

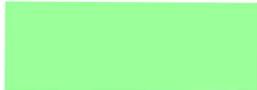
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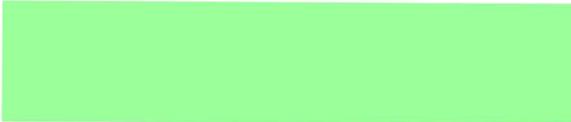
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **JUN 05 2014** OFFICE: VERMONT 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

N. Z.
for

Ron Rosenberg
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 appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center on September 28, 2012. In the Form I-129 visa petition, the petitioner describes itself as a physical therapy business established in 2001. In order to employ the beneficiary in what it designates as a "therapist coordinator," the petitioner seeks 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 May 29, 2013, finding that the petitioner failed to establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the position had been determined to be a specialty occupation. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, the record supports the conclusion that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner indicated on the Form I-129 that it wishes to employ the beneficiary as a therapist coordinator from September 30, 2012 to September 30, 2015, on a full-time basis, and with an annual salary of \$64,043. In addition, the petitioner indicated on the petition that the beneficiary will work at [REDACTED] Brooklyn, NY [REDACTED]

In a support letter dated September 25, 2012, the petitioner indicated that it "specializes in customized treatment programs that address and treat the source of the patients' injury and pain using manual therapy technique, patient education and personalized exercise plan." The petitioner also stated that as a therapist coordinator, the beneficiary "will analyze and provide the assessment of clinical skills possessed by physical and occupational therapist, as well as assessment of the therapist[s] past work history and practice." The petitioner further stated that "[i]t is our position that an individual requires at minimum a Bachelor's degree to perform the above-described specialty occupation job duties." The petitioner did not provide any information regarding licensure

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

requirements. The petitioner provided a copy of the beneficiary's foreign academic credentials and an academic evaluation.

On the Form I-129, the petitioner designated its business operations under the North American Industry Classification System (NAICS) code 561320.² This NAICS code is designated for "Temporary Help Services." See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 56130 – Temporary Help Services, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed June 4, 2014). Although on the Form I-129 the petitioner stated that it is a physical therapy business, it did not indicate the NAICS code for an office of physical, occupational and speech therapists, and audiologists. See U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 621340 - Offices of Physical, Occupational and Speech Therapists, and Audiologists, on the Internet at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed June 4, 2014). It is not clear why the petitioner chose the NAICS code for "Temporary Help Services." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The LCA designation selected by the petitioner for the therapist coordinator position corresponds to the occupational classification "Physical Therapists" - SOC (ONET/OES) Code 29-1123 at a Level I (entry level) wage.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on December 24, 2012. The director outlined the evidence to be submitted.

The petitioner and counsel responded to the director's RFE and provided additional evidence, including the following job description of the proffered position:

1. Utilizing the knowledge of clinical therapeutic skills, effectively analyze the practice and needs of physical and occupational therapist (10% of time)[.]
2. Interprets and implements the quality assurance standards (8% of time)[.]
3. To monitor unusual occurrences, report follow-up procedures, and report monthly and year-to-date comparisons (4% of time).
4. Writes quality assurance policies and procedures (6% of time)[.]
5. Review quality assurance standards, studies existing policies and procedures and interviews personnel and customers to evaluate effectiveness of quality assurance program (7% of time)[.]
6. To perform other assigned duties as necessary within the realm of the Medical

² According to the U.S. Census Bureau, the North American Industry Classification System (NAICS) is used to classify business establishments according to type of economic activity, and each establishment is classified to an industry according to the primary business activity taking place there. See <http://www.census.gov/eos/www/naics/> (last viewed June 4, 2014).

