

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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**



D2

Date: **APR 29 2011** Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 136 50890

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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 service center director 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 visa petition the petitioner stated that it is a provider of health care services with 23 employees. Although health care service provider is not a very specific description, the AAO notes that evidence in the record suggests that the petitioner is in the business of sending nurses, physical therapists, etc., to its clients' homes to provide services.

To employ the beneficiary in what it designates as a quality assurance manager position, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

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 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 a particular position 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.

With the visa petition, counsel submitted two vacancy announcements pertinent to the proffered position and a letter dated March 31, 2009 from the petitioner's administrator. The vacancy announcements state that the proffered position requires a bachelor's degree in nursing or a related field.

The March 31, 2009 letter states:

[The beneficiary] will be responsible for ongoing strategic development, implementation and management of the [petitioner's] Quality and Regulatory Compliance functions. Her responsibilities include achieving patient safety goals and quality core measures, developing quality improvement plans and reports, managing the survey process for regulatory agencies and required licensure, and communicating with accrediting and regulatory bodies.

It continues, "The normal minimum requirements for the performance of the above job duties are a bachelor's degree in nursing or related studies with at least five years of related work experience."

The service center, on April 15, 2009, issued an RFE in this matter requesting, inter alia, additional evidence that the proffered position qualifies as a specialty occupation. Subsequently, the petitioner provided nine vacancy announcements issued by other companies.

One announcement is for a Manager, Quality Assurance, for Cardinal Health in Waukegan, Illinois. It states that the position requires a Bachelor of Arts degree, but not that the degree must be in any specific specialty. Further, the record contains no evidence that the business of Cardinal Health consists of providing healthcare professionals to work in patients' homes, as the petitioner's business does, or that it is of the same approximate size as the petitioner.

Another announcement is for a Manager, Quality Assurance, for WellCare, in Tampa, Florida. The announcement states that the position is in the IT/Software Development job category. As to the education required, it states, "Bachelor's degree in computer science or equivalent and/or experience is desired." The record contains no evidence that WellCare provides home healthcare professionals or that it is of the same approximate size as the petitioner.

Another is for an Area Healthcare Manager for Brookdale Senior Living Inc. in Santa Monica, California. It states the position requires a bachelor's degree in nursing and that Brookdale Senior Living operates senior housing communities, rather than providing home healthcare professionals. It contains no indication that Brookdale Senior Living is of the same approximate size as the petitioner.

Another is for a Care Manager for APSHealthcare.com in Honolulu, Hawaii. It states that the position requires a minimum of a bachelor's degree in a health related field, and that APSHealthcare.com offers care management and behavioral healthcare services. It contains no

indication that APSHealthcare provides home healthcare professionals or is of the same approximate size as the petitioner.

Another is for a Case Manager, RN for Physician Health Partners (PHP), whose location is unstated. As to the education requirement for the position, that announcement states, "Bachelor's degree." Elsewhere the announcement states, "RN required; or equivalent combination of education or experience." It is not clear from these two statements that a minimum of a bachelor's degree in a specific specialty or its equivalent is required. Nevertheless, the announcement indicates that PHP is "a premier healthcare management provider." Whether it provides home healthcare professionals is unclear. The announcement contains no indication that PHP is of the same approximate size as the petitioner and, thus, the petitioner cannot be found to be similar to this organization.

Another vacancy announcement is for a Manager, Quality/Utilization Management for Woodland Healthcare in Woodland, California. That announcement states, "Bachelor of Science in Nursing or Health Care Administration required." The announcement states that the duties of the position are managing "the daily activities and functions of Woodland Healthcare's acute care Case Managers and the Quality Management activities and reporting for Woodland Healthcare (Hospital and Clinics)." This suggests that Woodland Healthcare does not provide home healthcare professionals. The size of Woodland Healthcare is not stated.

