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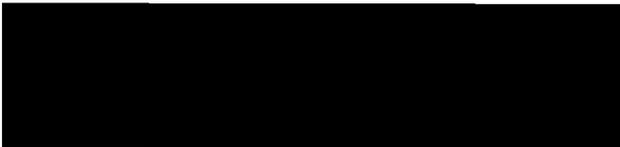
**PUBLIC COPY**

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

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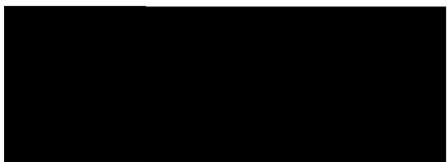
Date: **FEB 08 2012** Office: CALIFORNIA SERVICE CENTER

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:



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. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn, and the case will be remanded for further action consistent with this decision and entry of a new decision.

The petitioner states that it is a home health care facility with 23 employees and a gross annual income of \$1.54 million. It seeks to employ the beneficiary as a rehab case manager and to classify him 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 on the grounds that the petitioner failed to establish that the beneficiary possesses the appropriate licensure as required by the proffered position, or has proven an exemption or exception from said requirement.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the petitioner's support letter dated May 26, 2009, the petitioner states that the beneficiary will work as a rehab case manager. As stated by the petitioner, the proffered position's duties would require the beneficiary to:

- Manage the multi-disciplinary rehab program;
- *Intake evaluation;*
- Provide referrals to continue care;
- Share responsibility for group programming and education;
- Participate in case conferences;
- Be responsible for all necessary paperwork and record keeping; and
- Obtain and document all relevant intake material in a timely manner.

The support letter does not state that the proffered position requires at least a bachelor's degree in a specific specialty or its equivalent. However, the letter indicates that the beneficiary earned a bachelor's degree in physiotherapy from the University of Karachi in Karachi, Pakistan in 1995.

The petitioner submitted copies of the beneficiary's foreign degree and college transcripts, as well as a credential evaluation indicating that the beneficiary's education is equivalent to a U.S. bachelor's degree in physical therapy. In addition, the petitioner submitted an expert opinion letter.

On May 12, 2009, the director issued an RFE requesting the petitioner to submit a new Form I-129 H-1B Data Collection Supplement responding to the question regarding TARP funding.

On May 27, 2009, the petitioner submitted a new *Form I-129 H-1B Data Collection Supplement* and answered the TARP funding question.

The director issued another RFE on November 5, 2009 requesting that the petitioner submit, inter alia, (1) a more detailed description of the work to be performed by the beneficiary; (2) a line-and-block organizational chart showing the petitioner's hierarchy and staffing levels; (3) an advisory evaluation of the beneficiary's foreign educational credentials by the Foreign Credential Commission on Physical Therapy (FCCPT), or an equivalent credentialing organization verifying that the beneficiary's education, training, licensing, experience and English competency meet all statutory and regulatory requirements; and (4) a copy of the beneficiary's permanent State of Michigan physical therapist license.

On December 17, 2009, in response to the director's RFE, the petitioner submitted, in part, (1) a more detailed job description; (2) a line-and-block organizational chart; (3) job vacancy announcements; and (4) a copy of the beneficiary's credential evaluation.

The director denied the petition on January 12, 2010.

On appeal, counsel for the petitioner argues that a license is not required in the State of Michigan to perform the proffered position's duties as the beneficiary will be performing administrative and management tasks. Counsel also states that the beneficiary will not be involved in direct patient care. Counsel further states that the proffered position is a specialty occupation as the U.S. Department of Labor's (DOL's) Occupational Information Network (O\*NET) Summary Report for 11-9111.00 – Medical and Health Services Managers indicates a Job Zone 5 for these occupations.

The AAO notes that the director denied the petition on only one basis, namely, her determination that the petitioner failed to establish that the beneficiary possessed a licensure required to perform the proffered position's duties in the State of Michigan. Upon review of the State of Michigan's Department of Licensing and Regulatory Affairs (LARA), the AAO finds no such licensure requirement. *See* Michigan Department of Licensing and Regulatory Affairs (LARA), at [http://www.michigan.gov/lara/0,4601,7-154-27417\\_27529-50941--,00.html](http://www.michigan.gov/lara/0,4601,7-154-27417_27529-50941--,00.html). Accordingly, the director's decision to deny the petition on this basis will be withdrawn.<sup>1</sup>

Upon further review, however, the petition cannot be approved based on the record as presently constituted. More specifically and beyond the decision of the director, the petitioner has failed to establish that the beneficiary would be employed in a specialty occupation.

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 an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and

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<sup>1</sup> It is noted that the director's conclusion, i.e., the proffered position requires a license to fully perform its duties in Michigan appears to have been based on the incorrect finding that the proffered position is a physical therapist or a nursing administrator. If this position were in fact a physical therapist or nursing coordinator position, the director's conclusion regarding the requisite license would have been correct.

- (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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*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 [(2)] 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, a proposed 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) (hereinafter *Defensor*). 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), 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.

