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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

B2



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



DEC 29 2010

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)

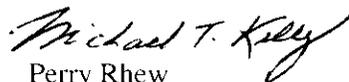
ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the 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.

The petitioner is a medical rehabilitation and services provider with 24 employees. It seeks to employ the beneficiary as a physical therapy manager 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

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

The first issue in this matter is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

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), 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 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 this matter, the petitioner seeks the beneficiary’s services as a physical therapy manager. The petitioner describes the position’s duties as follows:

- Plan, administer, and direct operation of health rehabilitation services;
- Assess patient needs and design and implement rehabilitation services to ensure delivery of quality patient care;

- Consult with medical staff and professionals to plan and coordinate joint patient management objectives;
- Study current trends and new developments in rehabilitation treatments;
- Conduct staff conferences and plan training programs to maintain proficient staff in therapy techniques and use of new methods and equipment;
- Participate in the recruitment, orientation and performance management of staff in collaboration with Patient Care Managers;
- Maintain confidential and secure records of rehabilitation cases at all times and in accordance with HIPPA privacy rules;
- Allocate personnel on the basis of work load, space, and equipment available;
- Ensure that all therapy services provided are in accordance with policies and procedures as well as state and federal regulations;
- Analyze operating costs, prepare departmental budgets, and recommend patient fees for therapy;
- Plan and market services;
- Assist rehab team in coordinating optimal patient scheduling;
- Attend facility meetings as directed by the *Administrator*; and
- Conduct additional duties as assigned by the *Administrator*.

The petitioner also states that the proffered position requires a bachelor's degree in physical therapy or the equivalent and experience in relevant fields.

The petitioner submitted copies of the beneficiary's foreign education documents and certificates, but did not submit a credential evaluation so the AAO cannot determine whether the beneficiary has the U.S. equivalent of a bachelor's degree in a specific specialty.

On June 12, 2009, the director requested additional information from the petitioner regarding Troubled Asset Relief Program (TARP) funding. The petitioner responded on June 29, 2009.

On July 2, 2009, the director denied the petition, finding that the proffered position's duties as described fall under the section on Administrative Services Managers as defined in the U.S. Department of Labor's Occupational Outlook Handbook (*Handbook*). Additionally, the director found that because the described duties entail patient treatment, albeit indirect treatment, the beneficiary would be required to hold a license in physical therapy. Because the petitioner failed to demonstrate that the beneficiary either has or is exempted from having such a license, the director found that the beneficiary is not qualified to perform the duties of the proffered position.

On appeal, the petitioner argues that the proffered position falls under the *Handbook's* section on Medical and Health Services Managers rather than Administrative Services Managers and is therefore a specialty occupation. The petitioner argues that licenses are not required for Medical and Health Services Managers, except for those who work in nursing care facilities, which the petitioner is not and, therefore, the beneficiary is qualified for the proffered position. The petitioner also submitted copies of letters from other rehabilitation centers in support of its argument that the proffered position is a specialty occupation.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO first turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. 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 in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

USCIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In reviewing the duties provided for the proffered position as well as the organizational chart and other supporting documentation, the AAO agrees with counsel that the *Handbook's* description of Medical and Health Services Managers is a suitable approximation of the proffered position. The *Handbook*, 2010-11 edition, provides as follows:

Medical and health services managers, also referred to as healthcare executives or healthcare administrators, plan, direct, coordinate, and supervise the delivery of healthcare. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.

The structure and financing of healthcare are changing rapidly. Future medical and health services managers must be prepared to deal with the integration of healthcare delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work, and an increased focus on preventive care. They will be called on to improve efficiency in healthcare facilities and the quality of the care provided.

Large facilities usually have several assistant administrators who aid the top administrator and handle daily decisions. Assistant administrators direct activities in clinical areas, such as nursing, surgery, therapy, medical records, and health information.

In smaller facilities, top administrators handle more of the details of daily operations. For example, many nursing home administrators manage personnel, finances, facility operations, and admissions, while also providing resident care.

Clinical managers have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. *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 quality; develop reports and budgets; and coordinate activities with other managers.

Health information managers are responsible for the maintenance and security of all patient records. Recent regulations enacted by the Federal Government require that all healthcare providers maintain electronic patient records and that these records be secure. As a result, health information managers must keep up with current computer and software technology, as well as with legislative requirements. In addition, as patient data become more frequently used for quality management and in medical research, health information managers must ensure that databases are complete, accurate, and available only to authorized personnel.

In group medical practices, managers work closely with physicians. Whereas an office manager might handle business affairs in small medical groups, leaving policy decisions to the physicians themselves, larger groups usually employ a full-time administrator to help formulate business strategies and coordinate day-to-day business.

A small group of 10 to 15 physicians might employ 1 administrator to oversee personnel matters, billing and collection, budgeting, planning, equipment outlays, and patient flow. A large practice of 40 to 50 physicians might have a chief administrator and several assistants, each responsible for a different area of expertise.

