

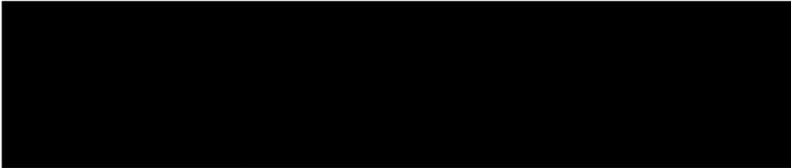
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



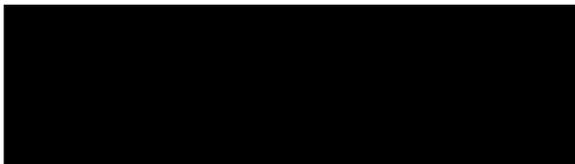
D2

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 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,

Michael T. Kelly
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 be denied.

On the Form I-129, the petitioner averred that it operated a skilled nursing care center, that it was established in 1990, and that it employed 185 personnel. The petitioner seeks to employ the beneficiary in a position that it designates as a physical therapist graduate intern, in the State of Washington, from October 1, 2009 to September 25, 2012. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the petitioner had not established that the proffered position of physical therapy graduate intern qualified as a specialty occupation. Specifically, the director noted that upon review of the duties of the proffered position, the position appeared to correspond with the duties of a physical therapy aide, which is an occupation that does not require a bachelor's degree in a specific specialty. On appeal, counsel submits a brief and documentation in support of the appeal.

The record includes: (1) Form I-129 and supporting documentation; (2) the director's denial decision; and (3) Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

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 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.

The AAO notes preliminarily that the official compendium of the statutes of the State of Washington – the Revised Code of Washington (RCW) - indicates that a person must have either obtained a baccalaureate degree in physical therapy from an institution of higher learning approved by the board or a baccalaureate degree from an institution of higher learning and a certificate or advanced degree from a school of physical

therapy approved by the board, in order to apply for a license to practice as a *physical therapist* or a *physical therapist assistant*. See RCW 18.74.030. Thus, a physical therapist and a physical therapist assistant are specialty occupations in the State of Washington. However, both a physical therapist and a physical therapist assistant must have obtained a license to practice physical therapy in the State of Washington.

Further, section 18.74.010 of the RCW provides the following pertinent definitions:

- (3) “Physical therapy” means the care and services provided by or under the direction and supervision of a physical therapist licensed by the state. The use of Roentgen rays and radium for diagnostic and therapeutic purposes, the use of electricity for surgical purposes, including cauterization, and the use of spinal manipulation, or manipulative mobilization of the spine and its immediate articulations, are not included under the term “physical therapy” as used in this chapter.
- (4) “Physical therapist” means a person who meets all the requirements of this chapter and is licensed in this state to practice physical therapy.

Section 246-915-010 of the Washington Administrative Code (WAC) – the official compendium of Washington State’s rules implementing the laws compiled in the RCW – includes these definitions:

- (4) “Trained supportive personnel” means:
 - (a) “Physical therapist assistant.” An individual who meets all the requirements of this chapter and is licensed as a physical therapist assistant and who performs physical therapy procedures and related tasks that have been selected and delegated only by the supervising physical therapist. However, a physical therapist may not delegate sharp debridement to a physical therapist assistant; or
 - (b) “Physical therapy aide.” An individual who is involved in direct physical therapy patient care who does not meet the definition of a physical therapist or physical therapist assistant and receives ongoing on-the-job training.

On appeal, counsel for the petitioner asserts that the proffered position in this matter is not that of a physical therapist, thus the beneficiary does not require a license, but that the proffered position is that of a physical therapist graduate intern. Counsel contends that, contrary to the director’s findings, the proffered position is more than that of a physical therapist aide and that, although the proffered position does not require a license, it includes duties that comprise the duties of a specialty occupation.

Thus, the AAO will examine whether the record establishes that the proffered position is a specialty occupation.

