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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[REDACTED]

File: [REDACTED] Office: TEXAS SERVICE CENTER

Date: **JAN 20 2004**

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Mari Jensen
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to employ the beneficiary permanently in the United States as an assistant professor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. The director denied the petition because the director concluded that the beneficiary will be involved in patient care, and the petitioner has not established that the beneficiary meets the regulatory requirements regarding aliens in the medical profession.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

The job description on line 13 of part A of the Form ETA-750 labor certification in the record states, in full, “[i]ndividual will be responsible for didactic and clinical teaching as well as incidental patient care; initiating and maintaining clinical studies in the Department of Anesthesiology.”

In a letter dated December 5, 2001, Professor Carol L. Lake, chair of the petitioner’s Department of Anesthesiology, describes the position offered to the beneficiary:

This letter serves as verification of the offer of permanent professional employment to [the beneficiary] as an Assistant Professor of Anesthesiology. . . .

The position requires a Doctor of Medicine degree, or its equivalent, and completion of a four-year residency in Anesthesiology.

[The beneficiary] will be spending approximately 50% of his time teaching clinical anesthesiology and 50% conducting clinical research. His duties will include but not be limited to:

1. Assessment of, consultation for, and preparation of, patients for anesthesia.
2. Relief and prevention of pain during and following surgical, obstetric, therapeutic and diagnostic procedures.
3. Monitoring and maintenance of normal physiology during the perioperative period.
4. Management of critically ill patients.
5. Diagnosis and treatment of acute, chronic, and cancer related pain.
6. Clinical management and teaching of cardiac and pulmonary resuscitation.
7. Evaluation of respiratory function and application of respiratory therapy.
8. Conduct of clinical, translational, and basic science research.
9. Supervision, teaching and evaluation of performance of personnel, both medical and paramedical involved in perioperative care.

10. Administrative involvement in health care facilities and organizations, and medical schools necessary to implement these responsibilities.
11. Work in concert with the various specialists on the patient care team in the Intensive Care Unit; utilize recognized techniques for vital support; and teach other physicians, nurses, and health professionals the practice of intensive care.

The first seven items on the above eleven-item list appear to be indistinguishable from the duties of a practicing anesthesiologist.

Section 212(a)(5)(B) of the Act states, in pertinent part:

An alien who is a graduate of a medical school not accredited by a body or bodies approved for the purpose by the Secretary of Education (regardless of whether such school of medicine is in the United States) and who is coming to the United States principally to perform services as a member of the medical profession is inadmissible, unless the alien (i) has passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) and (ii) is competent in oral and written English.

Department of Labor regulations at 20 C.F.R. § 656.20(d)(1)(i) state that an application for labor certification as a physician or surgeon shall include documentation which shows clearly that the alien has passed Parts I and II of the National Board of Medical Examiners Examination (NBME), or the Foreign Medical Graduate Examination in the Medical Sciences (FMGEMS) offered by the Educational Commission for Foreign Medical Graduates (ECFMG), except under certain conditions that do not apply in this proceeding.

The director instructed the petitioner to submit “documentation that the beneficiary has taken and passed the USMLE steps 1,2,3; FLEX 1 and 2, or NBME Parts I, II and III” and “a copy of the beneficiary’s ECFMG certificate.” In response, counsel states:

There is no INS regulation which requires [the beneficiary] to provide evidence showing that he has taken or passed the USMLE Steps 1, 2 and 3 or any other such exams nor obtain an ECFMG certificate as a prerequisite to employment as an assistant professor. Both the USMLE and ECFMG certificates are required where one is employed to practice medicine as a physician. [The beneficiary] clearly is not employed to practice medicine as a physician. . . .

Furthermore, The University’s offer of employment dated December 5, 2001, by Dr. Carol L. Lake . . . clearly states that “[the beneficiary] will be spending approximately 50% of his time teaching clinical anesthesiology and 50% conducting clinical research. . . . The letter further discusses the scope of [the beneficiary’s] responsibility, which do not include clinical patient care. This letter establishes that [the beneficiary] will not be employed to practice medicine.

