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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

A₂



DATE: **FEB 09 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition on June 9, 2009 and dismissed a subsequent motion November 19, 2009. Counsel for the petitioner subsequently filed an appeal on the director's June 9, 2009 decision on December 1, 2009. Despite the fact that counsel for the petitioner clearly requested "a motion to reopen and a motion to reconsider" by checking box F on the initial Notice of Appeal or Motion (Form I-290B), counsel claims on appeal that "a new filing fee is not required since we requested that the original submission be treated as an appeal in the event that the Service Center did not re-adjudicate the petition and approve it." Counsel further asserts that "it is understood that the California Service Center will treat this case strictly as an appeal and forward it onto the [AAO] in Washington, DC." The appeal will be rejected. The petition will be denied.

The petitioner is a residential mental health treatment provider and seeks to employ the beneficiary as a rehabilitation counselor. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On June 9, 2009, the director denied the petition, finding that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision dated June 9, 2009; (5) the petitioner's combined motion to reopen and reconsider; (6) the director's decision dated November 19, 2009 dismissing the petitioner's motion; and (7) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Title 8 C.F.R. § 103.2(a)(7)(i) requires that U.S. Citizenship and Immigration Services (USCIS) reject any petition or application filed with the incorrect filing fee. In this case, the petitioner filed an appeal on Form I-290B without including the required filing fee. Therefore, the appeal must be rejected as improperly filed.

The appeal must also be rejected as untimely filed. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a USCIS office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed, and accompanied by the correct fee. For calculating the date of filing, the appeal shall be regarded as properly filed on the date that it is so stamped by the service center or district office.

Counsel specifically states that the petitioner is appealing the director's decision dated June 9, 2009. It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal. According to the date stamp on the Form I-290B Notice of Appeal, it was received by USCIS on

December 1, 2009, nearly six months after the decision was issued. Accordingly, the appeal was untimely filed.

An untimely-filed appeal must meet specific requirements to be treated as a motion. The regulation at 8 C.F.R. § 103.5(a)(2) requires that a motion to reopen state the new facts to be provided in the reopened proceeding, supported by affidavits or other documentary evidence. Furthermore, 8 C.F.R. § 103.5(a)(3) requires that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy.

Review of the record indicates that the appeal does not meet either of these requirements. The petitioner does not provide any new facts to be considered in the reopened proceeding, nor does the petitioner provide affidavits or other documentary evidence. Furthermore, the petitioner neither states a clear reason for reconsideration nor provides any pertinent precedent decision to establish that the decision was based on an incorrect application of law or USCIS policy. For these reasons, even if the appeal were not being rejected for being filed without the required fee, the appeal would not be treated as a motion to reopen or reconsider.

As the appeal was improperly filed, it must be rejected. While the appeal must be rejected, the AAO will nevertheless discuss why the appeal would have been dismissed even if it were properly filed.

If the appeal were properly filed, the issue before the AAO would have been whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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

An occupation which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields 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 [(2)] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor 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.

In a letter of support dated March 23, 2009, the petitioner claimed that it "is the nation's largest not-for-profit provider of quality services for children and adults with psychological, behavioral, or neurological treatment needs." It claimed to require the services of the beneficiary as a rehabilitation coordinator and that her specific duties would be as follows:

- Perform duties as residential representative of client treatment teams including completing initial assessments, developing and implementing activities and programs, collecting data and facilitating client progress;
- Implement proactive behavior strategies as outlined in the "clients" treatment plans including reinforcement schedules and least restrictive interventions;
- Will implement treatment team procedures as directed by the Residence Director;
- Be responsible for acting as client advocate for designated clients; meeting weekly with clients to discuss and support progress, networking with team members and related parties;
- Provide effective supervision to clients at all time, with particular emphasis on safety and therapeutic boundaries;
- Take initiative to develop professional skills through participation in trainings, professional rounds, courses and other learning opportunities.

The petitioner concluded by stating that the required the incumbent to possess at least a bachelor's degree in psychology, counseling, or a related field, or its equivalent, and claimed that the beneficiary possessed the U.S. equivalent to a bachelor's degree in psychology.

In a September 22, 2009 RFE, the director requested additional information. Specifically, the director requested more detailed evidence demonstrating that the proffered position is a specialty occupation, in addition to evidence demonstrating that the beneficiary is qualified to perform the duties of a specialty occupation.