- Records Department (4% of time).
7. To assist the president with records form and revisions (2% of time)[.]
 8. Reviews and evaluates patients' medical records, applying quality assurance criteria (4% of time)[.]
 9. Performs quality-assurance functions to accomplish business coordination monitoring and reporting of quality-assurance studies according to the QA/UR plans (4% of time)[.]
 10. Responsible for knowing current QA regulations and informing the Director of any new and/or revised regulations imposed (4% of time).
 11. Selects specific topics for review, such as problem procedures, drugs, high volume cases, high risk cases, or other factors (3% of time).
 12. Compiles statically [sic] data and writes narrative reports summarizing quality assurance findings (4% of time).
 13. Assists departments with the coordination of audit information, and recommends appropriate data-gathering mechanisms, procedures, etc[.] (3% of time).
 14. Responsible for achieving a satisfactory working environment between other departments performing quality-assurance studies (3% of time)
 15. May review patient records, applying utilization review criteria, to determine need for admission and continued for therapy in the clinics (5% of time).
 16. May oversee personnel engaged in quality assurance review of the medical records (5%)[.]
 17. Assist with developing and maintaining an unusual occurrence procedure (2% of time)[.]
 18. Assist with the monitoring of unusual occurrences, prepares action-taken reports (4% of time)[.]
 19. Reviews testing, quality control, and other testing reports for accuracy completeness and compliance to requirements to ensure that quality assurance standards and regulatory requirements are met (4% of time).
 20. Assist the president with revision to the QA/UR plan for staff review (4% of time).
 21. Keeps the president informed of studies in process and progress thereof, committee agendas items; discusses problems and completion of audit procedures (4% of time).
 22. Assists with and/or advises on laboratory procedures development and implementation as requested or necessary (2% of time).
 23. Reviews, tracks and communicates information regarding process variations and quality control samples as required by laboratory quality assurance procedures (2% of time).
 24. Maintains current and accurate records of all relevant communications, audits, corrective action plans and effectiveness monitoring (2% of time).

In a letter in response to the RFE dated March 20, 2013, counsel for the petitioner explained that the proffered position is a "management/administrative position related to physical therapy." Counsel also stated that the "position does not require a healthcare certificate because the beneficiary is not involved in direct patient care," and "[h]e is not practicing as a physical therapist, but rather is a coordinator/manager of the physical therapy program and quality assurance."

The director reviewed the information provided by the petitioner. Although the petitioner claimed that the beneficiary would serve in a specialty occupation, the director determined that the petitioner failed to establish how the beneficiary's immediate duties would necessitate services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. The director also found that the beneficiary would not be qualified to perform the duties of the proffered position. The director denied the petition on May 29, 2013. The petitioner and counsel submitted an appeal of the denial of the H-1B petition. On appeal, the petitioner and counsel submitted a brief and additional evidence.

II. LAW AND ANALYSIS

A. Failure to Establish that Proffered Position Qualifies as a Specialty Occupation

As a preliminary matter, on appeal, counsel for the petitioner indicates that the "preponderance of the evidence" standard is relevant to this matter, and that the petitioner clearly established, through the evidence presented, that the proffered position is a specialty occupation.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt

leads the director to believe that the claim is probably not true, deny the application or petition.

Applying the preponderance of the evidence standard, we conclude that the petitioner has not established that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The 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 which [(2)] 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). To avoid this 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 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 evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

In the H-1B petition, the petitioner stated that the beneficiary would be employed in a therapist coordinator position. However, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. As previously mentioned, 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 evidence in the record of proceeding establishes that performance of the particular proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

As previously noted, in the support letter, the petitioner stated that as a therapist coordinator, the beneficiary "will analyze and provide the assessment of clinical skills possessed by physical and occupational therapist, as well as assessment of the therapist[s] past work history and practice." In response to the director's RFE, the petitioner provided an expanded job description of the proffered position and added various generic duties related to quality assurance. Moreover, the petitioner claimed for the first time that the therapist coordinator position does not require a physical therapy license. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's RFE did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

We find that, as reflected in the descriptions of the position as quoted above, the petitioner describes the proposed duties in terms of generalized and generic functions that fail to convey sufficient substantive information to establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the petitioner's assertion that the beneficiary will "assist the president with records form and revisions," "[a]ssist with developing and maintaining an unusual occurrence procedure," "[a]ssist with the monitoring of unusual occurrences," "[a]ssist the president with revision to the QA/UR plan for staff review," and "[a]ssist[] with and/or advise[] on laboratory procedures development and implementation as requested or necessary."