To make its determination whether the proffered position 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 DOL’s *Occupational Outlook Handbook* (hereinafter the *Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry’s professional association has made a degree in a specific specialty a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>2</sup>

The AAO finds that the duties described by the petitioner reflect the duties of a medical and health services manager. The “Medical and Health Services Managers” chapter at the 2010-2011 edition of the *Handbook* describes the duties of a medical and health services manager, in part, as follows:

Healthcare is a business and, like every business, it needs good management to keep the business running smoothly. *Medical and health services managers*, also referred to as *healthcare executives* or *healthcare*

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<sup>2</sup> 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.

*administrators*, plan, direct, coordinate, and supervise the delivery of healthcare. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.

\* \* \*

*Clinical managers* have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. For example, directors of physical therapy are experienced physical therapists, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. Clinical managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work quality; develop reports and budgets; and coordinate activities with other managers.

*Health information managers* are responsible for the maintenance and security of all patient records. Recent regulations enacted by the Federal Government require that all healthcare providers maintain electronic patient records and that these records be secure. As a result, health information managers must keep up with current computer and software technology, as well as with legislative requirements. In addition, as patient data become more frequently used for quality management and in medical research, health information managers must ensure that databases are complete, accurate, and available only to authorized personnel.

\* \* \*

Medical and health services managers in managed care settings perform functions similar to those of their counterparts in large group practices, except that they could have larger staffs to manage. In addition, they might do more community outreach and preventive care than do managers of a group practice.

Some medical and health services managers oversee the activities of a number of facilities in health systems. Such systems might contain both inpatient and outpatient facilities and offer a wide range of patient services.

See Bureau of Labor Statistics, U.S. Dept. of Labor, Occupational Outlook Handbook, 2010-11 Ed., at <http://www.bls.gov/oco/ocos014.htm> (accessed Jan. 12, 2012). Under this chapter's section on "Training, Other Qualifications, and Advancement," the *Handbook* states that:

A master's degree in one of a number of fields is the standard credential for most generalist positions as a medical or healthcare manager. A bachelor's degree is sometimes adequate for entry-level positions in smaller facilities and departments. In physicians' offices and some other facilities, on-the-job experience may substitute for formal education.

*Education and training.* 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.

*Id.* Because the *Handbook* indicates that working as a medical and health services manager does not normally require at least a bachelor's degree in a specific specialty or its equivalent, the *Handbook* does not support the proffered position as being a specialty occupation.

Furthermore, the AAO notes that the *O\*NET* Summary Report for 11-9111.00 – Medical and Health Services Managers, cited by counsel, is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in healthcare, physical therapy, occupational therapy, or a related field. A designation of Job Zone 5 indicates that a position requires extensive preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated qualifies as a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). See the *O\*NET* Online Help Center, at <http://www.onetonline.org/help/online/zones>. Further, the Help Center's discussion confirms that Job Zone 5 does not indicate any requirements for particular majors or academic concentrations. See *id.* Therefore, despite counsel's assertions to the contrary, the *O\*NET* information is not probative of the proffered position qualifying as a specialty occupation.

The AAO will now discuss the expert opinion letter from [REDACTED] submitted by the petitioner. In the letter, [REDACTED] states that the proffered position's duties can only be performed by a person who possesses (1) a bachelor's degree in physiotherapy with a specialization in management, or a closely related field or (2) possesses the equivalent in professional experience. [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. Absent evidence to the contrary, it appears that [REDACTED] did not base his opinion on any objective evidence, but instead bases his opinion on a letter submitted by the petitioner requesting him to provide an expert opinion letter, which was not included in the record. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). Therefore, the AAO finds that the letter from [REDACTED] does not establish that the proffered position is a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not

satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, 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).

Here and as already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions. Finally, for the reasons discussed in greater detail below, the petitioner's reliance upon the job vacancy advertisements is misplaced.

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of 21 advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions in the home health care industry. The advertisements provided, however, establish at best that a bachelor's degree is generally required for most of the positions posted, but a bachelor's degree or the equivalent in a *specific specialty* is not. In addition, even if all of the job postings indicated that a bachelor's or higher degree in a specific specialty or its equivalent were required, the petitioner fails to establish that the submitted advertisements are relevant in that the posted job announcements are not for parallel positions in similar organizations in the same industry. For instance, while the advertisements are for positions in the health care industry, some of them appear to be for inpatient and outpatient facilities, such as hospitals, skilled nursing, and rehabilitation centers and, therefore, they cannot be found to be parallel positions in similar organizations. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.<sup>3</sup>

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<sup>3</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just 21 job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar home health care companies. [REDACTED]. Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at

Furthermore, 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 a bachelor's degree is not required in a specific specialty. Furthermore, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than medical and health services manager positions, as described in the *Handbook*, that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Next, the record of proceeding does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Nevertheless, the petitioner and counsel claim repeatedly that the duties of the rehab case manager position can only be employed by an individual with at least a bachelor's degree or higher in healthcare, physical therapy, occupational therapy, or related field. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, 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.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than those of a general medical and health

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195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of rehab case manager for a 23-person home health care company required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

services manager position that is not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As previously discussed, as the director's decision did not address the eligibility issue of whether the proffered position qualifies as a specialty occupation, the petition will be remanded for a determination on this issue and a new decision to either grant or deny the petition. The director may request such additional evidence as is deemed necessary in rendering a decision.

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 director's decision dated January 12, 2010 shall be withdrawn and the record remanded for the entry of a new decision.