In response, counsel for the petitioner addressed the director's queries in a letter dated May 26, 2009. Counsel provided the following updated overview of the beneficiary's duties:

[The beneficiary] will work with individuals to maximize the independence and employability of residents of [the petitioner] who may be coping with personal, social, and vocational difficulties as a result of a birth [defect], illness, disease or accident. She will coordinate activities for residents of care and treatment facilities. Additional responsibilities will include implementing and assisting in individual therapeutic treatment programs; interacting as a part of a treatment team consisting of psychologists, teachers, and nurses; evaluating the progress of the residents; planning activities in line with treatment issues; and interpreting and reporting on the residents' behaviors.

Counsel also restated the list of duties included in the petitioner's initial letter of support.

In addition to a discussion of the beneficiary's duties, counsel also submitted a list of other rehabilitation counselors employed by the petitioner, along with a statement regarding the field of study in which they allegedly hold a degree. Counsel further clarified that there was no licensing requirement in the State of Arizona for the proffered position and submitted documentation in support of this contention. Finally, counsel submitted a number of job listings for positions it deemed parallel to the proffered position in similar organizations in support of the contention that a degree requirement was common in the petitioner's industry.

The director denied the petition and dismissed a subsequently filed motion, determining that the petitioner had failed to establish that the proffered position is a specialty occupation. The director found that, contrary to the assertions of the petitioner and counsel, the proffered position does not require a degree in a specific specialty.

On appeal, counsel contends that the director's findings were erroneous and argues that a bachelor's degree is the normal prerequisite for entry into the occupation. Counsel contends specifically that the proffered position is a "quasi-hybrid" between a rehabilitation counselor and a vocational counselor and claims that, according to the U.S. Department of Labor (DOL), it has an SVP rating of seven, thereby establishing it as a specialty occupation.

In reviewing the record, the AAO observes that 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry

into the particular position. Factors considered by the AAO when determining this criterion include whether DOL's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty.

To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO first turns to the 2010-2011 online edition of the *Handbook*. The director determined that the proffered position, titled "Rehabilitation Counselor" by the petitioner, was most akin to that of a social or human service assistant included in the *Handbook's* section entitled "Social and Human Service Assistants." According to the *Handbook*, this occupational category is described as follows:

Social and human service assistants help social workers, healthcare workers, and other professionals to provide services to people. Social and human service assistant is a generic term for workers with a wide array of job titles, including human service worker, case management aide, social work assistant, community support worker, mental health aide, community outreach worker, life skills counselor, social services aide, youth worker, psychological aide, client advocate, or gerontology aide. They usually work under the direction of workers from a variety of fields, such as nursing, psychiatry, psychology, or social work. The amount of responsibility and supervision they are given varies a great deal. Some have little direct supervision. For example, they may run a group home. Others work under close direction.

Social and human service assistants provide services to clients to help them improve their quality of life. They assess clients' needs, investigate their eligibility for benefits and services such as food stamps, Medicaid and welfare, and help clients obtain them. They also arrange for transportation, if necessary, and provide emotional support. They monitor and keep case records on clients and report progress to supervisors and case managers.

Social and human service assistants play a variety of roles in the community. For example, they may organize and lead group activities, assist clients in need of counseling or crisis intervention, or administer food banks or emergency fuel programs. In halfway houses, group homes, and government-supported housing programs, they assist adults who need supervision with personal hygiene and daily living tasks. They review clients' records, ensure that they take prescribed medication, talk with family members, and confer with medical personnel and other caregivers to provide insight into clients' needs. Assistants also give emotional support and help clients become involved in community recreation programs and other activities.

In psychiatric hospitals, rehabilitation programs, and outpatient clinics, social and human service assistants work with psychiatrists, psychologists, social workers, and others to help clients master everyday living skills, communicate more effectively,

and live well with others. They support the client's participation in a treatment plan, such as individual or group counseling or occupational therapy.

The work, while satisfying, can be emotionally draining. Understaffing and relatively low pay can add to the pressure.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Social and Human Service Assistants," <http://www.bls.gov/oco/ocos059.htm> (accessed January 31, 2012).

Counsel, however, contends on appeal that the proffered position is actually a "quasi-hybrid" of a rehabilitation counselor and vocational counselor, as set forth by the DOL's Standard Occupational Classification (SOC) system. According to SOC, rehabilitation and vocational counselors are included in the *Handbook's* section entitled "Counselors," which states in relevant part the following:

Counselors work in diverse community settings designed to provide a variety of counseling, rehabilitation, and support services. Their duties vary greatly, depending on their specialty, which is determined by the setting in which they work and the population they serve. Although the specific setting may have an implied scope of practice, counselors frequently are challenged with children, adolescents, adults, or families that have multiple issues, such as mental health disorders and addiction, disability and employment needs, school problems or career counseling needs, and trauma. Counselors must recognize these issues in order to provide their clients with appropriate counseling and support.

