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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**



82

FILE: WAC 09 146 50659 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2011

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:

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,

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 long term health care facility. It seeks to employ the beneficiary as a health educator 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.

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

The primary issue that the AAO will consider is whether the 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 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.

In this matter, the petitioner seeks the beneficiary’s services as a health educator. The initial letter from the petitioner submitted with the petition stated that the beneficiary would perform the following duties:

- Collect and analyze data to determine patient and group needs;
- Develop operational plans and policies to achieve health education objectives and services to patients, families and staff;

- Plan, implement, and evaluate health programs;
- Consult with other health and social service professionals;
- Prepare materials and distribute to patients and staff;
- Develop and present health education programs such as training workshops and presentations;
- Meet with managing staff for evaluation of health education program; and
- Develop and maintain cooperative working relationships with agencies and organizations.

The petitioner stated that it requires its health educator to have at least a bachelor's degree in a health concentration plus one year of experience.

The petitioner submitted copies of the beneficiary's credentials along with a credential evaluation stating that the beneficiary's education together with her experience is equivalent to a U.S. bachelor's degree in nursing.

On May 30, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description, an organizational chart if the beneficiary will supervise or direct others, and the past hiring practices of the petitioner. The RFE also requested additional information regarding the petitioner's business.

In response to the RFE, the petitioner broke down the duties as follows:

- Plan, implement and evaluate health programs, including consulting with other health care professionals and preparing materials for distribution to patients and staff (60% of the time);
- Collect and analyze data to determine patient and group needs (15% of time);
- Meet with managing staff for evaluation of health education program (10% of time);
- Develop and maintain relationships with agencies and organizations interested in public health care (10% of the time); and
- Develop and present health education programs, including producing educational materials and acting as a resource for information (5% of time).

The more detailed position description provided by the petitioner in response to the RFE indicates that the beneficiary will coordinate and prepare training and informational materials, but sufficient evidence was not presented that the beneficiary is actually conducting the training of the patients and staff, except incidentally.

The petitioner also submitted an Expert Opinion letter from [REDACTED]

[REDACTED] has a Ph.D. in adult education, although she does not have experience in health education. [REDACTED] concludes that the proffered position requires at least a "Bachelor's degree in Nursing or its equivalent, as well as the completion of at least one year of work experience in a related field." The AAO notes that the minimum degree requirement cited by [REDACTED] has a much narrower focus than the degree requirement stated by the petitioner of at least a bachelor's degree in a health concentration. [REDACTED] bases her conclusion on the proffered duties provided by the petitioner in the original support letter, which does not include a breakdown of the duties as was provided in response to the RFE, and four advertisements placed by other

companies. [REDACTED] does not provide copies of these advertisements, but merely summarizes them in her opinion letter. As the position descriptions for these advertisements are not provided, the AAO cannot affirmatively determine whether they are parallel to the proffered position. However, all of these advertisements appear to be placed by insurance and health systems companies. They are not placed by long term health care facilities, and so these entities have not been established as being parallel to the petitioner.

Additionally, the petitioner submitted three advertisements placed by other entities for the following positions: a nurse educator who will provide education services and which requires a bachelor's degree generally; a health educator who will provide education to patients and which requires a bachelor's degree in health education or a related field; and a health care educator who will provide direct screening and intervention to patients and which requires at least a bachelor's degree in a relevant field.

The petitioner also submitted an advertisement for a local public health educator from the State of New York, which is also an entity that is not parallel to the petitioner as it is a state government and, moreover, is not the same state where the petitioner is located. This description states that teaching individuals, families, groups, and communities is central to the role of a health educator and that any of the following are all acceptable for the position: (1) a bachelor's degree in health education, health science, public health, health promotion, community health, or health communications from a regionally accredited or New York State-registered college or university, (2) a bachelor's degree in education, nursing, epidemiology, wellness and fitness, or nutrition from a regionally accredited or New York State-registered college or university plus one year of experience in health education, or (3) a bachelor's degree in marketing, human services, social work or psychology from a regionally accredited or New York State-registered college or university plus two years of experience in health education.

The director denied the petition on August 28, 2009, finding that the proffered position is most similar to that of a Registered Nurse as described in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director noted that the *Handbook* does not indicate that the occupation of Registered Nurse is usually a specialty occupation.

