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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

File: EAC 98 110 50646 Office: Vermont Service Center

Date: **JAN 14 2002**

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)

PUBLIC COPY

IN BEHALF OF PETITIONER: Self-represented

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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a medical practice with two employees and an unspecified gross annual income. It seeks to employ the beneficiary as an interpreter and multi-lingual translator for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On motion, the petitioner argues that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

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.

The beneficiary's foreign education has been found by an academic expert to be equivalent to a baccalaureate degree in foreign languages conferred by a United States institution. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the proffered position.

The term "specialty occupation" is 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.

The duties of the proffered position are described in pertinent part as follows:

Interview the patient (in their native language) and then prepare a thorough and detailed medical history (in English); translate and interpret oral and written communications from the doctor to the patient and vice versa; convey symptoms, diagnoses, treatments, etc to the patient; obtain necessary documents from the patient's native country when needed; translate medical articles and brochures from English to the appropriate foreign language when required for a course of treatment; monitor critical and acute patients' progress and ongoing treatment; maintain individual patient files and translate and interpret same when necessary; read and understand complex medical documents and translate same as appropriate; provide detailed and technical oral and written translations and/or interpretations on an ongoing and continual basis.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

The petitioner asserts that the Department of Labor has determined that the proffered position is a specialty occupation. However, a reference in the Department of Labor's Dictionary of Occupational Titles (DOT), Fourth Edition, 1977, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

The petitioner has cited an unpublished decision of the Service which, she asserts, states that the occupation of translator is a specialty occupation. Service employees are not bound by unpublished decisions. In addition, the decision indicated that translators, under certain specific circumstances may be considered members of the profession. While the terms "profession" and "specialty occupation" are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i). That statutory language effectively supersedes the unpublished decision cited.

The petitioner has also cited several published decisions of the Service. Nevertheless, the petitioner has not established the relevance of those decisions to the facts and issues of this proceeding.

The petitioner has provided five virtually identical letters from physicians and dentists who state that the usual requirement for positions like the proffered position is either "a bachelor's degree in foreign languages (and technical translating/interpreting experience through either course work or experience) or equivalent professional level experience." Five letters are insufficient to establish an industry standard. In addition, none of the writers have provided evidence in support of their assertions. Finally, none of the writers have defined the term "equivalent".

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a medical assistant with those of a technical writer.

A review of the Handbook, 2000-2001 edition, at pages 342-343 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a medical assistant. The Handbook states:

Most employers prefer to hire graduates of formal programs in medical assisting. Such programs are offered in vocational-technical high schools, postsecondary vocational schools, community and junior colleges and in colleges and universities. Postsecondary programs last either 1 year, resulting in a certificate or diploma, or 2 years, resulting in an associate degree

Similarly, a review of the Handbook at page 245 finds no requirement of a baccalaureate degree in a specialized area for employment as a technical writer. The Handbook states:

A college degree generally is required for a position as a writer or editor. Although some employers look for a broad liberal arts background, most prefer to hire people with degrees in communications, journalism, or English Technical writing requires a degree in, or some knowledge about a specialized field In many cases, people with good writing skills can learn specialized knowledge on the job

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

With respect to the petitioner's objection to denial of this petition in view of the previous approval of a similar petition in the beneficiary's behalf, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petition and its supporting documents. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will not be disturbed.

ORDER: The order of January 13, 1999 dismissing the appeal is affirmed.