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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B1

[redacted]

FILE: WAC 08 146 53528 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 2009

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:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it operates a directed care facility, that it was established in 2004, that it employs six persons, and that its gross and net annual income varies. The petitioner seeks to employ the beneficiary as a wellness coordinator. Accordingly, 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).

On September 2, 2008, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the petitioner established that a bachelor's degree is normally the minimum requirement for a wellness coordinator and is common in the industry. The petitioner also points out that the adjudicating officer failed to realize that owns two assisted living facilities, one being the petitioner, and that it has the capacity to assist 15 residential care patients. The petitioner indicated its agreement that a residential care facility with five patrons would not necessarily have a wellness coordinator but as the petitioner along with the second assisted living facility owned by [redacted] had the capacity for 15 residents, it was necessary to have a wellness coordinator. The petitioner contends that the duties described constitute a specialty occupation.

Preliminarily, the AAO notes that the entity filing the petition is identified as [redacted] located at [redacted] in Tucson, Arizona. Information provided in response to the director's request for further evidence (RFE) included the organizational chart of [redacted], and listed nine employees. The Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation, also submitted in response to the director's RFE, identified the taxpayer as [redacted] and listed the address as [redacted] in Tucson, Arizona. The record in response to the director's RFE included a license issued to [redacted] located at [redacted] for the care of 10 residents and a license issued to [redacted] located at [redacted] for the care of five residents.[1] The appeal is filed by [redacted]. The AAO acknowledges that the petitioner filed the Form I-129 as an entity doing business; however, the petitioner on the Form I-129 identified the beneficiary's work location as at [redacted] and did not include other locations. The failure of the petitioner to correctly identify itself as [redacted]. and the failure to indicate that the beneficiary would be working at two locations precludes consideration of the second facility as part of this petition. The AAO finds that adding information about a second facility and referencing the correct corporate entity without further explanation and only in response to the director's RFE, are material changes to the petition. A petitioner may not make material

[1] The license indicates it is a "duplicate" license and indicates the license was issued April 1, 2008.

changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO will proceed with its decision identifying the petitioner in this matter as [redacted] doing business as [redacted] located at [redacted]

The record includes: (1) the Form I-129 and supporting documentation filed April 14, 2008; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) 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.

The AAO observes that for purposes of the H-1B adjudication, the issue of *bona fide* employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is determined to be a specialty occupation. Therefore, the AAO will specifically review whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

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 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] requires 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 [2] 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 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, 8 U.S.C. § 1184(i)(1), 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), 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 professions. These occupations all require a baccalaureate degree in the

specific specialty as a minimum for entry into the occupation and fairly represent the types of professions 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

In a letter appended to the Form I-129, the petitioner stated that it provides "quality long term residential care for the elderly and individuals who may need significant levels of supervision" and that it "currently operates an assisted living facility in Tucson, Arizona." The petitioner expressed its desire to have a wellness coordinator to "oversee the process of developing, implementing, and evaluating the progress of the service plans for [its] residents." The petitioner indicated the responsibilities of the wellness coordinator would include but not be limited to:

- Develop medically-approved and holistic service plans for residents based on current practices in the medical industry;
- Develop assessment procedures for residents being admitted into the facility;
- Develop systems for tracking our service plans for each resident;
- Evaluate the progress of service plans for our residents and implement changes to improve delivery of services as necessary;
- Coordinate with other staff personnel;
- Develop a system to efficiently communicate the progress and implementation of our service plan;
- Train nursing aides to follow the directions and recommendations of the service plans; and
- Report to executive officers regarding the progress and effectiveness of the service plans.

The petitioner added that a wellness coordinator position is a specialty occupation because the Department of Labor had determined that a bachelor's degree is required. The petitioner did not provide any documentary evidence in support of this statement. The petitioner noted that it is imperative that the wellness coordinate have a medical background and training.

In response to the director's RFE, the petitioner provided, among other items already listed above, advertisements relating to the occupation of "wellness coordinator." The advertisements included: (1) a wellness coach position for the [redacted] which functions focused primarily on exercise and training that required a four-year degree in exercise physiologist or a related degree; (2) a wellness coordinator for [redacted] that provided an overview of duties, including some similar duties listed by the petitioner, that listed a BS in nursing or a related field but did not indicate whether the degree was preferred or required; (3) a wellness coordinator for [redacted] that indicated the ideal candidate would possess a degree in community health education or the recreation field, but did not list the duties of the position; and (4) a senior wellness coordinator, paraprofessional, for the City of Miramar that provided an overview of the position and indicated

that the position required a bachelor's degree with a major in education, rehabilitation, health and/or human services or a related field, noting that an equivalent combination of education, training, and experience may be substituted for some of the requirements.

As observed above, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation. The director noted the four advertisements submitted and observed that although some of the announcements specified an educational background, the advertisements did not limit the field of study to a particular background but included a wide variety of fields as possible preparation for the occupation. The director also noted that the advertisements did not provide sufficient information to ascertain whether the organizations were similar to the petitioner in their number of employees and type of operations. The director also found that although the petitioner had been in business since 2004, it had not provided evidence that it had previously employed an individual with a bachelor's or higher degree in a specific field of study for the wellness coordinator position. The director further determined that the petitioner had failed to 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 degree in a specific field of study.