However, notably, the assertions provide no insight into the beneficiary's actual duties, nor do they include any information regarding the specific tasks that the beneficiary will perform. The petitioner repeatedly states that the beneficiary will "assist" in various tasks, but fails to sufficiently

define how this translates to specific duties and responsibilities as the phrase "assist" does not delineate the actual work the beneficiary will perform. This is again illustrated by the petitioner's statement that the beneficiary "[a]ssists departments with the coordination of audit information, and recommends appropriate data-gathering mechanisms, procedures, etc." The petitioner does not explain the beneficiary's specific role ("assist[ing]") and has not provided any information regarding its "departments," where these departments are located within the petitioner's business operations and what employees, if any, work in those departments. Indeed, it is not sufficiently clear what the beneficiary will be doing and where the beneficiary's position falls within the petitioner's corporate hierarchy, as the petitioner did not provide an organizational chart indicating the company's structure. 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)).

Thus, as so generally described, the expanded job description does not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. That is, the overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's business operations. Furthermore, the petitioner did not provide sufficient documentation to substantiate the job duties and responsibilities of the proffered position.

Such generalized information does not in itself establish a necessary correlation between any dimension of the proffered position and a need for a particular level of education, or educational equivalency, in a body of highly specialized knowledge in a specific specialty. We also observe, therefore, that it is not evident that the proposed duties as described in this record of proceeding, and the position that they comprise, merit recognition of the proffered position as a specialty occupation. We find that, to the extent that they are described by the petitioner, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, so as to persuasively support the claim that the position's actual work would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific specialty directly related to the demands of the proffered position.

The petitioner has failed to provide sufficient details regarding the nature and scope of the beneficiary's employment or any substantive evidence regarding the actual work that the beneficiary would perform. Without a meaningful job description, the record lacks evidence sufficiently concrete and informative to demonstrate that the proffered position requires a specialty occupation's level of knowledge in a specific specialty. Based upon a complete review of the record of proceeding, we find that the petitioner has failed to establish (1) the substantive nature and scope of the beneficiary's employment; (2) the actual work that the beneficiary would perform; (3) the complexity, uniqueness and/or specialization of the tasks; and/or (4) the correlation between that work and a need for a particular educational level of highly specialized knowledge in a specific specialty. Consequently, these issues preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions.

That is, the petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Thus, the petitioner has failed to establish that the proffered position is a specialty occupation under the applicable provisions. In this regard, the AAO here refers back to, and hereby incorporates by reference, its earlier analysis, comments, and findings with regard to the petitioner's generalized and generic descriptions of the duties and the position they comprise, and the lack of evidence substantiating the duties and responsibilities of the position. As described, the AAO finds, they do not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested, such that they persuasively support any claim in the record of proceeding that the work that they would generate would require the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). The AAO finds that the petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

B. The beneficiary is not be qualified to perform the duties of the proffered position if the position had been determined to be a specialty occupation

We will now address the director's second basis for denying the petition, namely whether the petitioner has established that the beneficiary qualifies for the proffered position. Even if the petitioner had established that the proffered position qualifies as a specialty occupation (which it has not), the director correctly determined that the beneficiary is not qualified to perform the duties of such a specialty occupation. The statutory and regulatory framework that we must apply in our consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In addition, 8 C.F.R. § 214.2(h)(4)(v)(A) states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

Therefore, to qualify an alien for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its

foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In order to equate a beneficiary's credentials to a U.S. baccalaureate or higher degree, the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;³
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the

³ The petitioner should note that, in accordance with this provision, we will accept a credentials evaluation service's evaluation of *education only*, not training and/or experience.

specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

It is always worth noting that, by its very terms, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) is a matter strictly for USCIS application and determination, and that, also by the clear terms of the rule, experience will merit a positive determination only to the extent that the record of proceeding establishes all of the qualifying elements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) – including, but not limited to, a type of professional recognition.

As previously noted, the petitioner stated that the beneficiary would be employed as a therapist coordinator and submitted an LCA for the occupational classification of "Physical Therapists" – SOC (ONET/OES) Code 29-1123.

We recognize the *Occupational Outlook Handbook* (hereinafter, *Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that we address.⁴ We reviewed the chapter of the *Handbook* entitled "Physical Therapists" including the sections regarding the typical duties and requirements for this occupational category. However, the *Handbook* indicates that "Physical Therapists" require a Doctor of Physical Therapy (DPT) degree and a license, and thus, the beneficiary does not appear to meet the qualification for the proffered position.

