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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

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Date: **MAY 02 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 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 an outreach clinic. It seeks to employ the beneficiary as a human services assistant 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 the petitioner's brief 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, 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.

In this matter, the petitioner seeks the beneficiary’s services as a human services assistant and filed the present H-1B petition on March 30, 2009. The initial letter from the petitioner submitted with the petition stated that the beneficiary would:

- Facilitate the strengthening families parenting and family program;
- Assist clients in identifying available benefits and social/community services;

- Assist the Chief Operations Administrator (COA) in developing and organizing parenting programs for high risk families as well as coordinating staff activities and training; and
- Perform day-to-day administrative operation activities.

The petitioner stated that it requires its human services assistant to have at least a bachelor's degree in counseling or a related field.

The petitioner submitted copies of the beneficiary's U.S. Master of Arts in Counseling.

On May 22, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation along with information regarding the petitioner's business.

In response to the RFE, the petitioner provided a copy of a Position Description Acknowledgement agreement signed by the petitioner and the beneficiary on October 20, 2008. This document states that the proffered position assists the COA in facilitating the Strengthening Families Program as well as staffing, billing and business development. The position description is the same as previously provided in the petitioner's support letter. The petitioner did not submit any additional evidence to demonstrate that the proffered position is a specialty occupation.

The director denied the petition on August 30, 2009, finding that the proffered position is most similar to that of a human services assistant as described under the Social and Human Services Assistant section 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 human services assistant is a specialty occupation.

On appeal, the petitioner states that on May 22, 2009, a date after the present petition was filed, the beneficiary received the new job title of Primary Care Case Manager and a higher salary. Although the petitioner argues that the duties previously described are not different from the new duties, a number of the duties in the position description provided on appeal have expanded significantly the position description previously provided, rather than merely being a more detailed explanation of the previously provided duties. According to the position description provided on appeal, in addition to performing the duties previously provided, the beneficiary will teach at-risk youth and parents, initiate or approve medical services for enrollees, provide care services for enrollees, and create and maintain patient medical records for enrollees. Although the petitioner did not break down the duties by percentages, it appears that teaching youth and parents as well as providing primary care services to enrollees will be the beneficiary's central role in her new position. As these duties were not previously provided, it appears that the petitioner is trying to change the job description on appeal. Moreover, the petitioner has stated on appeal that the proffered position's title and salary changed after the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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. The position description provided by the petitioner on appeal did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

To make its determination whether the employment 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*, upon 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)).

The AAO agrees with the director that the proffered position is closest to that of a human services assistant as described in the *Handbook*, which provides:

Social and human service assistants *help social workers, healthcare workers, and other professionals to provide services to people*. Social and human service assistant is a generic term for workers with a wide array of job titles, including human service worker, case management aide, social work assistant, community support worker, mental health aide, community outreach worker, life skills counselor, social services aide, youth worker, psychological aide, client advocate, or gerontology aide. They usually work under the direction of workers from a variety of fields, such as nursing, psychiatry, psychology, or social work. The amount of responsibility and supervision they are given varies a great deal. Some have little direct supervision. For example, they may run a group home. Others work under close direction.

Social and human service assistants provide services to clients to help them improve their quality of life. They assess clients' needs, investigate their eligibility for benefits and services such as food stamps, Medicaid and welfare, and help clients obtain them. They also arrange for transportation, if necessary, and provide emotional support. They monitor and keep case records on clients and report progress to supervisors and case managers. . . .

(Emphasis added). As the original position description indicates that the duties will focus more on assistance of other professionals and performing administrative tasks than providing direct

evaluations and assessments, the AAO finds that the proffered position is closest to that of a social and human service assistant as described in the *Handbook*.

Regarding the training for a social and human services assistant, the *Handbook* reports:

A high school diploma is the minimum education requirement, but employers often seek individuals with relevant work experience or education beyond high school. . . .

Therefore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for human services assistants.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As the *Handbook* indicates no specific degree requirement for employment as a human services assistant, and 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. 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).

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 1151, 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102).

As already discussed, 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. The petitioner has not submitted evidence that parallel organizations routinely require at least 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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for human services assistants. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than human services assistant positions that can be performed by persons without at least a bachelor's degree, or its equivalent, in a specific specialty.

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).

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 proposed duties, as generically described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of human services assistants not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties does not establish a job that would require the beneficiary to possess qualifications beyond those of a human services assistant. 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).

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.