

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

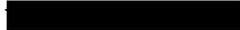


U.S. Citizenship
and Immigration
Services

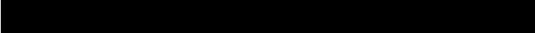


D₂

DATE: DEC 09 2011

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

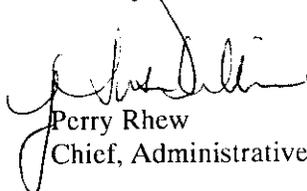
SELF-REPRESENTED

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,


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner states that it is a non-profit organization established in 1993 with 14 employees and a gross annual income of \$6 million. It seeks to employ the beneficiary as a community health program coordinator 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) the Form I-129, Petition for Nonimmigrant Worker, 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, Notice of Appeal or Motion, with the petitioner's accompanying statement and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue in this matter 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 [1] 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 [2] 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 its undated letter accompanying the petition, the petitioner indicated that it was created in 1993 to fill gaps in the continuum of care for homeless veterans. In that regard, the petitioner noted that its primary goal is to provide safe, sober, clinically supported housing and employment assistance for homeless veterans. The petitioner also noted that its Las Vegas, Nevada site, the site listed on the Labor Condition Application (LCA) accompanying the petition, had 208 beds available for homeless veterans and that its program in conjunction with the VA Southern Nevada HealthCare System

provided homeless veterans employment assistance, job development, counseling substance abuse support, and low cost rental housing, accompanied by a variety of support services designed for the homeless veteran to achieve stability. The petitioner stated that the proffered position of community health program coordinator required an individual who possessed a bachelor's degree in nursing, healthcare, psychology or other related field. The petitioner stated that the duties and responsibilities of the position included:

In charge of contracted research for the NIH; establish viable coalitions among civic, community and health partners in specific locations to plan programs designed to meet various health care conditions, change health behaviors or establish new educational programs; participating in establishing and maintaining communications between community health divisions and physicians, nursing personnel, and other health care professionals; manage and authorize expenditures of program funds for clinical services, health, health promotion/health education. – 50 percent of the time.

Manage educational training programs for health professionals and paraprofessionals or other objectives consistent with the programs – 30 percent of the time.

Compile and maintain records, reports and documentation of program activities for use in program evaluation; coordinate and communicate with other agencies in order to ensure the prompt and efficient implementation of the plans and programs – 20 percent of the time.

The petitioner also noted that the beneficiary must have knowledge of business and public relations that would surpass the employees under her supervision. The petitioner did not provide an organizational chart or identify the positions under the beneficiary's supervision. The petitioner noted that the beneficiary's credentials had been evaluated as equivalent to a bachelor of science degree in nursing awarded by a regionally accredited institution of higher education in the United States.

The petitioner also provided a copy of its job posting for the proffered position that included a different version of duties and responsibilities than the petitioner described in its letter accompanying the petition. The petitioner's posting listed the duties as:

Develops, implements, and evaluates community health programs and Basic Life Support; schedules and supervises Childhood Immunization program; develops, implements, and manages community health prevention programs; develops training objectives for prevention program personnel' manages expenditures from the "Prevention Services Trust Fund;" manages relevant grant search and applications, awards, and reports; communicates and interacts with individuals of various ethnic and economic backgrounds to maintain positive public image and establish cooperative working relationships; demonstrates continuous effort to improve community health programs, streamline work processes, and work cooperatively and

jointly with community health organizations and Los Angeles Public Health Department to provide quality health information.

The petitioner listed the minimum educational requirements for the posted position as a bachelor's degree in nursing or psychology.

On September 16, 2009, the director requested a more detailed description of the work to be performed and additional evidence establishing that the proffered position qualified as a specialty occupation, among other things.

In an October 22, 2009 response to the director's RFE, the petitioner adopted the language of its job posting as the claimed duties of the position and added the amount of time the beneficiary would spend on the duties as:

Develops, implements, and evaluates community health programs and Basic Life Support; schedules and supervises Childhood Immunization program; develops, implements, and manages community health prevention programs; develops training objectives for prevention program personnel' manages expenditures from the "Prevention Services Trust Fund;" manages relevant grant search and applications, awards, and reports; communicates and interacts with individuals of various ethnic and economic backgrounds to maintain positive public image and establish cooperative working relationships – 65 percent of the time.

Demonstrates continuous effort to improve community health programs, streamline work processes, and work cooperatively and jointly with community health organizations and Los Angeles Public Health Department to provide quality health information – 25 percent of the time.

The petitioner added that the beneficiary would spend 10 percent of her time "manag[ing] registration and conduct[ing] community health education seminars or conference services, with responsibility for meeting logistics, to program." The petitioner did not explain why the beneficiary would work to improve relations and work cooperatively with the Los Angeles Public Health Department when the proffered position was located in Las Vegas, Nevada.