The subchapter of the *Handbook* entitled "How to Become a Physical Therapist" states the following about this occupational category:

⁴ All of our references are to the 2014-2015 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>.

Physical therapists need a Doctor of Physical Therapy (DPT) degree. All states require physical therapists to be licensed.

Education

In 2013, there were 218 programs for physical therapists accredited by the Commission on Accreditation in Physical Therapy Education, all of which offered a Doctor of Physical Therapy (DPT) degree.

DPT programs typically last 3 years. Most programs require a bachelor's degree for admission as well as specific prerequisites, such as anatomy, physiology, biology, chemistry, and physics. Most DPT programs require applicants to apply through the Physical Therapist Centralized Application Service (PTCAS).

Physical therapist programs often include courses in biomechanics, anatomy, physiology, neuroscience, and pharmacology. Physical therapist students also complete clinical internships, during which they gain supervised experience in areas such as acute care and orthopedic care.

Physical therapists may apply to and complete a clinical residency program after graduation. Residencies typically last about 1 year and provide additional training and experience in specialty areas of care. Therapists who have completed a residency program may choose to specialize further by completing a fellowship in an advanced clinical area.

Licenses

All states require physical therapists to be licensed. Licensing requirements vary by state but all include passing the National Physical Therapy Examination administered by the Federation of State Boards of Physical Therapy. Several states also require a law exam and a criminal background check. Continuing education is typically required for physical therapists to keep their license. Check with state boards for specific licensing requirements.

After gaining work experience, some physical therapists choose to become a board-certified specialist. The American Board of Physical Therapy Specialties offers certification in 8 clinical specialty areas, including orthopedics and geriatric physical therapy. Board specialist certification requires passing an exam and at least 2,000 hours of clinical work or completion of an APTA-accredited residency program in the specialty area.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2014-15 ed.* Physical Therapists, on the Internet at <http://www.bls.gov/ooh/healthcare/physical-therapists.htm#tab-4> (last visited June 4, 2014).

The *Handbook* states that physical therapists need a Doctor of Physical Therapy (DPT) degree and that all states require physical therapists to be licensed to practice. In the instant case, the petitioner submitted an academic evaluation by [REDACTED] dated July 8, 2009, which indicates that the beneficiary has the U.S. equivalent of a three and one half year undergraduate degree, rather than a 4 year baccalaureate degree. Also, the evaluation states that only the beneficiary's Provisional Certificate was submitted for the evaluator's review, rather than a copy of the Final Diploma. The petitioner also submitted an evaluation by [REDACTED] Inc., dated July 11, 2012, that states that the beneficiary has the U.S. equivalent of a Bachelor's degree in physical therapy. The July 11, 2012 evaluation also states that "[t]he Bachelor's degree in Physical Therapy is no longer offered in the United States." We note that, in response to the RFE, counsel stated that the "position does not require a healthcare certificate because the beneficiary is not involved in direct patient care," and "[h]e is not practicing as a physical therapist, but rather is a coordinator/manager of the physical therapy program and quality assurance." However, there is no indication that the beneficiary meets the educational and licensure requirements (as required by all states) to serve as a physical therapist and the petitioner has not established the beneficiary to be exempt from the requirements.

Next, we note that, on appeal, counsel claims that "[h]ad the evaluator [for [REDACTED] also considered professional experience . . . , it would have found the beneficiary had more than the equivalent of a bachelor's degree." 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). Moreover, the evidence in the record does not establish that the evaluator, [REDACTED] for [REDACTED], is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). Specifically, no documentation was provided establishing that Ms. [REDACTED] is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

Upon review of the record of proceeding, and applying the preponderance of the evidence standard, we find that the petitioner has not demonstrated (1) that the beneficiary possesses a Doctor of Physical Therapy (DPT) degree; and (2) that the beneficiary is licensed to work as a physical therapist. Therefore, based upon the record of proceeding, the beneficiary is not qualified for the proffered position, and the petitioner failed to establish eligibility for the requested benefit under Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A). The petitioner, therefore, has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

III. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the

initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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