* * *

Vocational counselors, also called *employment counselors* or *career counselors*, usually provide career counseling outside the school setting. Their chief focus is helping individuals with career decisions. Vocational counselors explore and evaluate the client's education, training, work history, interests, skills, and personality traits. They may arrange for aptitude and achievement tests to help the client make career decisions. They also work with individuals to develop their job-search skills and assist clients in locating and applying for jobs. In addition, career counselors provide support to people experiencing job loss, job stress, or other career transition issues.

Rehabilitation counselors help people deal with the personal, social, and vocational effects of disabilities. They counsel people with both physical and emotional disabilities resulting from birth defects, illness or disease, accidents, or other causes. They evaluate the strengths and limitations of individuals, provide personal and vocational counseling, offer case management support, and arrange for medical care, vocational training, and job placement. Rehabilitation counselors interview both individuals with disabilities and their families, evaluate school and medical reports,

and confer with physicians, psychologists, employers, and physical, occupational, and speech therapists to determine the capabilities and skills of the individual. They develop individual rehabilitation programs by conferring with the client. These programs often include training to help individuals develop job skills, become employed, and provide opportunities for community integration. Rehabilitation counselors are trained to recognize and to help lessen environmental and attitudinal barriers. Such help may include providing education, and advocacy services to individuals, families, employers, and others in the community. Rehabilitation counselors work toward increasing the person's capacity to live independently by facilitating and coordinating with other service providers.

U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., "Counselors," <http://www.bls.gov/oco/ocos067.htm> (accessed January 31, 2012).

Upon review, while the AAO notes that some of the duties of the proffered position are described in the *Handbook's* section pertaining to counselors, the AAO ultimately concurs with the director's finding that the proffered position is most akin to that of a social and human service assistant. Specifically, it is noted that the proffered position requires the incumbent to perform a variety of duties intended to help improve the quality of life of the petitioner's clients, such as implementing treatment procedures as directed by the petitioner's residence director, supervising clients and advocating on behalf of clients, and implementing proactive behavior strategies as outlined in client treatment plans.

It is noted that, despite the petitioner's assertions that the beneficiary will act as a rehabilitation counselor, there is no claim at any time that the beneficiary will actually "counsel" individuals seeking treatment at the petitioner's facility. The description of duties for a rehabilitation counselor set forth in the section of the *Handbook* quoted above indicate such counselors proactively counsel clients by evaluating their strengths and limitations and developing individual rehabilitation programs. The beneficiary, however, will not engage in this step of the process, but rather will assist in implementing procedures and programs developed by others. Consequently, the AAO concludes that the proffered position is akin to that of a social and human service assistant.¹

¹ The petitioner contended in response to the RFE that there is no licensing requirement for the proffered position, because a person practicing counseling and who is employed by an agency licensed by the department of economic security is exempt from the state licensing requirement. It is unclear from the record, however, whether the petitioner's licenses, i.e., licenses to conduct a child welfare agency and a satellite home, would satisfy the requirements of the licensing exemption cited by counsel. In other words, it is unclear whether the statute cited meant only to exclude those employed by agencies licensed to conduct social work, counseling, and case management. As such, the evidence in the record fails to establish that the beneficiary, if actually engaged in counseling as contended by the petitioner, would be exempt from the licensing requirement based on licenses issued by the department of economic security.

The *Handbook's* section pertaining to the educational requirements for social and human service assistants states:

A high school diploma is the minimum education requirement, but employers often seek individuals with relevant work experience or education beyond high school.

Education and training. Many employers prefer to hire people with some education beyond high school. Certificates or associate degrees in subjects such as human services, gerontology or one of the social or behavioral sciences meet many employers' requirements. Some jobs may require a bachelor's or master's degree in human services or a related field, such as counseling, rehabilitation, or social work.

Human services degree programs have a core curriculum that trains students to observe patients and record information, conduct patient interviews, implement treatment plans, employ problem-solving techniques, handle crisis intervention matters, and use proper case management and referral procedures. Many programs utilize field work to give students hands-on experience. General education courses in liberal arts, sciences, and the humanities also are part of most curriculums. Most programs also offer specialized courses related to addictions, gerontology, child protection, and other areas. Many degree programs require completion of a supervised internship.

