical conditions, total joint replacements, golf/tennis elbow, fractures, temporomandibular joint (TMJ) disorders, and tension headaches[;]

- Pool therapy in a heated, indoors setting[;]

- Lymphedema with manual edema reduction and fitting for custom compression garments[;]

- Gait training[;]

- Wound care[;]

- A Maintenance Program for progressing from active therapy to a setting where the patient can continue to exercise in a supervised setting[;]

- Hand therapy under direction of a Certified Hand Therapist[;]

- Orthopedic Disorders, particularly of the arm and hand. This includes sprains/strains of muscles and joints, fractures, burns, rheumatoid and osteoarthritis, and traumatic crush or laceration injuries[;]

- Custom and pre-fabricated splints for the arms and hands[;]

- Conservative and post-surgical therapy for Carpal Tunnel Syndrome and other nerve related problems[;]

- Driving evaluation and retraining[;]
- Cognitive training[;]
- Visual/Perceptual training[;]
- Self-care retraining[; and]
- Adaptive equipment to increase independence[.]

Focus on helping geriatric individuals achieve independence and the fullest participation in all facets of their lives through customized treatment programs. The treatment helps them to improve their abilities, or adapt to any limitations.

Supervise treatment programs which will help people to improve use of the arms and hands and their abilities to carry out the activities of daily living. Perform evaluations of home and work environments with necessary adaptations or equipment. Train patients in home exercises as well as the use of equipment and "gadgets" to increase independence and safety. Family members receive instruction in safe and effective methods of caring for their loved ones. Work with the physician, patient, and family to ensure that the treatment plan is consistent with the goals and potential of each patient.

Analyze physical rehabilitation prescription from doctor, licensed physical therapist, dentist, chiropractor, podiatrist, physician assistant, or advanced nurse practitioner. Following admission to the facility, the rehabilitation and recreation director will perform an in depth evaluation and based on these findings, obtain the services of a licensed physical therapist and consult the physician recommendations. Discuss with the patient and family members the designed specialized treatment program to help assist in recovery.

Based on programs designed by licensed physical therapist, implement treatment plans of residents of adult and geriatric populations. Specialize in maintaining designed programs for those conditions that cause loss of mobility, pain, and decreased function. This can be a disease process, such as Arthritis or a Stroke, or can be the result of a

> surgery or accident. Help improve their mobility skills and independence and regain independence. Many of these conditions will continue to improve with the home's rehabilitation and recreation programs.
>
> In summary, this position assists in the provision of therapy under the supervision of the Physical Therapist who shall be responsible for the extent, kind, and quality of the services provided through a continuum of care. This work is performed according to the licensed physical therapist's licensure/certification, Code of Ethics, Federal/State regulations, JCAHO/UMQC and Care Center policies and procedures.
>
> This position requires a bachelor's degree in Physical Therapy from an accredited school for Physical Therapy or a combination of training and experience equivalent to that obtained from the school. Knowledge of patient focused care delivery preferred. Must have a variety of problem solving skills. Excellent communication skills with internal and external customers. Excellent interpersonal skills. Must be able to demonstrate position-required behaviors in fulfillment of the organization's mission.

In denying the I-129 petition, the director noted that the duties of the proffered position would be performed under the supervision of a Physical Therapist who would be responsible for the extent, kind, and quality of services provided. As such, the director determined that the offered position was that of a physical therapist assistant, and not a specialty occupation.

On appeal, counsel states that the offered position qualifies as a specialty occupation and submits a copy of a classified advertisement. Specifically, counsel asserts that: a baccalaureate or higher degree is normally the minimum requirement for entry into the position; and the petitioner normally requires a degree or its equivalent for the position.

The duties of the proffered position fall within those of a physical therapy assistant. In the *Occupational Outlook Handbook*, 2002-03 edition,(*Handbook*) at 322, the Department Of Labor describes the duties of a physical therapist assistant:

> Physical therapist assistants and aides perform components of physical therapy procedures and related tasks selected by a supervising physical therapist. These workers assist physical therapists in providing services that help improve mobility, relieve pain, and

> prevent or limit permanent physical disabilities of patients suffering from injuries or disease. Patients include accident victims and individuals with disabling conditions, such as low back pain, arthritis, heart disease, fractures, head injuries, and cerebral palsy.
>
> *Physical therapist assistants* perform a variety of tasks. Components of treatment procedures performed by these workers, under the direction and supervision of physical therapists, involve exercises, massages, electrical stimulation, paraffin baths, hot and cold packs, traction, and ultrasound. Physical therapist assistants record the patient's responses to treatment and report to the physical therapist the outcome of each treatment.

It is the licensed physical therapist who determines patients' abilities to be independent and reintegrated into the community or workplace after illness or injury, and then develops a treatment plan describing a treatment strategy, its purpose, and anticipated outcome. *Id.* at 259. The physical therapist assistant, under the direction of the physical therapist, is then involved in the implementation of the treatment plan. In this instance, the beneficiary would do precisely that. He would assist in the provision of therapy as determined by the physical therapist. The duties of the offered position do not require a minimum of a bachelor's degree for entry into the position. Physical therapist assistants typically earn an associate's degree from an accredited physical therapist assistant program, and state licensure is not uniformly required to practice. *Id.* at 323. Accordingly, the petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has also failed to establish any of the remaining regulatory criteria for classification of the offered position as a specialty occupation:

First, the petitioner presented no evidence to establish that a degree requirement is common to the industry in parallel positions among similar organizations, or, alternatively, that the position offered is so complex or unique that it can be performed only by an individual with a degree. The petitioner states that the beneficiary would supervise individuals holding degrees in the following disciplines: physical therapy; nursing; and psychology or social work. No evidence was presented, however, to establish what employees the beneficiary would actually supervise or their educational backgrounds. It is not sufficient to merely go on the record and state that unnamed professionals will be supervised. Evidence must be presented that is sufficient to identify the individuals to be supervised, and establish their educational credentials if the petitioner is to sustain its burden of proof in this regard. *Matter of Treasure Craft of California,* 14 I&N Dec.

190 (Reg. Comm. 1972).

Second, the nature of the specific duties is not so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Indeed, the duties appear to be common to the industry.

Finally, the petitioner has not established that it normally requires a degree or its equivalent for the proffered position. The petitioner submitted a job advertisement that appears to have run in a newspaper in April, 2002. The advertisement does not appear, however, to be for the petitioner, but for [redacted] located at a different address in Sacramento, CA. Even if the advertisement pertained to the petitioner, and involved the offered position, it still does not establish that the petitioner has required a degree of those previously holding the position, or, others currently holding the offered or similar position. If that were the case, the position would still not qualify as a specialty occupation as the duties of the position do not require the practical application of a body of highly specialized knowledge.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.