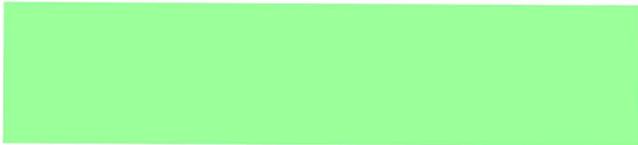




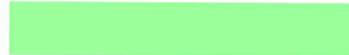
U.S. Citizenship
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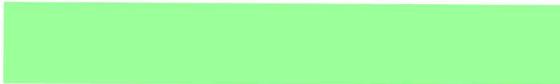


DATE: JUN 18 2013

OFFICE: CALIFORNIA SERVICE CENTER

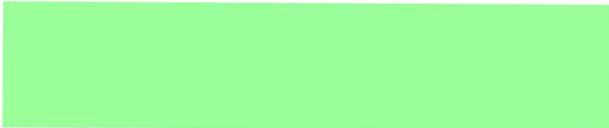


IN RE: Petitioner:
Beneficiary:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director revoked the approval of the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

On the Form I-129 visa petition, the petitioner describes itself as a massage therapy business established in 2005. The petition approval that was revoked had been granted to extend the beneficiary's classification 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), so that the petitioner could continue employing her in what it designates as an athletic trainer position.

The director revoked approval of the petition on two grounds. The director first found that the proffered position is not actually that of an athletic trainer, but rather a massage therapist, and that it is therefore not a specialty occupation. She also made a corresponding finding that the petitioner had failed to demonstrate that the beneficiary is qualified to perform the duties of a massage therapist. Accordingly, revocation of the petition's approval was appropriate under 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), because the beneficiary was no longer employed by the petitioner in the capacity specified in the petition, and under 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), because the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact. Next, the director found that the petitioner did not pay the beneficiary the wage stated in the petition. Accordingly, revocation of the petition's approval was appropriate under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), because the petitioner violated the terms and conditions of the approved petition.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke approval of the petition (NOIR); (3) counsel's response to the NOIR; (4) the director's letter revoking approval of the petition; and (5) the Form I-290B and supporting documentation.¹

Upon review of the entire record, the AAO finds that the petitioner has failed to overcome the director's grounds for revoking the approval of this petition. Accordingly, the appeal will be dismissed, and approval of the petition will be revoked.

When it filed the petition, the petitioner proposed employing the beneficiary as an athletic director from July 2, 2010 through July 1, 2013, at a wage of \$41,600 per year. The director approved the petition on October 20, 2010.

U.S. Citizenship and Immigration Services (USCIS) randomly selected the petitioner for a post-adjudicative site visit, and a USCIS site inspector visited the petitioner's facility on February 2, 2011. However, the site investigator's findings revealed that the petitioner was not

¹ Counsel marked the box at Part 2 of the Form I-290B, which he signed on February 24, 2012, to indicate that a brief and/or additional evidence would be submitted to the AAO within 30 days. As fourteen months have passed from the time counsel made that statement and the AAO has not received a brief and/or additional evidence, the record is deemed complete and ready for adjudication.

employing the beneficiary in the capacity specified in the petition, and that the petitioner's statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact. Specifically, the petitioner's receptionist notified the site investigator that the beneficiary was working as a massage therapist, and that petitioner pays all of its massage therapists on a commission basis. The site investigator noted further that the petitioner's website made no references to the types of services typically offered by an athletic director; the website only discussed its massage services. The site investigator also noted that the petitioner's office consisted of a large, open room containing seven massage stations.