The director denied the petition, acknowledging that the labor certification referred to “incidental patient care” but noting that Prof. Lake’s letter listed several “clinical responsibilities for the position.” The director reproduced items 1 through 6 from that list, and noted that the petitioner had failed to demonstrate that the beneficiary had passed the required equivalency examinations.

On appeal, counsel states “[a]s a professor, [the beneficiary’s] duties will be directed toward imparting knowledge to students and others. While he may have patient care contact incidental to his teaching and research, such contact with patients will only occur in an academic environment and not in a clinical setting.” Counsel cites a newly submitted letter from Dr. Joel Kaplan of the petitioning university, who states that the petitioner “devotes half of his time to research with his remaining effort being devoted to teaching. [The beneficiary] is never assigned to non-teaching clinical activity.” Contrary to what counsel implies, Dr. Kaplan does not minimize the beneficiary’s “clinical activity,” but rather his “non-teaching clinical activity.” Dr. Kaplan does not state that “contact with patients will . . . not [occur] in a clinical setting.”

The petitioner also submits another copy of Prof. Lake’s letter of December 5, 2001. With regard to this letter, counsel states:

[W]hile the offer Letter . . . states that [the beneficiary] will have certain enumerated clinical responsibilities, those responsibilities are consistent with his position as a professor wherein he will be instructing those students and other patient care providers on the delivery of proper medical services to patients. [The beneficiary] will not, however, be the individual rendering such patient care. . . . He is the “supervisor” of those medical students and other patient care providers in his capacity as their professor.

The above explanation is not consistent with the wording of Prof. Lake’s letter. That letter indicated that the beneficiary’s “duties will include . . . [r]elief and prevention of pain during and following surgical, obstetric, therapeutic and diagnostic procedures” as well as “[d]iagnosis and treatment of acute, chronic, and cancer related pain,” among other plainly clinical duties. Counsel’s assertion that these items refer to the beneficiary’s supervision of medical students fails to take into account item 9 on the list, “Supervision, teaching and evaluation of performance of personnel, both medical and paramedical involved in perioperative care.” If item 9 indicates that the beneficiary, himself, is to personally supervise, teach and evaluate, then we must conclude that item 2 indicates that the beneficiary, himself, is to provide “[r]elief and prevention of pain during . . . procedures,” and item 5 indicates that the beneficiary, himself, is to administer “[d]iagnosis and treatment of . . . pain.” If we assume otherwise, item 9 is meaningless and redundant because of supervision and teaching are tacitly included in the other items. The duties listed in the letter, be they clinical, supervisory, or administrative, are clearly the beneficiary’s own duties. Counsel’s wholly unsupported claim to the contrary carries no weight. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

We find the director's decision to conform to the spirit of the statutory and regulatory language cited above. An assistant professor providing clinical instruction to medical students, in a setting involving the actual treatment of real patients, is performing services within the medical profession. The treatment of patients (including the administration of anesthesia during surgery) is, unquestionably, the practice of medicine, regardless of whether or not medical students are present to witness that treatment. The statutory language of section 212(a)(5)(B) of the Act is intended to protect patients rather than to draw an arbitrary distinction between private physicians who treat patients on their own, and instructors who treat patients in the presence of students.

Counsel does not explain why it is unreasonable for an assistant professor, charged with the grave responsibility of (in counsel's words) "imparting knowledge to students and others," to be held to the same standards as the physicians who depend on him for proper training. Counsel argues that the beneficiary's educational background shows him to be eminently qualified for the position, in which case it would seem that the beneficiary would have little trouble passing the examinations named in the statute and Department of Labor regulations. The petitioner has never explained its resistance to subjecting the beneficiary to these examinations, thereby removing the sole impediment to the approval of the petition.¹

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

ORDER: The appeal is dismissed.

¹ We note that, if the beneficiary were to take and pass the examinations, the petitioner would need to obtain a new labor certification after that time, and file a new petition with the appropriate documentation and fee. The beneficiary must be eligible as of the petition's filing date, pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). In cases involving labor certification, the petition's filing date is considered to be the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).