



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF O-N-&R-C-

DATE: NOV. 27, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a nursing home, seeks to employ the Beneficiary as a “rehab specialist” under the H-1B nonimmigrant classification. See Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

I. ISSUE

The issue before us is whether the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.¹

II. SPECIALTY OCCUPATION

A. Legal Framework

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.

¹ We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); see also 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

We note that the Director found that the Beneficiary did not maintain nonimmigrant status in the United States. On appeal, the Petitioner asserts that the Director erred in finding that the Beneficiary did not maintain her nonimmigrant status. However, we do not have jurisdiction over this matter, as issues surrounding the Beneficiary’s maintenance of nonimmigrant status are within the sole discretion of the Director. Accordingly, we will not address this issue.

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 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 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.

B. The Proffered Position

In the Labor Condition Application (LCA) submitted to support the visa petition, the Petitioner indicated that the proffered position corresponds to the occupational category “Physical Therapists” with SOC (ONET/OES) code 29-1123, at a Level I (entry level) wage.

In the support letter dated April 1, 2014, the Petitioner described the proffered position as follows:

[The Beneficiary] is being offered temporary employment as a Rehab Specialist with the Care Center in our Rehabilitation Department. In her position, [the Beneficiary] will implement our pre-established rehabilitation treatment programs and plans; observe and report safety, hygiene and daily comfort need of residents-patients; complete reviews for resident-patient’s rehab plan; and analyze progress as the result of specified therapies and inform assigned physician and therapist to ensure that plans of care and services provided are necessary to obtain the expected result. [The Beneficiary] will also be expected to make observation[s] on systemic and specific problems that hinder effective and efficient rehab treatments, conduct research for solutions, and propose changes to our interdisciplinary team and management.

The responsibilities of [the Beneficiary] will also include the following: observe, record, and report changes in the resident-patient's conditions to physician and therapist; provide continuous evaluation of the effectiveness of treatment through the ongoing assessment of resident-patient, input from resident-patient, and other relevant data resulting in specified rehab treatment or modification to rehabilitation plan; participate in team process and attend case conference with resident-patient and family educational meetings; direct resident-patient and his/her family in fostering safe home and workplace environment; observe and monitor adherence to rules and standards and report any violation to management.

[The Beneficiary] will be working in close coordination with physicians and therapists in creating Interdisciplinary Team Plan and developing Individualized Rehabilitation plan for resident-patient by providing team member with assessment of resident-patient's problems, needs, and goals. Further, the beneficiary will be expected to assist each resident-patient in achieving the optimum result of his/her Individualized Rehabilitation plan; schedule and lead orientation to rehabilitation session to guide resident-patient to foster independent functioning; implement community reintegration activities under the direction of physicians and therapists to assist resident-patient with a variety of needs at home, workplace, and community; develop instructional materials to be utilized by resident-patient and his/her family and community members; and assist resident-patient to maintain and improve his/her learning, social, employment, and leisure goals.

Our requirements for the professional position of Rehab Specialist in which we seek to employ [the Beneficiary] are, at a minimum, a Bachelor's degree in Physical Therapy, Occupational Therapy, or a related field, or the equivalent thereof. It has been the established practice of [the Petitioner] to require at least a Bachelor's degree in Physical Therapy or Occupational Therapy for all of our Rehab Specialist positions.

The Petitioner included copies of the Beneficiary's degree and transcripts indicating that she received a foreign Bachelor of Science in Physical Therapy from a university in the Philippines. However, the Petitioner did not include an evaluation of the Beneficiary's foreign degree. In addition, the Petitioner provided a copy of the Beneficiary's registration certificate as a "Physical Therapist Assistant" in New York.

In response to the Director's RFE, the Petitioner restated the majority of the job duties as discussed in the support letter, but noted that it had made a slight revision to the job duties. Although the Petitioner did not specify the change it had made, it appears that it omitted the following duty listed in the support letter: "participate in team process and attend case conference with resident-patient and family educational meetings." The Petitioner also broke down the proffered duties as follows:

30% Monitor the Implementation of Individualized Rehabilitation Programs and Research Ensure implementation of resident-patient's pre-established rehabilitation programs and plans; observe and report therapists' compliance to safety protocols and satisfaction of the resident-patient's needs; ask and record questions from resident-patients; review recommendations for use of therapies in place of medication and monitor the implementations; record reactions of patients to recommendations.

25% Observation and Recordation of the Delivery of Physical/Occupational Therapy and Rehabilitation Services Plan observe, record, and report changes in the resident-patient's conditions to physician and therapist; conduct observation to identify issues in the implementation of best treatment practices; spot and record suspected systemic and specific problems; observe adherence to rules and standards and report any violation to management.

25% Contribution to the Individualized Program Development and Resident-patient Assistance Coordinate with physicians and therapists in modifying and developing Individualized Rehabilitation plan for each resident-patient by providing team member with assessment of resident-patient's problems, needs, and goals as she has observed; schedule and lead orientation to rehabilitation session to guide resident-patient to foster independent functioning; implement community reintegration activities under the direction of physicians and therapists to assist resident-patient with a variety of needs at home, workplace, and community; and, develop instructional materials to be utilized by resident-patient and his/her family and community members.