As a result of these findings, the director issued the NOIR on July 21, 2011, and counsel submitted a timely response. However, the director did not find the evidence submitted by counsel persuasive. As noted by the director, the beneficiary's paystubs indicate that his compensation is based completely upon commissions and tips, which is consistent with the testimony of the receptionist with whom the site investigator spoke. The "Sports Injury Reports" and "My Customer Reports" notes indicate that the beneficiary performed massage therapy for every single client. Counsel also submitted an e-mail message allegedly sent to the beneficiary by a nationally-known Olympic swimmer,² in which the swimmer attempted to schedule a standing weekly appointment for a 90-minute massage. However, this e-mail message did not contain references to any type of athletic training services; it mentioned only massage. The director revoked approval of the petition on January 25, 2012.

On appeal, counsel claims that the petitioner's website does not mention any athletic training services because the beneficiary's clientele is generated via "word of mouth referrals"; that although the treatment notes indicate that the beneficiary performed massages on every single client, those notes establish only that she performed massage services for every single client only during the period of time covered by those notes, and that those notes do not mean that her services as an athletic trainer are never needed; and that, with regard to the petitioner's failure to pay the beneficiary the wage specified in the petition, it is a matter for the U.S. Department of Labor and not a violation of the terms of the H-1B petition. Counsel also submits a photograph of what he claims is the private room in which the beneficiary works.

In general, the authority to revoke approval of an H-1B petition is found at 8 C.F.R. § 214.2(h)(11), which states, in pertinent part, the following:

Revocation of approval of petition.

(i) *General.*

- (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An

² Name withheld to protect individual's identity, as it is not clear he consented to the disclosure of this e-mail message.

amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. . . .

- (B) The director may revoke a petition at any time, even after expiration of the petition.

* * *

(iii) *Revocation on notice—*

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition. . . . ;
or
- (2) The statement of facts contained in the petition . . . was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated [paragraph] (h) of this section or involved gross error.

- (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. . . .

As noted above, the AAO agrees with all three of the director's grounds for revoking the approval of this petition. In reaching this conclusion, the AAO agrees with the director's foundational determination that, at root, the proffered position is not actually an athletic trainer, but is instead in reality a massage therapist. In adjudicating this petition, the AAO will first discuss this foundational issue. It will then discuss a related finding, which the AAO makes beyond the

decision of the director, that approval of the petition would have been a proper basis for revocation of the approval of this petition, pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), because the director's approval of the petition violated "section (h) of this paragraph" (that is, the provisions at 8 C.F.R. § 214.2(h)). Specifically, approval of the petition appears to have violated section (h) of this paragraph because the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the occupational category (Athletic Trainers) does not correspond to the proffered position and its constituent duties as described in the record of proceeding. Although the director did not revoke approval of the petition on this basis, the AAO finds that this would not preclude the director from again initiating revocation-on-notice proceedings on that issue. After addressing these preliminary matters, the AAO will then discuss the two grounds upon which the director revoked the approval of the petition.

The Proffered Position is a Massage Therapist

In its May 2010 letter of support, the petitioner stated that the beneficiary would perform the following tasks:

- Evaluating patients' physical condition;
- Advising and treating patients so that they maintain maximum physical fitness for participation in their respective sports;
- Massaging parts of patients' bodies in order to relieve soreness, strains, and bruises;
- Rendering first aid to injured players, including cleaning and bandaging wounds and applying heat and coldness in order to promote healing;
- Reporting on the progress of patients' recoveries to their sports training camp directors or physicians;
- Wrapping patients' ankles, fingers, or wrists in synthetic skin, protecting gauze, and adhesive tape in order to support their muscles and ligaments; and
- Treating chronic minor injuries and related disabilities in order so that patients may maintain their performance.

These duties generally align with those performed by athletic trainers, as such positions are described in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which the AAO recognizes as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses.³

³ The *Handbook*, which is available in printed form, may also be accessed online at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are from the 2012-13 edition available online.

See generally U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Athletic Trainers," <http://www.bls.gov/ooh/healthcare/athletic-trainers.htm#tab-4> (accessed December 14, 2012).

However, while the duties as set forth by the petitioner in its letter of support align with those of athletic trainers, the record of proceeding does not establish that those are the duties actually being performed.