Medical and health services managers in managed care settings perform functions similar to those of their counterparts in large group practices, except that they could have larger staffs to manage. In addition, they might do more community outreach and preventive care than do managers of a group practice.

Some medical and health services managers oversee the activities of a number of facilities in health systems. Such systems might contain both inpatient and outpatient facilities and offer a wide range of patient services.

(Emphasis added.)

Additionally, the AAO notes that the petitioner stated in the Labor Condition Application (LCA) that it used the Foreign Labor Certification Data Center's Online Wage Library (OWL) as the basis for its prevailing wage. The AAO takes administrative notice of the OWL, which indicates that, at the time the LCA was submitted, the Level 1 wage for Medical and Health Services Managers was \$56,597 per year while the proffered wage in the petition is \$46,000 per year.

With respect to education and training requirements for medical and health services managers, the *Handbook* states:

A master's degree in one of a number of fields is the standard credential for most generalist positions as a medical or healthcare manager. A bachelor's degree is sometimes adequate for entry-level positions in smaller facilities and departments. In physicians' offices and some other facilities, on-the-job experience may substitute for formal education.

Education and training. Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities, at the departmental level within healthcare organizations, and in health information management. Physicians' offices and some other facilities hire those with on-the-job experience instead of formal education. . . .

* * *

Licensure. All States and the District of Columbia require nursing care facility administrators to have a bachelor's degree, pass a licensing examination, complete a State-approved training program, and pursue continuing education. Some States also require licenses for administrators in assisted-living facilities. A license is not required in other areas of medical and health services management.

(Emphasis added.) In other words, according to the *Handbook*, although a bachelor's degree is often obtained by people in smaller facilities and departments, a bachelor's degree in a *specific specialty* is not required.

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.

As the *Handbook* indicates that a bachelor's degree in a wide range of fields is acceptable for employment as medical and health services managers, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a *specific specialty*.

Accordingly, the AAO finds that the petitioner has failed to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that 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.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Although the petitioner has provided letters on appeal from other rehabilitation centers stating that they require their physical therapy managers to have a bachelor's degree in physiotherapy or the equivalent, these other employers did not provide a detailed description of the duties for their physical therapy managers. Consequently, the AAO cannot determine whether the proffered position's duties are parallel to those performed by the physical therapy managers employed at other rehabilitation centers. As a result, the petitioner has not established a degree requirement in parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree in a specific specialty or its equivalent is not required. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than physical therapy manager positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree or its equivalent in a specific specialty. The AAO does not find that sufficient evidence was provided to demonstrate that the proffered duties, as described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of staff development managers performing the vague and generic duties described by the petitioner. The AAO, therefore, finds that the petitioner has also failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Second, the AAO will examine whether the beneficiary is qualified to perform the duties of a specialty occupation. Although the AAO has determined that the proffered position is not that of a physical therapist, the petitioner has titled this position as a Physical Therapy Manager and has stated that the beneficiary will provide patient care, albeit indirectly. According to Michigan law:

- (1) A person shall not engage in the practice of physical therapy or practice as a physical therapist assistant unless licensed or otherwise authorized under this part. A person shall engage in the actual treatment of an individual only upon the prescription of an individual holding a license
- (2) The following words, titles, or letters or a combination thereof, *with or without qualifying words or phrases*, are restricted in use only to those persons authorized under this part to use the terms and in a way prescribed in this part: “physical therapy”, “physical therapist”

Therefore, even though the petitioner is not a nursing care or assisted-living facility, because the petitioner uses the words “Physical Therapy” in the title of the proffered position, even though the title is qualified with the word “Manager,” the beneficiary is required to have a physical therapy license under Michigan law. As such, the AAO finds that the petitioner has failed to establish that the beneficiary has the requisite license to hold the proffered position with the current title. Moreover, the AAO finds that the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation because, as discussed earlier in this decision, the petitioner did not submit a credential evaluation as required for a foreign degree or other sufficient documentation to show that the beneficiary qualifies to perform services in a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(C). Therefore, the director’s decision is affirmed and the petition will also be denied on this ground.

Beyond the decision of the director, the AAO also finds that the petitioner failed to establish that the LCA corresponds to the petition as the prevailing wage in the LCA does not match the prevailing wage for medical and health services managers working at the location listed in the petition, according to the wage source listed by the petitioner in the LCA. For this additional reason, the petition cannot be approved.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Further, the regulation at 8 C.F.R. § 214.2(h)(2)(E), which states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining 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.*

[Italics added].

As discussed above, the prevailing wage listed in the petitioner's LCA does not correspond with the prevailing wage for medical and health services managers, according to the wage source provided by the petitioner. In light of the fact that the record of proceeding indicates that the beneficiary will not be paid the prevailing wage for medical and health services managers working at the location listed in the Form I-129, USCIS cannot ascertain that this LCA actually

supports the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 dismissed. The petition is denied.