U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

FILE: WAC 03 113 50211 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 3 2005

IN RE: Petitioner:
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]

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 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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a home health agency that seeks to employ the beneficiary as a rehabilitation specialist. The petitioner, therefore, seeks 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 basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation, and that the beneficiary does not qualify to perform the duties of the proposed position.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's two requests for additional evidence (RFE); (3) the petitioner's RFE responses; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner's letter of support set forth the following description of the duties of the proposed position:

> In general, the specialist will use [the] rehabilitation program to help people with illnesses, disabilities, and other conditions [to] develop and use their available capacity in ways that enhance their health, functional abilities, independence, and quality of life, in cooperation with physicians, nurses, psychologists, social workers, and physical and occupational therapists. Rehabilitation [s]pecialists use education and training to improve general health and well being. Because the work involves rehabilitative services, knowledge in human anatomy, physiology, medical and psychiatric terminology, human development, characteristics of illness and disabilities, and the concept[s] of inclusion and normalization are essential. Therefore, a bachelor's degree in a health major or human service field is the usual requirement for entry into this profession.
>
> [The] [r]ehabilitation specialist uses [the] rehabilitation program which includes education, training, and activities participation, to help people. Job duties include the following:
>
> Provides individual or group instruction for daily living, communication, orientation, and mobility, and operation of medical equipment and machinery. Organizes assessment and training activities for clients individually or in groups on daily living, communication, orientation and mobility, and other independent living skills. Conducts assessments of physical, mental, emotional, and social functioning to determine the individual's needs, interest[s], and abilities. Provides oral and written reports of client information in multi-disciplinary staff meetings to develop individual program plans for clients. Applies remedial instructional techniques to accommodate the unique physical limitations and learning abilities of clients with disabilities. Records client performance through behavioral observations and accurate recording of standardized performance measures such as work quantity and quality, daily living skill inventories, behavioral rating scales, skill proficiency in a planned program of skill proficiency. Reviews performance data to

> make recommendations or to suggest changes in the individual rehabilitation program plans of clients. Provides feedback on performance to assist clients to achieve independent living goals. Applies principles of human behavior and other intervention methods to implement instructional plans.

In response to one of the director's two requests for evidence, the petitioner broke down the percentage of time that the beneficiary will spend performing the various tasks as follows:

> Approximately 10 percent of the time the Rehabilitation Specialist will spend on collecting and analyzing data to define individual's needs, interest[s], and abilities [sic]. Another 50 percent of the time the Rehabilitation Specialist will spend on developing, coordinating, and implementing individual plans, instructional programs[,] and supports which assist persons with illness or disabilities to live, work, and participate in the community[.] [sic] Another 20 percent of the time the Rehabilitation Specialist will spend on reviewing and monitoring individual plans for clients and assessing, evaluating, and summarizing data and documentation for individual goal development [sic]. Another 20 percent of the time the Rehabilitation Specialist will spend on drafting reports, recommending equipment, materials[,] and supplies to meet individual goals, and coordinating the development and monitoring of behavior management and crisis intervention plans per individual's goals and time frames [sic]. . . .

The director denied the petition, likening the duties of the proposed position to those of social and human health assistants, positions that do not normally qualify for classification as specialty occupations.

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts that the duties of the proposed position are analogous to those of medical and health services managers.

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.

In determining whether a position qualifies as a specialty occupation, Citizenship and Immigration Services (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 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In the first RFE, the director likened the duties of the position to those of an occupational therapist, a conclusion with which the petitioner disagreed. In the denial, the director likened the duties of the proposed position to those of social and human health assistants. On appeal, counsel states that the duties of the position in fact mirror those of medical and health services managers. The duties of medical and health services managers are set forth in the *Handbook* as follows:

> Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. The occupation, medical and health services manager, encompasses all individuals who plan, direct, coordinate, and supervise the delivery of healthcare. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.
>
> The structure and financing of healthcare is changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. They will be called upon to improve efficiency in healthcare facilities and the quality of the healthcare provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of interrelated services—for example, those ranging from inpatient care to outpatient followup care.
>
> Large facilities usually have several assistant administrators to aid the top administrator and to handle daily decisions. Assistant administrators may direct activities in clinical areas such as nursing, surgery, therapy, medical records, or health information. (Managers in nonhealth areas, such as administrative services, computer and information systems, finance, and human resources, are not included in this statement. For information about them, see the statements on management occupations elsewhere in the *Handbook.*)
>
> In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finance, facility operations, and admissions, and have a larger role in resident care.

> Clinical managers have more specific responsibilities than do generalists, and have training or experience in a specific clinical area. For example, directors of physical therapy are experienced physical therapists, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. Clinical managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work; develop reports and budgets; and coordinate activities with other managers.

In support of the proposition that the duties of the proposed position mirror those of medical and health services managers, counsel asserts that "in the mind of the petitioner, the beneficiary's impact is to be agency-wide rather than limited to only a few patients." Counsel states the following in the appellate brief:

> While the beneficiary will spend a portion of his time communicating with patients to identify their needs, it will be minimal, comprising only a small portion of his duties. The percentage of time he will spend engaged in analyzing a patient's needs is only 10% of his total responsibilities. He will spend another 20% of his time reviewing and monitoring developed plans for patients. The balance of his time will be spent monitoring and evaluating programs, drafting reports on the efficacy of these programs, and recommending equipment and supplies to ensure they meet the needs of the petitioner's patients.