As noted above, the petitioner's receptionist notified the USCIS site investigator that the beneficiary is working as a massage therapist. Although counsel argued in his August 21, 2011 letter that the petitioner's receptionist "is the lowest level worker who merely answers the telephone," the petitioner has not explained why the receptionist was under the impression that the beneficiary worked as a massage therapist, if such was not the case.⁴ The AAO notes further that the receptionist's comments regarding the manner in which the beneficiary is paid – on the basis of commissions – were borne out through the beneficiary's paystubs, which indicate his only source of remuneration is via commissions and tips.⁵

It is also not clear why the petitioner's website did not reference its alleged provision of athletic training services given the fact that it promoted its massage services, advertised special discounts available for massage sessions, and specified the rates charged for massage services. It is difficult for the AAO to envision why the petitioner would not use its website as a platform for advertising its athletic training services, when it did do so for its massage services. Although counsel claims on appeal that the beneficiary receives clients only through word-of-mouth referrals, that assertion does not make sense absent credible, supporting testimony from the petitioner as to why it made the business decision not to use its website to support the athletic training portion of its business, as it does to support the massage therapy portion of the business. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As noted above, the treatment notes indicate that the beneficiary provided a massage to every single client he saw. Although an Olympic swimmer allegedly e-mailed the beneficiary, he did not contact the beneficiary for athletic training services – he wanted a massage.

⁴ It is noted that the beneficiary is a certified massage therapist in the State of California. See California Massage Therapy Council, "Verify Certification," <https://www.camtc.org/VerifyCertification.aspx> (last accessed May 13, 2013).

⁵ Although counsel claimed in his August 21, 2011 letter that the beneficiary is paid \$20 per hour, he did not address the fact that the beneficiary's paystubs indicate that all of his earnings were received via commissions and tips.

The petitioner has failed to resolve the questions that arose during the USCIS site visit and were discussed by the director, which indicate that the beneficiary is not performing services as an athletic trainer but is instead working as a massage therapist. To the contrary, the petitioner's submissions made after the director's issuance of the NOIR – particularly the paystubs, treatment notes, and the e-mail allegedly sent by an Olympic swimmer – indicate further that the beneficiary is actually working as a massage therapist. Accordingly, the AAO finds that the beneficiary is in fact working as a massage therapist, and not as an athletic trainer, as claimed in the petition.

Accordingly, revocation of the petition's approval was appropriate under 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), because the beneficiary was no longer employed by the petitioner in the capacity specified in the petition, and under 8 C.F.R. § 214.2(h)(11)(iii)(A)(2), because the statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact.

The LCA Submitted in Support of the Petition Does Not Correspond to It

The LCA submitted by the petitioner in support of the instant position specifies the occupational classification for the position as "Athletic Trainers," SOC (O*NET/OES) Code 29-9091.00. However, as discussed above, the AAO has determined that the position proffered in this petition is actually that of a massage therapist.

DOL has clearly stated that its LCA certification process is cursory, that it does not involve substantive review, and that it makes the petitioner responsible for the accuracy of the information entered in the LCA.

With regard to LCA certification, the regulation at 20 C.F.R. § 655.715 states the following:

Certification means the determination by a certifying officer that a labor condition application is not incomplete and does not contain obvious inaccuracies.

Likewise, the regulation at 20 C.F.R. § 655.735(b) states, in pertinent part, that "[i]t is the employer's responsibility to ensure that ETA [(the DOL's Employment and Training Administration)] receives a complete and accurate LCA."

Further, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) also makes clear that certification of an LCA does not constitute a determination that a position qualifies for classification as a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B

classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part (emphasis added):

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to submit an LCA that corresponds to the claimed duties of the proffered position, as the proposed duties as described in the record of proceeding comprise a position not designated as such on the LCA – a market research analyst.

The appropriate wage level is determined only after selecting the most relevant O*NET occupational code classification. The *Prevailing Wage Determination Policy Guidance*⁶ issued by DOL states that “[t]he O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification” for determining the prevailing wage for the LCA.