Another announcement is for a Regional Operations Manager - RN - Telephonic, for DaVita of Chicago, Illinois. One part of that announcement states that the educational level of the position is "Bachelor's Degree." Elsewhere, the announcement states, "Bachelor's degree in Nursing preferred; Master's degree a plus." One listed duty of the position is, "Provide the leadership and Management of a Nursing team who coordinate and support our patient care telephonically." That suggests that DaVita, or at least the department filling that vacancy, does not provide home healthcare professionals, but contacts patients by phone to discuss treatment and concerns. The size of DaVita is unknown.

Another announcement is for a Quality Assurance/Quality Improvement & Operations Manager for Children's Hospital & Research Center in Oakland, California. That announcement states, "Must have a Bachelor's degree in Medical Technology or Science" The business of Children's Hospital clearly does not consist of providing home healthcare professionals. Further, its size is unknown.

The final vacancy announcement is for a Quality Assurance Coordinator for Royal Health Care of Islandia, New York, which describes itself as a Managed Health Care Management Services Organization and states that it is in the insurance industry. As to the educational requirements of the position, the announcement states, "High School diploma/GED required; college graduate preferred." The relative size of Royal Health Care is unknown to the AAO.

On May 20, 2009, the service center issued a second RFE. It requested, *inter alia*, evidence that similarly-sized businesses with similar incomes regularly require a quality assurance manager. It allowed the petitioner to show, apparently in the alternative, that its business is of such complexity

that it has a bona fide position for a quality assurance manager, even though otherwise similar companies may not. It asked that the petitioner document the number of quality assurance managers it has employed in the past and submit evidence to show how many have had baccalaureate degrees.

In a response dated May 20, 2009 counsel stated, "Please be informed that the matters requested [in the RFE] were already responded to [in the response to the previous RFE]." No evidence accompanied that letter, but counsel provided a memorandum in which he stated that the Health and Medical Managers section of the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* demonstrates that the proffered position requires a bachelor's degree. Counsel cited the section pertinent to Health and Medical Managers and the section pertinent to Occupational Health and Safety Specialists."

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* is addressed further below.

The director denied the visa petition on June 4, 2009 finding, as was noted above, that the petitioner had not demonstrated that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and is therefore a position in a specialty occupation. On appeal, counsel submitted five additional vacancy announcements and a brief.

One of the vacancy announcements provided was placed by Sutter Health of San Rafael, California for an RN—Quality Assurance position. That announcement states that Sutter Health provides hospice care and home healthcare. That announcement does not, however, indicate that Sutter Health is of the same approximate size as the petitioner, or that the position announced has any minimum education requirement.

Another vacancy announcement was placed by Baylor Health Care System of Dallas, Texas for a Nurse Manager—Antepartum. That announcement indicates that the position is at the Baylor University Medical Center, which suggests that Baylor Health Care System's business does not consist of providing home healthcare professionals. The record contains no indication that Baylor Health Care System is of the same approximate size as the petitioner. Further, that vacancy announcement contains no reference to an educational requirement.

Another announcement was placed by Resolution Health Inc. of Columbia, Maryland for a Process Improvement Manager. That announcement contains no indication that the business of Resolution Health consists of providing home healthcare professionals and no indication that it is of the same approximate size as the petitioner. Further, although that announcement states that the educational level of the position announced is "Bachelor's Degree," it contains no indication that the degree must be in any specific specialty.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed April 18, 2011.

Another announcement was placed by MetroWest Medical Center, of Framingham, Massachusetts, for a Manager, Quality and Performance Improvement. That it is called a medical center suggests that its business does not consist of providing home healthcare professionals. Further, the announcement contains no indication that it is of the same approximate size as the petitioner and no indication that the position has any educational requirement.

The final vacancy announcement was placed by TheraCare of New York, New York for a Compliance Manager. It contains no indication that the business of TheraCare consists of providing home healthcare professionals and no indication of TheraCare's size. Further, although that announcement states that the educational level of that position is "Bachelor's Degree," it contains no indication that the degree must be in any specific specialty.