On appeal, the petitioner asserts that the director did not properly consider the advertisements submitted and noted that all of the advertisements listed educational requirements and all the advertisements limited the field of study to some area of physical science. The petitioner notes that the [redacted] job description was on point with its job description of the proffered position. The petitioner concludes by asserting that the nature of the duties is so complex that a bachelor's degree is necessary.

Upon review of the evidence in the record the AAO does not find the evidence of record persuasive in establishing the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. However, the *Handbook* does not describe the specific proffered occupation of wellness coordinator. In this instance, the AAO finds that the petitioner has provided a general description of duties that relates to developing assessment procedures, developing systems for tracking the service plans of each resident, evaluating the progress of services plans, and developing a system to efficiently communicate the progress and implementation of its service plans. The described duties are administrative in nature. To the extent these duties require evaluation of service plans, of resident assessment, and developing plans that are based on current practices in the medical industry the AAO finds that the generally described duties correspond most closely to that of a registered nurse.

The *Handbook* reports:

> When caring for patients, RNs establish a plan of care or contribute to an existing plan. Plans may include numerous activities, such as . . . administering therapies and treatments; observing the patient and recording those observations; and consulting with physicians and other health care clinicians. Some RNs provide direction to licensed practical nurses and nursing aids regarding patient care.
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> * * *
>
> RNs also can choose to work with a well-defined population, such as geriatric nurses, who work with the elderly.

Further, upon review of the *Handbook's* discussion of the educational requirements associated with the position of registered nurses, the *Handbook* reports that there are "three educational paths to registered nursing, including a bachelor's degree, an associate's degree or a diploma from an approved nursing program." Thus, the *Handbook* does not recognize that a bachelor's degree in a specific field of study is a requirement to perform the duties of a registered nurse.

The petitioner's generally described tasks of the proffered position do not include sufficient detail to conclude that the individual in the position would require a baccalaureate or higher degree or its equivalent as the minimum requirement for entry into the particular position. The petitioner has not explained why or how the listed tasks would require a specific course of study with the end result of a baccalaureate degree. The petitioner has not otherwise demonstrated that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. In this matter, the record does not establish that the duties of the position require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The AAO now turns to consider whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

A review of the evidence of record finds it insufficient to establish that the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or is distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO acknowledges the four advertisements submitted in response to the director's RFE and also on appeal. However, the job announcements do not provide sufficient information to enable the AAO

to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. For example, one advertisement is by the City of Miramar, an entity completely unlike the petitioner; the other three advertisements appear to be from organizations engaged in operating group homes but there is insufficient information to indicate that these organizations are similar to the petitioner as is required by this criterion. For example, the advertisements do not indicate if the organizations operate facilities with five, fifteen, or more residents, or whether the facilities are extended stay or day care organizations. Going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N 190 (Reg. Comm. 1972)). Similarly, the job duties in three of the advertisements appear to relate to exercise, fitness, or recreation, and the listed degrees relate to fields in exercise physiology, recreation or community health, or health and human services. As the petitioner pointed out, one of the advertisements lists some of the duties the petitioner listed in its description of job duties; however, although the advertiser listed a "BS in nursing" the advertiser did not indicate if the degree was preferred or required. Moreover, the advertisement's brief description does not provide sufficient information to ascertain why the advertiser prefers or requires a "BS in nursing." The AAO notes that an employer's preference is insufficient to establish that a position is a specialty occupation. When carefully considering the advertisements, the AAO does not find that the duties of the proffered position are sufficiently similar to the duties of the advertised positions that require a bachelor's or higher degree in a specific discipline.

The AAO also agrees with the director's observation that the field of study listed in the advertisements vary greatly, and thus do not establish that a degree in a field directly related to the duties of the position is required, a necessary element for classification as a specialty occupation. The AAO does not find the "medical sciences" sufficiently definitive as a specific field of study. The record does not contain sufficient evidence demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*.

The petitioner in this matter has also failed to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)* which requires that the proffered position be of such complexity or uniqueness that it can be distinguished from positions within the same industry that do not require degrees. As noted above, the record does not contain evidence detailing what duties of the proffered position require the attainment of a baccalaureate or higher degree in a specific discipline. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a registered nurse or skilled administrator, occupations that do not require a bachelor's or higher degree in a specific discipline. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*.

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)*, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The

petitioner states that it has been in the business since 2004 but does not provide evidence that it previously employed a wellness coordinator. The AAO recognizes the petitioner's desire to hire an individual with a medical background and training and a bachelor's degree or equivalent experience associated with the medical field, but the desire to hire an individual with a certain set of qualifications is insufficient to establish the third criterion. 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 employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees.

As determined above, the general description of the duties of the proffered position provided does not establish that any of the duties require the theoretical and practical application of knowledge usually associated with the attainment of a bachelor's or higher degree in a specific discipline. Upon review of the record, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)*.

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate to routine nursing and administrative duties. Although the petitioner asserts that the duties of the position are specialized and complex, the petitioner has not explained what particular duties of the proffered position comprise tasks that require the application of specialized or complex knowledge associated with the attainment of a baccalaureate or higher degree in a specific discipline. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in nursing. Although the position may require skill, the petitioner has not established that the skill may be attained only through the specialized coursework attendant to a four-year university level education in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)*(4)*.

The petition will be denied and the appeal dismissed for the above stated reason. 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.

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