The O*NET Summary Report for the occupational category “Massage Therapists” summarizes that occupation as follows:

Perform therapeutic massages of soft tissues and joints. May assist in the assessment of range of motion and muscle strength, or propose client therapy plans.

* * *

- Assess clients’ soft tissue condition, joint quality and function, muscle strength, and range of motion.
- Refer clients to other types of therapists when necessary.
- Treat clients in professional settings or travel to clients' offices and homes.

⁶ Available at http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf (last accessed May 13, 2013).

- Use complementary aids, such as infrared lamps, wet compresses, ice, and whirlpool baths to promote clients' recovery, relaxation, and well-being.
- Develop and propose client treatment plans that specify which types of massage are to be used.
- Confer with clients about their medical histories and problems with stress or pain to determine how massage will be most helpful.
- Provide clients with guidance and information about techniques for postural improvement and stretching, strengthening, relaxation, and rehabilitative exercises.
- Massage and knead muscles and soft tissues of the body to provide treatment for medical conditions, injuries, or wellness maintenance.
- Prepare and blend oils and apply the blends to clients' skin.
- Apply finger and hand pressure to specific points of the body.

See Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Massage Therapists, available at <http://www.onetonline.org/link/summary/29-9011.00> (accessed December 14, 2012).

Pursuant to the AAO's discussion above regarding the actual job duties being performed by the beneficiary, the record makes clear that those duties are those of a massage therapist, not an athletic trainer.

The aforementioned *Prevailing Wage Determination Policy Guidance* published by DOL specifies that determination of the proper occupational classification should be made by "consider[ing] the particulars of the employer's job offer and compar[ing] the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected." In this case, the petitioner has not provided any documentation to substantiate its claim that the position's primary and essential tasks, knowledge, and work activities are those generally associated with the occupational category of "Athletic Trainers,"⁷ rather than "Massage Therapists," as depicted by O*Net OnLine. As such, it has not established that this LCA actually corresponds to this petition.

This fact, that the record of proceeding does not establish that the LCA submitted in support of the petition corresponds to it, would have been a proper basis for revocation pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), because the director's approval of the petition violated section

⁷ See generally Employment & Training Administration, U.S. Dept. of Labor, O*Net OnLine, Summary Report for Athletic Trainers, available at <http://www.onetonline.org/link/summary/29-9091.00> (accessed December 14, 2012).

(h) of 8 C.F.R. § 214.2. Specifically, approval of the petition appears to have violated section (h) of this paragraph because the petitioner provided as the supporting Labor Condition Application (LCA) for this petition an LCA which does not correspond to the petition, in that the occupational category (Athletic Trainers) does not correspond to the proffered position and its constituent duties as described in the record of proceeding. The specific “section (h)” provision violated is the requirement at 8 C.F.R. § 214.2(h)(4)(i)(B)(I), which requires that, before filing a petition for H-1B classification in a specialty occupation, the petitioner must obtain a certified LCA “in the occupational specialty in which the beneficiary will be employed.” Although the director did not revoke approval of the petition on this basis, the AAO finds that this would not preclude the director from again initiating revocation-on-notice proceedings on that issue.

The Proffered Position is Not a Specialty Occupation

The AAO will now explore the matter of whether the evidence of record establishes that the proffered position constitutes a specialty occupation. Based upon a complete review of that evidence, the AAO finds that it does not.

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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not rely simply upon a proffered position’s title. The specific duties of the 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 beneficiary, and determine whether the position qualifies

as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d at 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.

The AAO will now discuss the application of each supplemental, alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied by establishing that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of the petition.

Again, the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations it addresses, and finds that the duties of the proffered position align with those of massage therapists as described in the *Handbook*.