In the brief submitted with the appeal, counsel urged that the proffered position must be considered as a hybrid of the Occupational Health and Safety Specialists and Technicians section and the Medical and Health Service Managers section of the *Handbook*. Counsel again asserted that the *Handbook* supports the position that the proffered position qualifies as a specialty occupation.

The current edition of the *Handbook* describes the duties of Occupational Health and Safety Technicians separately from those of Occupational Health and Safety Specialists. The *Handbook* describes the duties of Occupational Health and Safety Technicians positions as follows:

Occupational health and safety technicians work with occupational health and safety specialists to help prevent harm to workers, property, the environment, and the general public. (See the statement on occupational health and safety specialists elsewhere in the *Handbook*.) For example, they might help design safe work spaces, inspect machines, or test air quality. In addition to making workers safer, technicians work with specialists to increase worker productivity by reducing absenteeism and equipment downtime, and to save money by lowering insurance premiums and workers' compensation payments, and preventing government fines. Some technicians work for governments conducting safety inspections and imposing fines.

Occupational health and safety technicians take measurements and collect workplace data either for routine inspection or as directed by a specialist. Technicians often focus on testing air, water, machines, and other elements of the work environment. They collect data that occupational health and safety specialists then analyze. Usually working under the supervision of specialists, they also help to implement and evaluate safety programs.

The *Handbook* describes the duties of Occupational Health and Safety Specialist positions as follows:

Occupational health and safety specialists, also known as *safety and health professionals* or *occupational health and safety inspectors*, help prevent harm to workers, property, the environment, and the general public. For example, they may design safe work spaces, inspect machines, or test air quality. In addition to making workers safer, specialists aim to increase worker productivity by reducing absenteeism and equipment downtime—and to save money by lowering insurance premiums and workers' compensation payments, and preventing government fines. Specialists working for governments conduct safety inspections and impose fines. Specialists often work with occupational health and safety technicians to ensure work place safety.

The AAO finds that the duties of the proffered position as described by the petitioner's administrator in her March 31, 2009 letter, bear no significant similarity to duties the *Handbook* attributes to Occupational Health and Safety Technicians and Occupational Health and Safety Specialists, and that the *Handbook* discussion of those positions is of no relevance to the instant case.

As to the duties of Medical and Health Service Managers, the *Handbook* states, "*Medical and health services managers*, also referred to as *healthcare executives* or *healthcare administrators*, plan, direct, coordinate, and supervise the delivery of healthcare."

Although the duties of the proffered position are very abstractly described in the petitioner's administrator's March 31, 2009 letter, they appear to be consistent with that description of Medical and Health Service Manager positions, and the AAO finds that the proffered position in the instant case is a position for such a Medical or Health Service Manager.

As to the education required for such a position, the *Handbook* states:

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.

Although that passage indicates that a bachelor's degree may be required for entry into medical and health service manager positions, it also indicates some positions do not require such a degree. It indicates that, for those positions that do require a degree, a degree in any of a wide range of disciplines may suffice. It does not indicate that medical and health service manager positions require a minimum of a bachelor's degree or the equivalent in a specific specialty.

Because the *Handbook* does not support its position and no other relevant evidence was submitted, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally

the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The vacancy announcements in the record were apparently submitted to demonstrate that the requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. None of those vacancy announcements, however, have been shown to have been placed by similar companies in the petitioner's industry for positions similar to the proffered position that require a minimum of a bachelor's degree or the equivalent in a specific specialty. They are, therefore, inadequate support for that proposition. Further, even if all 14 announcements submitted were placed by similar organizations for parallel positions and required a bachelor's degree in a specific specialty, that number of vacancy announcements would be statistically insufficient to establish an industry-wide trend.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The description of the duties of the proffered position is too abstract to permit analysis of their complexity. The petitioner has not, therefore, demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

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. The appeal will be dismissed and the petition denied.

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