

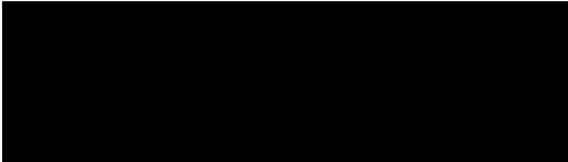
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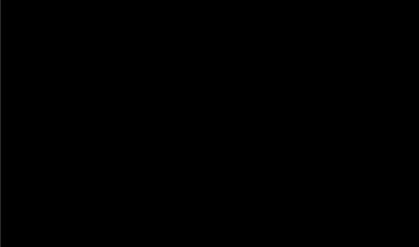


FILE: WAC 03 222 52206 Office: CALIFORNIA SERVICE CENTER Date: AUG 18 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a home healthcare service provider. It seeks to hire the beneficiary as a medical writer. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job 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 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 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 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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 petitioner states that it is seeking the beneficiary's services as a medical writer. Evidence of the beneficiary's duties includes: the Form I-129; a letter from the petitioner; and counsel's October 21, 2003 response to the director's request for evidence.

At the time of filing, the petitioner stated that the beneficiary would be required to provide a complete analysis of the patient's illness or injury based upon the physician's report, medical history and laboratory results; write reports to be submitted to Medi-care, Medi-cal, private insurance companies and other physicians; keep up-to-date on the latest medical research results and utilize the medical library; utilize medical journals, textbooks and medical research materials to obtain the analysis and evaluation of the patient's condition.

The petitioner noted that the beneficiary would not be providing any patient care. The petitioner indicated that the duties of the proffered position require the application of a general body of knowledge normally obtained in an academically recognized course of study leading to a doctor's degree in medicine or a related field.

The director issued a request for evidence noting that the beneficiary does not have a degree as required by the specialty.

In response, counsel referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and noted that the position is for a medical technical writer. The petitioner submitted an education evaluation that found the beneficiary to have the equivalent of a bachelor's degree in pharmacy and a doctor of medicine degree from an accredited college in the United States. Additionally, the petitioner submitted a letter from an assistant professor with Seattle University. Counsel referred to the opinion letter to support the petitioner's need for a medical writer, which stated in part:

The company's requirement for this facility's medical writer position does not specify a type of degree per se, but clearly this person must have the science knowledge as possessed by one with a bachelor's degree in health administration, nursing or a related health/medical field plus a minimum of two years experience in a medical environment.

In his denial, the director noted that in view of the submitted evidence, the petitioner did not meet any of the four criteria under 8 C.F.R. 214(h)(4)(iii)(A). The director found that the petitioner failed to show that it was

common, industry-wide, among similar home health care services to require a medical writer to possess a baccalaureate degree. The director noted that the petitioner has not demonstrated that it has in the past, required the services of individuals with a baccalaureate or higher degree in a specialized area for the proffered position. Finally, the director determined that the petitioner has not established that the specific duties are so specialized and complex that only an individual with a degree can perform it. The evidence of record is not persuasive to show that the job offered could not be performed by an individual whose educational training falls short of a baccalaureate degree.

On appeal, counsel asserts that the director cited new issues that he failed to raise previously. Counsel contends that the petitioner strictly comported with the law and regulatory requirements. Counsel asserts that the petitioner detailed legitimate duties. Counsel concludes by noting that since the Service did not notify the petitioner of the nature of the concerns, the petitioner requests the AAO to either conduct a de novo review or remand the petition.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 872, 1095 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are presented in such vague and generic terms, however, that it is impossible to determine precisely what tasks the beneficiary would perform on a daily basis. For example, the beneficiary will be keeping up-to-date on the latest medical research results and utilizing the medical library to perform the research necessary; utilizing medical journals, textbooks and medical research materials to obtain the analysis and evaluation of the patients' condition. The tasks to be carried out in performing these duties are not specifically detailed so that it is impossible to determine the complexity of the tasks to be performed. The duties could involve a looking up a complete definition of a condition, or involve tasks of much greater complexity. The duty of writing reports to be submitted to health insurance companies as described in the petition could be performed by someone with less than a bachelor's degree.

The *Handbook's* reference to science and medical writers indicates that they prepare a range of documents presenting detailed information on the physical or medical sciences. The *Handbook* reveals that science and medical writers convey research findings for scientific or medical professions and organize information for advertising or public relations needs. Additionally, the *Handbook* notes that many writers work with researchers on technical subjects to prepare written interpretations of data and other information for a general readership.

The proffered position does not resemble a science and medical writer as described by the *Handbook*. The petitioner has not indicated that it performs research or that it works in the area of medical sciences. The petitioner indicated that it provides home healthcare services. The petitioner stated that it provides services that physicians prescribe. The petitioner contends that the proffered position would provide a complete analysis of the patient's illness based on the physician's report yet has not provided any evidence that it employs physicians. The petitioner does not document the duties in relation to its business. The petitioner has not provided evidence of the number of patients it cares for. It is incumbent upon the petitioner to describe the duties of the proffered position in sufficient detail to permit an analysis of the position and to determine the nature and complexity of the duties to be performed. This, the petitioner failed to do. As such, it cannot be determined that: a baccalaureate or higher degree is normally the minimum requirement for entry into the position; the duties of the position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty; or the position's duties are so specialized and complex that knowledge required to perform them is usually associated with attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and (4).

The petitioner has not established the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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. The petition is denied.