In relevant part, the *Handbook* summarizes the duties typically performed by massage therapists as follows:

Massage therapists treat clients by using touch to manipulate the soft-tissue muscles of the body. With their touch, therapists relieve pain, rehabilitate injuries, reduce stress, increase relaxation, and aid in the general wellness of clients. . . .

Massage therapists typically do the following:

- Talk with clients about symptoms, medical history, and desired results
- Evaluate clients to locate painful or tense areas of the body
- Manipulate muscles or other soft tissues of the body
- Provide clients with guidance on how to improve posture, stretching, strengthening, and overall relaxation

Massage therapists use their hands, fingers, forearms, elbows, and sometimes feet to knead muscles and soft tissue of the body to treat injuries and to promote general wellness. A massage can be as short as 5–10 minutes or could last more than an hour.

Therapists also may use lotions and oils, massage tables or chairs, and medical heat lamps when treating a client. Massage therapists may offer clients information about additional relaxation techniques to practice between sessions.

Massage therapists can specialize in many different types of massage, called modalities. Swedish massage, deep-tissue massage, and sports massage are just a few of the many modalities of massage therapy. Most massage therapists specialize in several modalities, which require different techniques.

Usually, the type of massage given depends on the client's needs and physical condition. For example, therapists may use a special technique for elderly clients that they would not use for athletes. Some forms of massage are given solely to one type of client; for example, prenatal massage is given to pregnant women.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Massage Therapists," <http://www.bls.gov/ooh/healthcare/massage-therapists.htm#tab-2> (accessed December 14, 2012).

The *Handbook* states the following with regard to the educational requirements necessary for entrance into this field:

Training standards and requirements for massage therapists vary greatly by state and locality. Education programs are typically found in private or public postsecondary institutions and can require 500 hours or more of study to complete.

A high school diploma or equivalent degree is usually required for admission. Massage therapy programs generally cover subjects such as anatomy; physiology, which is the study of organs and tissues; kinesiology, which is the study of motion and body mechanics; business management; ethics; and the hands-on practice of massage techniques.

Training programs may concentrate on certain modalities, or specialties, of massage. Several programs also offer job placement and continuing education. Both full-time and part-time programs are available.

Id. at <http://www.bls.gov/ooh/healthcare/massage-therapists.htm#tab-4>.

These findings from the *Handbook* do not support a finding that a bachelor's degree, or the equivalent, in a specific specialty, is normally required for entry into this field.

As discussed above, the information from DOL's Occupational Information Network (O*NET OnLine) is necessary for determining the occupational category into which a proffered position falls for purposes of obtaining a certified LCA. However, the information from O*NET OnLine submitted by counsel does not establish that the proffered position qualifies as a specialty occupation under the first criterion described at 8 C.F.R. § 214.2(h)(4)(iii)(A). O*NET OnLine is not particularly useful in determining whether a baccalaureate degree in a specific specialty, or its equivalent, is a requirement for a given position, as its JobZone assignments make no mention of the specific field of study from which a degree must come. As was noted previously, the AAO 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 proposed position. The Specialized Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Furthermore, the information submitted by counsel pertains to athletic trainers and, as set forth above, the proffered position is not an athletic trainer position. For all of these reasons, O*NET OnLine is of little evidentiary value to this issue.

Nor does the record of proceeding contain any persuasive documentary evidence from any other relevant authoritative source establishing that the proffered position's inclusion in this occupational category is sufficient in and of itself to establish the proffered position as, in the words of this criterion, a "particular position" for which "[a] baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

Finally, the AAO notes that the petitioner designated the proffered position as a Level I position on the LCA. That designation is indicative of a comparatively low, entry-level position relative to others within its occupation, and it signifies that the beneficiary is only expected to possess a basic understanding of the occupation.⁸

As the evidence in the record of proceeding does not establish that a baccalaureate degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position that is the subject of this petition, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

⁸ The *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The proposed duties' level of complexity, uniqueness, and specialization, as well as the level of independent judgment and occupational understanding required to perform them, are questionable, as the petitioner submitted an LCA certified for a Level I, entry-level position. The LCA's wage-level indicates that the proffered position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to possess a basic understanding of the occupation; that he will be expected to perform routine tasks requiring limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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.