In the petitioner's March 26, 2009 letter in support of the petition, the petitioner stated:

████████████████████ will gain valuable experience in inpatient acute care and outpatient care. The ██████████████████████ will shadow Licensed Physical Therapists by assisting in providing services that help restore function, improve mobility, relieve pain, and prevent or limit permanent physical disabilities of patients suffering from injuries or disease. They will help restore, maintain, and promote overall fitness and health. ██████████████████████ patients include accident victims and individuals with disabling conditions such as low-back pain, arthritis, heart disease, fractures, head injuries and cerebral palsy. ██████████████████████ will not engage in activities or procedures that are only lawfully performed by licensed Physical Therapists.

The petitioner also noted that the proffered position is "open to graduate[s] of Bachelor, Masters, or Doctorate of Physical Therapists programs" and that "[t]hese graduates are either contemporaneously waiting for the results of their National Physical Therapy Examination (NPTE) examination, or are studying to take the exam." The initial record also included an offer letter to the beneficiary providing the same general description of job duties as listed in the letter of support.

On June 3, 2009, the director denied the petition. On appeal, counsel for the petitioner elaborates on the proffered position for the beneficiary. Counsel explains that the purpose of the position is to allow the physical therapist graduate intern (PTGI), the title applied by the petitioner to the proffered position, to gain experience for when the PTGI becomes a licensed physical therapist. Counsel asserts that the beneficiary:

Will spend a portion of his day shadowing a Licensed Physical Therapist, who provides services that restore function, improve mobility, relieve pain, and prevents and limits permanent physical disabilities of patients suffering from injuries and disease. A portion of her day will be spent studying and preparing for the examination. The PTGI will perform no tasks that require licensure.

The position is only open to graduates of Bachelors, Masters, or Doctorate of Physical Therapy programs. . . . The program was designed to provide an opportunity to experience the practical job functions of physical therapy while, at the same time, preparing for the licensing examination. This program serves as a "bridge" or "internship" between graduation and examination.

Counsel reiterates the assertion that the proffered position is not that of a physical therapist or of a physical therapist aide. Counsel asserts that physical therapist graduate internships are a growing occupation, and also asserts that many occupations, including the occupation of a physical therapist, require clinical internship for those who wish to enter graduate schools. Counsel indicates that the petitioner could not find any evidence of a graduate internship in any occupation which required a degree less than that of a bachelor's degree, that a degree requirement is the industry standard, and since the position is only open to recent graduates who are

learning about the profession and preparing for and sitting for the NPTE, the nature of the duties is so specialized as to demand a bachelor's degree.

Turning to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, the AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. Upon review of the *Handbook*, the AAO agrees with counsel's statement that the *Handbook* does not report on the education and experience of a physical therapist graduate intern. The AAO further notes that the record of proceeding includes no evidence documenting that the State of Washington recognizes as a creditable training program the type of limited but vaguely stated duties that the petitioner ascribes to the proffered position. In this regard, the AAO finds that the duties that the petitioner attributes to the proffered position are expressed exclusively in vague terms of limited functions that establish neither the substantive nature of the actual work that the beneficiary would perform or, for that matter, that the position as practiced would not include work prohibited by persons who are not licensed physical therapists or licensed physical therapist assistants.

Noting the petitioner's assurances – not backed by documentary evidence of the beneficiary's specific duties – that the PTGI will aide licensed therapists by assisting in providing physical therapy services but will not perform any tasks that require licensure, and noting counsel's statement on appeal that the beneficiary will spend a portion of his day shadowing a licensed physical therapist providing services, and will spend a portion of his day studying and preparing for the examination, the AAO finds no evidentiary basis for determining exactly what the petitioner would provide in terms of services. The AAO also finds that preparing for an examination does not qualify as H-1B work under the H-1B statutes and their implementing regulations.

The AAO does not find sufficient information in the petitioner's statements to determine that the proffered position, based upon the general description of duties, requires a baccalaureate or higher degree in a specific discipline to perform the duties of the proffered position. There is nothing in the description that indicates that the beneficiary will be providing services more advanced than that of a physical therapist aide, as defined in the WAC. Moreover, according to the WAC, the regulations of the jurisdiction where the beneficiary is expected to perform, a physical therapy aide is an individual who is involved in direct physical therapy patient care but who does not meet the definition of a physical therapist or physical therapist assistant, positions that require licensure. *See* section 246-915-010(4)(b) of the WAC.

