

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 038 50201 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2005

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:

[REDACTED]

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 Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center 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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a company that provides physical therapy services that seeks to employ the beneficiary as a physical therapist license applicant. The petitioner 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.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 requests for additional evidence; (3) the petitioner's responses to the director's requests; (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 physical therapist license applicant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 4, 2003 letter in support of the petition; and the petitioner's responses to the director's requests for evidence. According to this evidence, the beneficiary would perform duties that entail: conducting in-depth evaluations of residents or patients referred for therapy; developing and establishing short and long-term treatment goals and individual or group treatment programs; administering physical therapy treatments designed to increase strength, endurance, coordination and range of motion; using physical therapy modalities such as traction, massage, electrical stimulation, ultrasound and hydrotherapy; treating health problems resulting from injury or disease; assessing joint motion, muscle strength and endurance and performance of daily activities to facilitate or restore physical function, relieve pain, and maximize the capabilities of patients with physical disabilities, disorders, or injuries; writing initial report of results on evaluation of patient's physical condition; preparing written treatment plan; maintaining record of patients treated including daily treatment notes, evaluation of patients' progress and discharge planning notes and summaries; and preparing year-end summaries on patients treated. The petitioner stated that a qualified candidate would possess a bachelor's degree in physical therapy or a related field.

The director found that the proffered position was not a specialty occupation because the job is not a physical therapist position; it is a physical therapy aide or assistant position. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the duties of the position are far more complex than a physical therapist assistant, and are expressly those of a physical therapist, which require an advanced theoretical and practical application of a body of highly specialized knowledge.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the director that the position is a physical therapist assistant or aide. The duties of the proffered position are very similar to those described in the *Handbook* for a physical therapist, a position that requires a degree in physical therapy. While the beneficiary would be supervised by a physical therapist, that fact does not change the position from a physical therapist license applicant to a physical therapist assistant. The duties are clearly of a level and complexity to be considered a specialty occupation. The director's remarks on this issue are withdrawn.

The petition still may not be approved, however. Pursuant to Section 2639 of the California Business and Professions Code, a physical therapy license applicant who "has filed a complete application for licensure *with the board* for the first time may, following receipt of a letter of authorization to perform as a 'physical therapist license applicant,' perform as a physical therapist under the direct and immediate supervision of a physical therapist licensed in this state."¹ (Emphasis added). The record contains a letter from the Division of Professional Licensing Services of the State of New York, indicating that the beneficiary had applied for a license in that state. There is no evidence that the beneficiary had applied for licensure in the State of California prior to the date the petition was filed.

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 a physical therapist license applicant in the State of California, 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 requirements for eligibility. 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 March 9, 2004 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.

¹ www.leginfo.ca.gov, accessed July 28, 2005.