On appeal, counsel for the petitioner argues that the proffered position is not that of a Registered Nurse, but is that of a Health Educator, noting that the beneficiary is not going to treat patients and will not engage in any clinical duties or functions.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO 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 Department of Labor's *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)).

Although it is true that, according to the *Handbook*’s section on Registered Nurses, “*Nurse educators* plan, develop, implement, and evaluate educational programs and curricula for the professional development of student nurses and RNs,” the petitioner did not provide evidence that the beneficiary will be educating student nurses and RNs and, moreover, the petitioner did not provide evidence that the proffered position requires a nursing license. However, neither does the proffered position fit under the *Handbook*’s section on Health Educators because, even though some of the proffered duties fall under this section, the primary role of a Health Educator in a medical care facility setting is to:

work one-on-one with patients and their families. In this setting, a health educator’s goal is to educate individual patients on their diagnosis and how that may change or affect their lifestyle. To this end, they may explain the necessary procedures or surgeries as well as how patients will need to alter their lifestyles to manage their illness or return to full health. They may also direct patients to outside resources, such as support groups, home health agencies, or social services. Often, health educators work closely with physicians, nurses, and other staff to create educational programs or materials, such as brochures, Web sites, and classes. In some cases, health educators train hospital staff about how to better interact with patients.

Although the beneficiary will assist in creating educational programs or materials, the petitioner failed to submit evidence that the beneficiary will actually be educating patients or staff. Moreover, given the generic description of the proffered duties, which do not indicate with any specificity what type of health programs the beneficiary will help create or how the proffered duties require the theoretical and practical application of a body of highly specialized knowledge, the AAO finds that the petitioner has failed to submit sufficient evidence to determine whether the position best fits under the Health Educator section of the *Handbook*.

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 discussed previously, the petitioner has failed to submit sufficient evidence that the proffered position falls under the *Handbook*’s section on Health Educators. Moreover, as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor’s degree, or its equivalent, in a

specific specialty, 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 or its equivalent. Accordingly, the AAO finds that the petitioner has not established 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).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.

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).

As already discussed, the advertisements provided by the petitioner have not established that parallel firms routinely require at least a bachelor's degree in a specific specialty. Moreover, regarding the expert opinion letter from ██████████ the AAO finds that neither ██████████ evaluation document nor any other evidence in the record of proceeding establishes that ██████████ is an authority in the area in which she pronounces her opinion, namely, the hiring requirements for health educator positions.

The copies of the advertisements cited by ██████████ were not provided. Further, ██████████ focuses on generic and generalized duty descriptions provided by the petitioner, which, the AAO finds, are insufficient on which to base an expert opinion regarding what the beneficiary will actually be doing in order to establish that the proffered position requires at least a bachelor's degree in any specific specialty or the application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The very fact that ██████████ attributes a degree requirement that differs from the petitioner's own degree requirement undermines the credibility of her opinion.

For the reasons discussed above, the AAO finds that ██████████ evaluation has no significant evidentiary weight, and that it is not probative evidence on the specialty occupation issue. The

¹ It is noted that, even if the proffered position was established as being that of a health educator, a review of the *Handbook* does not indicate that such a position qualifies as a specialty occupation in that the *Handbook* does not affirmatively state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty or its equivalent for entry into the occupation of health educator. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2010-11 Edition, "Health Educators," <<http://www.bls.gov/oco/ocos063.htm>> (accessed March 30, 2011). A preference or even a general requirement is not equivalent to a normal minimum entry requirement. As such, absent evidence that the position of health educator qualifies as a specialty occupation under one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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.” As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to determine that the proffered position is unique from or more complex than other positions that can be performed by persons without at least a bachelor’s degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor’s degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).²

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. The AAO here augments its earlier comments regarding the petitioner’s failure to establish this criterion. The AAO does not find that there is enough evidence to document that the proffered position is that of a health educator. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess skills and qualifications requiring at least a bachelor’s degree or the equivalent in a *specific specialty*. The AAO, therefore, concludes that the proffered position has not been established 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).

² To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner’s perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor’s degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further, except to note that, in any event, the evaluation from [REDACTED] together with the supporting documentation submitted, does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). No documentation was submitted from South University to establish that [REDACTED] has the authority to grant credit for training and/or work experience, which is a requirement under the regulation. The original evaluation submitted by A&M Logos International Inc. is also insufficient under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Therefore, the petitioner failed to submit an evaluation that meets the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), and the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The petition will be denied and the appeal dismissed. 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.