The petitioner referenced the Department of Labor's *Occupational Outlook Handbook (Handbook)* as indicating that a bachelor's degree or its equivalent is the normal minimum requirement for entry into similar positions. The petitioner provided two advertisements to demonstrate an industry-wide degree requirement for positions parallel to the proffered position, including advertisements from: (1) a health services company of undisclosed size and nature which advertised for a public health community health program coordinator and listed its preference for a master's of public health in health behavior/health education or a bachelor's degree in a health related field with significant experience; and (2) a non-profit organization which provided an array of public health services and had advertised for a program coordinator of clinical and community health programs and listed a bachelor's degree and one to two years of experience and a master's degree preferred. The first

advertisement although listing a number of job duties did not appear to correspond for the most part to either of the petitioner's descriptions of job duties. The second advertisement provided a perfunctory overview of responsibilities that also failed to correspond to either of the petitioner's descriptions of duties.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, the petitioner asserts that the duties of the position most closely resemble that of a medical or health educator as set out in the *Handbook* because the duties of the proffered position are administrative, including planning for programs, supervision of personnel and overseeing the operations of the company. The petitioner does not identify the programs, the number or positions of those supervised, or further describe the beneficiary's day-to-day involvement in the petitioner's operations. The petitioner also provides a third version of the duties of the proffered position that borrows liberally from the overview of the *Handbook's* occupational category of a health educator. The petitioner provides a copy of an excerpt from the *Handbook* on health educators.

The petitioner also submits an additional five advertisements on appeal including: (1) a public health program coordinator from an unknown organization that required a master's degree in social work, human services, education, nursing or closely related field or a bachelor's degree and experience, or a combination of training and experience; (2) a home health outreach coordinator for a senior living center that recommended a baccalaureate degree with a major in community/marketing/public relations and/or a licensed nurse as preferred; (3) a health educator that required a master's in public health; (4) a health educator that required a graduate of a registered nursing program and preferred a bachelor's degree in nursing; and (5) a health educator for a major hospital that listed a master's degree in a field related to the position and a number of certifications. A review of the descriptions of duties listed in the advertisements does not reveal that the duties of the advertised positions are parallel to the duties of the proffered position.

The AAO observes that the petitioner in this matter has failed to establish the substantive nature of the work to be performed by the beneficiary. The general and inconsistent versions of the proposed duties precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). It is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Moreover, the AAO also finds that a petitioner cannot establish a proffered position is a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook*. For example, when discussing an occupational title such as health educator, the *Handbook's* generalized description is necessary when defining the range of

duties that may be performed within the occupation, however, that same or similar description may not be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has not offered a specific and consistent description of duties for its proffered position. It has not detailed the actual work to be performed for this position but rather has provided a broad and inconsistent overview of generic functions. The petitioner has not described how any of the proposed duties relate to its primary endeavor of providing assistance to homeless veterans. The petitioner cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To make its determination whether the proffered position, as described 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 *Occupational Outlook Handbook (Handbook)*,¹ 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)).

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.

In this matter, the petitioner initially provided two general descriptions of the duties of the proffered position, neither one including sufficient detailed information to determine whether the proffered position is that of a specialty occupation. In response to the director's RFE, the petitioner adopted language of one of the descriptions and added the amount of time the beneficiary would spend on the

¹ Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos001.htm> (last accessed November 2011).

duties, an allocation of time that is inconsistent with the information first submitted. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of responsibility, or its associated job responsibilities and the time spent on discrete job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits H-1B classification. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the duties of the position. The petitioner did not provide information identifying how any of the generic duties related to providing safe, sober, clinically supported housing and employment assistance for homeless veterans. Without this necessary and detailed information, the petitioner is precluded from establishing that the proffered position resembles any specific occupation outlined in the *Handbook*. Without describing the substantive nature of the work, it is not possible to discern whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Thus, the petitioner has not established the first criterion of 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 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).

In this matter the petitioner again has not provided sufficient detailed information to establish that its proffered position is parallel to any of the positions advertised. Moreover, as discussed above, the petitioner has not provided information that it is similar to any of the organizations in the job postings. Further, the advertisements do not clearly specify that a bachelor's degree in a specific discipline with core competencies is a requirement for entry into the advertised position. Upon review, 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. Neither has the petitioner

provided other evidence of an industry-wide standard for a bachelor's degree in a specific specialty for the proffered position.

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 petitioner has not provided a consistent description of the duties of the proffered position or substantive evidence of the actual duties of the proffered position. Thus, the information in the record does not distinguish the proffered position as unique from or more complex than positions that can be performed by persons without a baccalaureate specialty degree or its equivalent. Again, the failure to provide the substantive nature of the duties of the position precludes a determination that the proffered position is complex or unique or distinguishable from non-qualifying positions.

In order to satisfy the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner states that it has not employed other individuals in similar positions. Thus, the petitioner has not provided evidence that it normally requires a bachelor's degree in a specific specialty or its equivalent for the proffered position. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 does not find that the proffered duties, as generally and inconsistently described, provide sufficient information to determine that the duties reflect a need for a higher degree of knowledge and skill at the baccalaureate level in order to perform them. The AAO, therefore, concludes that the proffered position cannot be 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). Accordingly, the AAO shall not disturb the director's denial of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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