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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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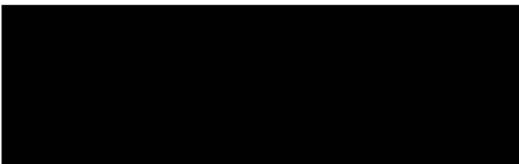


FILE: WAC 07 130 52210 Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2009

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)

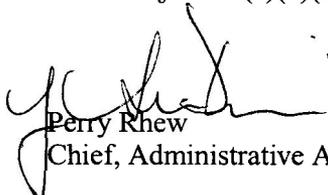
ON BEHALF OF PETITIONER:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The 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 The director's decision will be withdrawn and the matter remanded for further action.

The petitioner is a home health care service that seeks to employ the beneficiary as a recreational therapist. The petitioner, therefore, 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 on the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

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

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

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 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), 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 proposed 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.

In its March 26, 2007 letter of support, the petitioner stated that it is a provider of home health services. The petitioner stated that its business was developed for individuals with medical needs who prefer to remain in their homes while receiving skilled nursing; home health aide assistance; rehabilitative and recreational therapy; or medical social services. The petitioner stated that the duties of the proposed position would include the following:

- Planning and leading individual activities;
- Maintaining and recording weekly and quarterly progress reports;
- Keeping daily statistics;
- Completing initial assessments, and analyzing and screening each patient's leisure, social, and recreational abilities, deficiencies, interests, barriers, life experiences, and needs in order to determine the need for, and type of care or treatment to be provided, and the need for further assessments;
- Providing treatment services designed to improve social, emotional, cognitive, and physical functional behaviors as necessary prerequisites to future leisure and social involvement;
- Monitoring the extent to which goals are achieved, relative to the use of leisure time and acquisition of socialization skills;
- Reassessing patients after significant changes to their condition;
- Periodically attending Plan of Care and Physiatry meetings;
- Attending in-service training sessions; and
- Performing any other duties relevant to job functions.

In determining whether a proposed position qualifies as a specialty occupation, USCIS 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.

With regard to the duties typically performed by recreational therapists, the 2008-2009 edition of the *Handbook* states the following:

Recreational therapists, also referred to as *therapeutic recreation specialists*, provide treatment services and recreation activities for individuals with disabilities or illnesses. Using a variety of techniques, including arts and crafts, animals, sports, games, dance and movement, drama, music, and community outings, therapists improve and maintain the physical, mental, and emotional well-being of their clients. Therapists help individuals reduce depression, stress, and anxiety; recover basic motor functioning and reasoning abilities; build

confidence; and socialize effectively so that they can enjoy greater independence and reduce or eliminate the effects of their illness or disability. In addition, therapists help people with disabilities integrate into the community by teaching them how to use community resources and recreational activities. . . .

In acute health care settings, such as hospitals and rehabilitation centers, recreational therapists treat and rehabilitate individuals with specific health conditions, usually in conjunction or collaboration with physicians, nurses, psychologists, social workers, and physical and occupational therapists. In long-term and residential care facilities, recreational therapists use leisure activities—especially structured group programs—to improve and maintain their clients' general health and well-being. They also may provide interventions to prevent the client from suffering further medical problems and complications.

Recreational therapists assess clients using information from observations, medical records, standardized assessments, the medical staff, the clients' families, and the clients themselves. They then develop and carry out therapeutic interventions consistent with the clients' needs and interests. For example, they may encourage clients who are isolated from others or who have limited social skills to play games with others, and they may teach right-handed people with right-side paralysis how to use their unaffected left side to throw a ball or swing a racket. Recreational therapists may instruct patients in relaxation techniques to reduce stress and tension, stretching and limbering exercises, proper body mechanics for participation in recreational activities, pacing and energy conservation techniques, and team activities. As they work, therapists observe and document a patient's participation, reactions, and progress.