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 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 for 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.

Therefore, the petitioner has not satisfied the first of the two alternative prongs described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as the evidence of record does not establish a requirement for at least a bachelor's degree in a specific specialty as 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.

Next, the AAO finds that the petitioner did not 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."

In this particular case, the petitioner has failed to credibly demonstrate that the duties the beneficiary would perform on a day-to-day basis constitute a position so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty. The duties proposed for the beneficiary are very similar to those outlined in the *Handbook* as normally performed by massage therapists, and the petitioner's description of the duties which collectively constitute the proffered position lacks the detail and specificity required to establish that they surpass or exceed the duties performed by typical massage therapists in terms of complexity or uniqueness. As noted above the *Handbook* indicates that the performance of these typical duties does not normally require a bachelor's degree, or the equivalent, in a specific specialty. The AAO finds further that, even outside the context of the *Handbook*, the petitioner has simply not established complexity or uniqueness as attributes of the proffered position, let alone as attributes of such an elevated degree as to require the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Also, the AAO incorporates here by reference and reiterates its earlier discussion regarding the LCA and its indication that the proffered position is a low-level, entry position relative to others within the occupation. Based upon the wage rate, the beneficiary is only required to have a basic understanding of the occupation. Moreover, that wage rate is indicative of a position where the beneficiary would perform routine tasks that require limited, if any, exercise of independent judgment; would be closely supervised and monitored; would receive specific instructions on required tasks and expected results; and would have his work reviewed for accuracy.

The petitioner therefore failed to establish how the beneficiary's responsibilities and day-to-day duties constitute a position so complex or unique it can be performed only by an individual with at least a bachelor's degree, or the equivalent, in a specific specialty.

Consequently, as it did not show that the particular position for which it filed this petition is so complex or unique that it can only be performed by a person with at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turns next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which entails an employer demonstrating that it normally requires a bachelor's degree, or the equivalent, in a specific specialty for the position.

The AAO's review of the record of proceeding under this criterion necessarily includes whatever evidence the petitioner has submitted with regard to its past recruiting and hiring practices and with regard to employees who previously held the position in question.

To satisfy this criterion, the record must contain documentary evidence demonstrating that the petitioner has a history of requiring the degree or degree equivalency, in a specific specialty, in its prior recruiting and hiring for the position. The record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by the performance requirements of the proffered position.⁹ In the instant case, the record does not establish a prior history of recruiting and hiring for the proposed position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty.

The record in this case lacks any evidence regarding the petitioner's previous recruitment and hiring for this position. Accordingly, the record lacks evidence for consideration under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Next, the AAO finds that the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires the petitioner to establish that the nature of the

⁹ Any such assertion would be undermined in this particular case by the fact that the petitioner indicated in the LCA that its proffered position is a comparatively low, entry-level position relative to others within the occupation.

proffered 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 in a specific specialty.

Both on its own terms and also in comparison with the three higher wage-levels that can be designated in an LCA, the petitioner's designation of an LCA wage-level I is indicative of duties of relatively low complexity.

As earlier noted, the *Prevailing Wage Determination Policy Guidance* issued by the U.S. Department of Labor (DOL) states the following with regard to Level I wage rates:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered [emphasis in original].

The pertinent guidance from the Department of Labor, at page 7 of its *Prevailing Wage Determination Policy Guidance* describes the next higher wage-level as follows:

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

The above descriptive summary indicates that even this higher-than-designated wage level is appropriate for only "moderately complex tasks that require limited judgment." The fact that this higher-than-here-assigned, Level II wage rate itself indicates performance of only "moderately complex tasks that require limited judgment," is very telling with regard to the relatively low level of complexity imputed to the proffered position by virtue of its Level I wage-rate designation.