10% Recording and Reporting Process Follow up with her reports on violations and problems with appropriate internal authority; ensuring that the physical therapists accurately document exams to test and measure patients' strength, motor development and function, sensory perception, functional capacity, and respiratory and circulatory efficiency, and then record related data and clinical observations;

10% Treatment Review, Analysis and Research Compile statistical data and write narrative reports summarizing quality assurance findings; assist therapists to revise or design new rehabilitation programs and plans; conduct research on the best systems to accommodate better compliance to regulatory requirements; and, conduct research for solutions of systemic and specific problems.

The Petitioner also submitted copies of advertisements placed by other employers in support of its argument that the proffered position is a specialty occupation.

C. Analysis

We will now discuss the proffered position in relation to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The Petitioner asserts that the proffered position is located within the “Physical Therapist” occupational category, and should not be classified as a physical therapist assistant. Despite the Petitioner’s designation of the proffered position as a physical therapist on the LCA and its characterization of the proffered duties as those of a physical therapist on appeal, the Beneficiary’s credentials demonstrate that, at the time the petition was filed, she was licensed as a physical therapist assistant, and not as a physical therapist, in the State of New York, where she would perform her duties. Under New York laws defining physical therapists, “[o]nly a person licensed or otherwise authorized under this article shall practice physical therapy or use the title ‘physical therapist,’ ‘physiotherapist’ or ‘mechanotherapist’ or the abbreviation of ‘P.T.’ in connection with his or her name or with any trade name in the conduct of his profession.” N.Y. EDUC LAW § 6732 (McKinney 2015). It therefore appears that the Petitioner has mischaracterized the proffered position as being located within the “Physical Therapists” occupational category, as the Beneficiary is not licensed to work as a physical therapist under New York law. Further, the Petitioner has not provided any supporting documentation to demonstrate that the Beneficiary will actually perform the proffered duties, nor has the Petitioner submitted evidence that the proffered position actually falls within the occupational category of “physical therapist.” 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’l Comm’r 1972)).

As further evidence that the Petitioner did not accurately state the proffered duties, we note that under New York law, “[d]uties of physical therapist assistants shall not include evaluation, testing, interpretation, planning or modification of patient programs.” N.Y. EDUC LAW § 6738 (McKinney 2015). However, the Petitioner stated that the Beneficiary would, “*provide continuous evaluation of the effectiveness of treatment through the ongoing assessment of resident-patient, input from resident-patient, and other relevant data resulting in specified rehab treatment or modification to rehabilitation plan.*” (Emphasis added.) In addition, the Petitioner stated in its breakdown of duties that 25 percent of the Beneficiary’s duties would entail individualized program development and 30 percent of her duties would include monitoring the implementation of those programs. In other words, the Beneficiary is not licensed to perform more than 50 percent of the proffered duties. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1).

As the Petitioner did not submit documentation that the Beneficiary was licensed as a physical therapist, but only as a physical therapist assistant, we conclude that the Petitioner did not accurately depict the proffered duties in support of the petition.²

As the position description and characterization of the proffered position as one located within the occupational category of “Physical Therapist” is therefore inaccurate, we find that the record of proceeding lacks documentation regarding the actual work that the Beneficiary will perform to sufficiently substantiate the claim that the Petitioner has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. In other words, the record does not include an accurate portrayal of the proffered duties because the Petitioner has designated the proffered position as one within the occupational category of “Physical Therapist,” which is a job classification requiring a license that the Beneficiary does not have. Therefore, the Petitioner has not submitted corroborating evidence to support its claim that the Beneficiary has been offered a position in a specialty occupation.

The Petitioner has provided inconsistent information regarding the substantive nature of the work to be performed by the Beneficiary, which 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 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’s 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.

We therefore affirm the Director’s finding that the Petitioner has not established that the proposed position qualifies for classification as a specialty occupation.

III. ADDITIONAL BASIS

Since the identified basis for denial is dispositive of the Petitioner’s appeal, we need not address another ground of ineligibility we observe in the record of proceeding. Nevertheless, we will briefly note and summarize it here with the hope and intention that, if the Petitioner seeks again to employ the Beneficiary or another individual as an H-1B employee in the proffered position, it will submit sufficient independent objective evidence to address and overcome this additional ground in any future filing.

² We note that even if the Petitioner is able to prove, which it did not, that the proffered position is located within the occupational category of “Physical Therapist,” the petition would then have to be denied on the ground that the Petitioner is offering the Beneficiary a position for which she is not licensed, and therefore not qualified.

As discussed in this decision, the Petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the Beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further, except to note that, in any event, the Petitioner did not submit an evaluation of her foreign degree or sufficient evidence to establish that her degree is the equivalent of a U.S. bachelor's degree in a specific specialty. As such, since evidence was not presented that the Beneficiary has at least a U.S. bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved even if eligibility for the benefit sought had been otherwise established. Further, as discussed previously, the Beneficiary also does not qualify for the position as she lacks the requisite physical therapist license.

IV. CONCLUSION AND ORDER

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.

Cite as *Matter of O-N-&R-C-*, ID# 14852 (AAO Nov. 27, 2015)