U.S. Dept. of Labor, Bureau of Labor Statistics *Occupational Outlook Handbook*, 2010-11 ed., "Social and Human Service Assistants," <http://www.bls.gov/oco/ocos059.htm> (accessed January 31, 2012).

The *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the position. While formal education is available through degree programs, and while some employers may actually require a bachelor's or master's degree in one of the behavioral sciences, the *Handbook* indicates that candidates for these positions are typically required to possess only a high school diploma for entry into the occupational category. Consequently, the *Handbook* fails to demonstrate that a baccalaureate degree in a specific specialty or its equivalent is normally the minimum entry requirement for a career as a social and human service assistant.

The petitioner has therefore failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of rehabilitation counselor as described in the record of proceeding. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the

petitioner. Factors often considered by USCIS when determining the industry standard include: 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 petitioner submitted four job postings from hiring organizations which it claims support the contention that a degree in a specific specialty is required for parallel positions within similar organizations in the petitioner's industry. However, these postings are not persuasive evidence. First, the postings are for the position of "rehabilitation specialist," and not "rehabilitation counselor" or "vocational counselor," as the proffered position is identified by the petitioner, or social and human service assistant, as the position is classified based on the duties as described by the petitioner. Moreover, there is insufficient information contained in the postings to determine the nature of the hiring organizations and whether they are similar in size and scope to the petitioner. Finally, while it is noted that all postings list the skills/requirements for entry into the position, and that all list a bachelor's degree in a behavioral health related field plus two years of experience as one of the options, they also are willing to hire individuals with no degree. Specifically, these organizations indicate that they will accept certification as a Certified Psychiatric Rehabilitation Practitioner (CPRP), an associate's degree plus experience, or even a bachelor's degree in a non-behavioral health field plus experience health for entry into the advertised positions. Therefore, despite outlining a variety of educational requirements, none the postings require a degree in a specific specialty, and these postings fail to demonstrate that a common educational requirement exists within the petitioner's industry in parallel positions in similar organizations.

In the director's RFE dated May 2, 2009, the petitioner was also asked to submit letters from firms or individuals in the industry attesting that firms in the petitioner's industry routinely employ and recruit only degreed individuals with a bachelor's degree in a specific specialty for the occupation discussed herein. The petitioner failed to submit such evidence, but submits three letters from firms in the industry on appeal that respond to the requirements of this criterion.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of

the evidence submitted on appeal. For this reason and the reasons set forth above, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner has thus failed to establish that it has satisfied either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner does not discuss its staffing levels or organizational structure, nor does it claim to have previously employed specialty degreed individuals in the proffered position. Absent evidence responding to this criterion, the petitioner cannot demonstrate eligibility under this criterion.

Additionally, despite claiming that it requires at least a bachelor's degree in psychology or a related field, 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. Despite counsel's contention on appeal that the director misapplied the analysis in *Defensor* to the facts of this case, it must be noted that 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. To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed 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 already discussed, the duties of the proffered position are performed by an occupational category that does not require a baccalaureate degree in a specific specialty or its equivalent.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The duties of the position described encompass routine duties associated with social and/or human services. While the petitioner claims that the duties of the proffered position are sufficiently complex, the

record does not contain explanations or clarifying data sufficient to elevate the position to one that is so specialized and complex that the knowledge to perform these additional tasks is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As discussed previously, although the petitioner deems the position as that of a counselor, the duties as stated in the record do not encompass this critical task.

The AAO finds, therefore, that to the extent that they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty. As the petitioner has not established that the proffered position's specific duties require the application of specialized and complex knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the record of proceeding, the AAO determines that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, even if the appeal were properly filed, the AAO would not disturb the director's denial of the petition.

Beyond the decision of the director, if the appeal were properly filed, the petition also cannot be approved because the Labor Condition Application (LCA) submitted in support of the petition does not correspond to the petition.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. See 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .

In this case, the submitted LCA was certified for occupational code 195. It appears therefore that the LCA was certified for a social services aide, Dictionary of Occupation Titles (DOT) code 195.367.034, which corresponds to SOC code 21-1093.00, social and human services assistants. If the proffered position were truly a rehabilitation counselor position, SOC code 21-1015.00, the LCA should have been certified under the 045 occupational code, as SOC code 21-1015.00 best corresponds to DOT code 045.107.042, vocational rehabilitation counselor. Therefore, even if the proffered position were a rehabilitation counselor as claimed by counsel, the LCA would be found to

have been certified for the wrong occupation and the petition would have been denied for this reason.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is rejected. The petition is denied.