Community-based recreational therapists may work in park and recreation departments, special-education programs for school districts, or assisted-living, adult day care, and substance abuse rehabilitation centers. In these programs, therapists use interventions to develop specific skills, while providing opportunities for exercise, mental stimulation, creativity, and fun. Those few who work in schools help counselors, teachers, and parents address the special needs of students, including easing disabled students' transition into adult life.¹

With regard to the educational credentials required for entry into this field, the *Handbook* states the following:

A bachelor's degree with a major or concentration in therapeutic recreation is the usual requirement for entry-level positions. Some States regulate recreational therapists, but requirements vary. . . .

¹ See <http://www.bls.gov/oco/ocos082.htm> (accessed August 21, 2009).

Most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. People may qualify for paraprofessional positions with an associate degree in therapeutic recreation or another subject related to health care. An associate degree in recreational therapy; training in art, drama, or music therapy; or qualifying work experience may be sufficient for activity director positions in nursing homes.²

The *Handbook* finds that most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. The AAO agrees with the petitioner's assertion that the position being proposed in this petition is that of a recreational therapist. Accordingly, the AAO finds that the proposed position qualifies for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Accordingly, the director's decision finding otherwise will be withdrawn. However, the petition may not be approved, as the record does not establish that the beneficiary qualifies to perform the duties of the proposed position. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Further requirements for entry into this field are contained at section 17505.2 of the California Business and Professions Code:

² *Id.*

(a) It is unlawful for a person to represent himself or herself as a recreation therapist, to represent the services he or she performs as recreation therapy, or to use terms set forth in subdivision (c) in connection with his or her services, name, or place of business, unless he or she meets all of the following requirements:

(1) Graduation from an accredited college or university with a minimum of a baccalaureate degree in recreation therapy or in recreation and leisure studies with a specialization in recreation therapy. Alternatively, a person who does not have one of the preceding degrees may qualify if he or she has a baccalaureate degree in a specialization acceptable for certification or eligible for certification by any accrediting body specified in paragraph (2).

(2) Current certification or eligibility for certification as a recreation therapist by the California Board of Recreation and Park Certification or by the National Council for Therapeutic Recreation Certification, Inc.

(b) No person shall represent himself or herself as a recreation therapist assistant, or represent the services he or she performs as being in any way related to recreation therapy, unless he or she at a minimum has current certification, or has eligibility for certification, by the California Board of Recreation and Park Certification or by the National Council for Therapeutic Recreation Certification, Inc., as a recreation therapist assistant.

(c) A person who does not meet the requirements of subdivision (a) or (b) may not use any of the following words or abbreviations in connection with his or her services, name, or place of business:

* * *

(4) Recreation therapist.

* * *

(e) Any person injured by a violation of this section may bring a civil action and may recover one thousand five hundred dollars (\$1,500) for the first violation and two thousand five hundred dollars (\$2,500) for each subsequent violation. This is the sole remedy for a violation of this section.

The beneficiary earned a bachelor's degree in physical therapy from Centro Escolar University, in the Philippines, in 2004. The record contains an evaluation from Morningside Evaluations, dated March 26, 2007, which equates the beneficiary's degree to a bachelor's degree in physical therapy awarded by an accredited institution of higher education in the United States.

However, as was noted previously, the *Handbook* states that most entry-level recreational therapists need a bachelor's degree in therapeutic recreation, or in recreation with a concentration in therapeutic recreation. **The beneficiary, however, possesses no such degree.** Although the *Handbook* does note that certain paraprofessional positions may be filled by individuals with an associate degree in a subject related to health care, the petitioner contends, and the AAO agrees, that the proposed position is not a paraprofessional position. As stated above, similar requirements are set forth in the California Business and Professions Code, which specifically prohibits an individual from representing her services as those of a recreational therapist unless she (1) possesses a bachelor's degree in recreational therapy, or in recreation and leisure studies with a specialization in recreation therapy; or (2) possesses current certification by, or is eligible for certification by, either the California Board of Recreation and Park Certification, or the National Council for Therapeutic Recreation Certification, Inc.

As such, the record of proceeding indicates that the beneficiary is not qualified to perform the duties of the proposed position, which is that of a recreational therapist. As the director did not address this issue, the petition will be remanded so that the director may address the issue of the beneficiary's qualifications to perform the duties of the proposed position.

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of the specialty occupation. 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 September 7, 2007 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.