Further, the AAO notes the relatively low level of complexity that even this Level II wage-level reflects when compared with the two still-higher LCA wage levels, neither of which was designated on the LCA submitted to support this petition.

The aforementioned *Prevailing Wage Determination Policy Guidance* describes the Level III wage designation as follows:

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained,

either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. . . .

The *Prevailing Wage Determination Policy Guidance* describes the Level IV wage designation as follows:

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

Here the AAO again incorporates its earlier discussion and analysis regarding the implications of the petitioner's submission of an LCA certified for the lowest assignable wage-level. By virtue of this submission the petitioner effectively attested that the proffered position is a low-level, entry position relative to others within the occupation, and that, as clear by comparison with DOL's instructive comments about the next higher level (Level II), the proffered position did not even involve "moderately complex tasks that require limited judgment" (the level of complexity noted for the next higher wage-level, Level II). The AAO also finds that, separate and apart from the petitioner's submission of an LCA with a wage-level I designation, the petitioner has also failed to provide sufficiently detailed documentary evidence to establish that the nature of the specific duties that would be performed if this petition were approved is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

For all of these reasons, the evidence in the record of proceeding fails to establish that the proposed duties meet the specialization and complexity threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As the petitioner has not satisfied at least one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation.

Terms and Conditions of the Approved Petition

Finally, the AAO will address the third basis of the director's revocation – her determination that the petitioner did not pay the beneficiary the wage stated in the petition and that this fact required

revocation of the petition's approval pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3) because the petitioner violated the terms and conditions of the approved petition.

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by the petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of the filing of the application. See section 212(n) of the Act, 8 U.S.C. § 1182(n). The prevailing wage rate is defined as the average wage paid to similarly employed workers in a specific occupation in the area of intended employment. By signing the Form I-129 and LCA, the petitioner attests that it will comply with the wage requirements.

The primary rules governing an H-1B petitioner's wage obligations appear in the DOL regulations at 20 C.F.R. § 655.731. Based upon the excerpts below, the AAO finds that this regulation generally requires that the H-1B employer fully pay the LCA-specified H-1B annual salary: (1) in prorated installments to be disbursed no less than once a month; (2) in 26 bi-weekly pay periods, if the employer pays bi-weekly; and (3) within the work year to which the salary applies.

The regulation at 20 C.F.R. § 655.731(c) states, in pertinent part, the following:

Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. Benefits and eligibility for benefits provided as compensation for services must be offered in accordance with paragraph (c)(3) of this section.
- (2) "Cash wages paid," for purposes of satisfying the H-1B required wage, shall consist only of those payments that meet all the following criteria:
 - (i) Payments shown in the employer's payroll records as earnings for the employee, and disbursed to the employee, cash in hand, free and clear, when due, except for deductions authorized by paragraph (c)(9) of this section;
 - (ii) Payments reported to the Internal Revenue Service (IRS) as the employee's earnings, with appropriate withholding for the employee's tax paid to the IRS (in accordance with the Internal Revenue Code of 1986, 26 U.S.C. [§] 1, et seq.);
 - (iii) Payments of the tax reported and paid to the IRS as required by the Federal Insurance Contributions Act, 26 U.S.C. [§] 3101, et seq. (FICA). The employer must be able to document that the payments have been so reported to the IRS and that both the employer's and

employee's taxes have been paid except that when the H-1B nonimmigrant is a citizen of a foreign country with which the President of the United States has entered into an agreement as authorized by section 233 of the Social Security Act, 42 U.S.C. [§] 433 (i.e., an agreement establishing a totalization arrangement between the social security system of the United States and that of the foreign country), the employer's documentation shall show that all appropriate reports have been filed and taxes have been paid in the employee's home country.