Upon review, the AAO finds that the proffered position is akin to that of a physical therapist aide, as described in the 2010-2011 edition of the *Handbook*. In relevant part, the section pertaining to Physical Therapist Assistants and Aides states as follows:

Physical therapist aides help make therapy sessions productive, under the direct supervision of a physical therapist or physical therapist assistant. They usually are responsible for keeping the treatment area clean and organized and for preparing for each patient's therapy. When patients need assistance moving to or from a treatment area, aides assist in their transport.

Because they are not licensed, aides do not perform the clinical tasks of a physical therapist assistant in States where licensure is required.

The duties of aides include some clerical tasks, such as ordering depleted supplies, answering the phone, and filling out insurance forms and other paperwork. The extent to which an aide or an assistant performs clerical tasks depends on the needs and organization of the facility.

Regarding the educational requirements for the proffered position, the *Handbook* states as follows:

Education and training. Employers typically require physical therapy aides to have a high school diploma. They are trained on the job, and most employers provide clinical on-the-job training.

The *Handbook* indicates that physical therapy aides are generally required to have only a high school diploma. The *Handbook*, therefore, does not indicate that a bachelor's degree in a specific specialty is required to perform the duties of the proffered position. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO has reviewed the information submitted by counsel regarding the purpose of internships in general. However, the article relating to internships does not provide definitive evidence that a so-called physical therapist graduate intern in the State of Washington must have a baccalaureate or higher degree. The petitioner has not provided evidence that an industry standard exists for physical therapist graduate interns, either.

In addition, the AAO has reviewed the State of Washington Administrative Code for evidence of recognition of an industry standard or evidence that a physical therapist graduate intern may perform more unique or specialized duties than that of a physical therapist aide without a license, but has not found such information. The record does not provide sufficient evidence to establish that the proffered position exceeds the scope of a physical therapist aide who will perform services in the State of Washington. There is nothing in the record that elevates the duties of the described position to a position that is more specialized or complex than that of a typical physical therapist aide, a position that does not require a degree or the knowledge usually associated with the attainment of a bachelor's or higher degree in a specific discipline. Thus, the petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO has also reviewed the petitioner's statements that its program is only open to graduates of Bachelors, Masters, or Doctorate of Physical Therapy programs and thus, the proffered position satisfies the criteria for a specialty occupation. The AAO reiterates that the critical element is not the title of the position or an employer's self-imposed standards, but whether the evidence in the record of proceeding establishes that the proffered 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, if the petitioner allowed the beneficiary to perform the duties of a physical therapist or a physical therapist assistant, duties that under Washington State

law require the attainment of a baccalaureate degree, without a license, the petitioner would violate the laws of the State of Washington. Moreover, if USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Similarly, the petitioner has failed to establish that 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. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation or the industry-wide standard associated with the occupation. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements different from that of a physical therapist aide. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical physical therapy aide. Lacking a meaningful list of duties demonstrating that the proffered position includes duties sufficiently more complex and specialized than that of a physical therapist aide, the record of proceeding has not established that the specific duties of the proffered position involve the application of knowledge usually associated with at least a bachelor's degree in a specific specialty, as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Although the petitioner has not established that the proffered position is a specialty occupation, the AAO briefly notes that the State of Washington has provided guidance and established methodology for individuals who desire to practice physical therapy but who are not licensed. *See* WAC section 246-915-078 regarding interim permits and WAC section 246-915-120 regarding physical therapist applicants from unapproved schools. In brief, prior to performing duties that comprise the duties of a physical therapist or a physical therapist assistant, the individual must meet certain exact standards in order to obtain licensure. The record in this matter provides no evidence that the beneficiary has begun the process as set out in the Washington State Administrative Code to obtain licensure.

For the reasons set forth above, the petitioner has failed to supplement the record with sufficient evidence to establish that the beneficiary would be performing the duties of a specialty occupation, and the petition cannot be approved for this reason.

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