However, this assertion conflicts with the petitioner's earlier statements in the record regarding the percentage of time to be spent performing the duties of the proposed position. In the first RFE response, the petitioner stated that in addition to the thirty percent of the time the beneficiary would spend performing the duties accounted for by counsel above, an additional fifty percent of the beneficiary's time would be spent developing and coordinating individual plans and instructional programs. The duties cited by counsel on appeal as comprising "the balance" of the beneficiary's time (approximately 70%) are listed as encompassing only twenty percent in the petitioner's response to the director's RFE and therefore conflicts with evidence submitted previously.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification within the requested category. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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). The AAO will consider the job duties submitted to the director.

The AAO has conducted a *de novo* review of the entire record and finds that the duties of the proposed position, as described in the initial filing and elaborated upon in the RFE responses, resemble neither those of a social and human health assistant, as found by the director, nor those of a medical and health services manager, as asserted by counsel on appeal. Rather, the AAO finds that the duties of the proposed position in fact closely resemble those of an occupational therapist.

The proposed position lacks critical characteristics of a medical and health services manager position. While counsel correctly points out the *Handbook's* statement that "a bachelor's degree is adequate for some entry-level positions in smaller facilities and at the departmental level within healthcare

organizations," the proposed position lacks other characteristics of such positions at smaller facilities. For example, while the *Handbook* does notes that a bachelor's degree (and not a master's degree) would be an acceptable degree for an entry-level position at a small facility, it also notes that "[i]n smaller facilities, top administrators handle more of the details of daily operations."

However, the petitioner specifically stated, in the first RFE response, that the beneficiary "will not supervise anyone." Thus, it does not appear as though he would "handle more of the details of daily operations" as contemplated by the *Handbook*.

Also, the AAO is not persuaded by the petitioner's attempt in the first RFE response to distinguish the duties of the proposed position from those of an occupational therapist. The petitioner was correct to point out that occupational therapists require licensure. However, the issue of licensure pertains to the qualifications of the beneficiary to perform the duties of the position, not to whether the position is a specialty occupation or not. The duties for the proposed position that were provided in the initial filing and RFE response, though worded slightly differently, are similar to those of occupational therapists, as discussed in the *Handbook*:

> Occupational therapists (OTs) help people improve their ability to perform tasks in their daily living and working environments. They work with individuals who have conditions that are mentally, physically, developmentally, or emotionally disabling. They also help them to develop, recover, or maintain daily living and work skills. Occupational therapists help clients not only to improve their basic motor functions and reasoning abilities, but also to compensate for permanent loss of function. Their goal is to help clients have independent, productive, and satisfying lives.
>
> Occupational therapists assist clients in performing activities of all types, ranging from using a computer to caring for daily needs such as dressing, cooking, and eating. Physical exercises may be used to increase strength and dexterity, while other activities may be chosen to improve visual acuity and the ability to discern patterns. For example, a client with short-term memory loss might be encouraged to make lists to aid recall, and a person with coordination problems might be assigned exercises to improve hand-eye coordination. Occupational therapists also use computer programs to help clients improve decisionmaking, abstract-reasoning, problem-solving, and perceptual skills, as well as memory, sequencing, and coordination—all of which are important for independent living.
>
> Therapists instruct those with permanent disabilities, such as spinal cord injuries, cerebral palsy, or muscular dystrophy, in the use of adaptive equipment, including wheelchairs, splints, and aids for eating and dressing. They also design or make special equipment needed at home or at work. Therapists develop computer-aided adaptive equipment and teach clients with severe limitations how to use that equipment in order to communicate better and control various aspects of their environment.

In that the duties of the proposed position appears closely aligned to those of occupational therapists, the AAO next turns to the *Handbook's* discussion of whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* reports the following educational requirements for those seeking employment as occupational therapists:

> Currently, a bachelor's degree in occupational therapy is the minimum requirement for entry into this field. Beginning in 2007, however, a master's degree or higher will be the minimum educational requirement. As a result, students in bachelor's-level programs should complete their coursework and fieldwork before 2007. All States, Puerto Rico, and the District of Columbia regulate the practice of occupational therapy. To obtain a license, applicants must graduate from an accredited educational program and pass a national certification examination.

As such, the position satisfies 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position. The AAO therefore agrees with the petitioner's contention that the proposed position qualifies for classification as a specialty occupation.

The petition may not be approved, however, as the beneficiary does not appear qualified to perform the services of the specialty occupation. The record does not reflect that the beneficiary is licensed as an occupational therapist. As the director has not addressed this issue, the decision will be withdrawn. The petition will be remanded for the director to enter a new decision. The director may afford the petitioner reasonable time to provide evidence relevant to the issue of the beneficiary's qualifications for the position, as well 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 rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's April 27, 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.