- (iv) Payments reported, and so documented by the employer, as the employee's earnings, with appropriate employer and employee taxes paid to all other appropriate Federal, State, and local governments in accordance with any other applicable law.
 - (v) Future bonuses and similar compensation (i.e., unpaid but to-be-paid) may be credited toward satisfaction of the required wage obligation if their payment is assured (i.e., they are not conditional or contingent on some event such as the employer's annual profits). Once the bonuses or similar compensation are paid to the employee, they must meet the requirements of paragraphs (c)(2)(i) through (iv) of this section (i.e., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).
- (3) *Benefits and eligibility for benefits* provided as compensation for services (e.g., cash bonuses; stock options; paid vacations and holidays; health, life, disability and other insurance plans; retirement and savings plans) shall be offered to the H-1B nonimmigrant(s) on the same basis, and in accordance with the same criteria, as the employer offers to U.S. workers.
- (i) For purposes of this section, the offer of benefits "on the same basis, and in accordance with the same criteria" means that the employer shall offer H-1B nonimmigrants the same benefit package as it offers to U.S. workers, and may not provide more strict eligibility or participation requirements for the H-1B nonimmigrant(s) than for similarly employed U.S. workers(s) (e.g., full-time workers compared to full-time workers; professional staff compared to professional staff). H-1B nonimmigrants are not to be denied benefits on the basis that they are "temporary employees" by virtue of their nonimmigrant status. An employer may offer greater or additional benefits to the H-1B nonimmigrant(s) than are offered to similarly employed U.S. worker(s), *provided* that such differing treatment is consistent with the requirements of all applicable nondiscrimination laws (e.g., Title VII of the 1964 Civil Rights Act, 42 U.S.C. [§§] 2000e-2000e17). Offers of benefits by employers shall be made in good faith and shall

result in the H-1B nonimmigrant(s)'s actual receipt of the benefits that are offered by the employer and elected by the H-1B nonimmigrant(s).

* * *

- (iv) Benefits provided as compensation for services may be credited toward the satisfaction of the employer's required wage obligation only if the requirements of paragraph (c)(2) of this section are met (e.g., recorded and reported as "earnings" with appropriate taxes and FICA contributions withheld and paid).

At pages 3 and 13 of the Form I-129 and on the LCA, the petitioner reported that the salary for the proffered position would be \$41,600 per year. The beneficiary's pay stubs indicate that the petitioner paid her a total of \$11,615.50 between January 1, 2011 and July 31, 2011. However, the petitioner should have paid her approximately \$24,266.67 during this period of time, which indicates the petitioner paid the beneficiary less than half of the wage specified in the petition. Such a significant underpayment does not support a finding that the petitioner paid the beneficiary the required wage under the relevant statutory and regulatory provisions.

When a petitioner signs the Form I-129, it confirms "under penalty of perjury under the laws of the United States of America that this petition and the evidence submitted with it are all true and correct" and that it "agrees to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment." The petitioner attests that it has read and agreed to the labor condition statements at Section H, which include confirming that it will "[p]ay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time." The required wage must be paid to the employee, cash in hand, free and clear, when due. *See* 20 C.F.R. § 655.731(c)(1). As discussed above, the petitioner has not complied with this requirement, as the record indicates that during the first seven months of 2011 the petitioner paid the beneficiary a wage of less than fifty percent of the one specified in the petition.

The petitioner has failed to establish that it paid the beneficiary the appropriate salary for her work, as required under the Act. The record therefore establishes that the petitioner violated the terms and conditions of the approved petition, and the director also properly revoked approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). Accordingly, the appeal will be dismissed and approval of the petition will be revoked on this basis.

Conclusion

Aside from the AAO's essentially administrative comments regarding the petitioner's failure to submit an LCA which corresponds to the petition, the AAO has determined that approval of the petition was properly revoked on each of the two separate and independent grounds, addressed earlier in this decision, upon which the director's January 25, 2012 decision was based. Accordingly, the appeal will be dismissed, and the approval of the petition will remain revoked.

(b)(6)

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. Approval of the petition remains revoked.