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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
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Washington, DC 20536



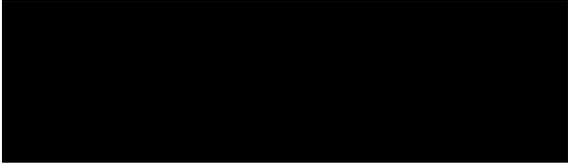
DEC 22 2003

File: WAC 02 191 50576 Office: CALIFORNIA SERVICE CENTER Date:

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:



PUBLIC COPY

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California pharmacy. It has ten employees and a gross annual income of \$2,500,000. It seeks to temporarily employ the beneficiary as a pharmaceutical detailer for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the director mischaracterized the position as a pharmacy technician. Counsel refers to documentation already submitted to establish that the proffered position is a specialty occupation.

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 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 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 field 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 issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the California Service Center on May 22, 2002, the petitioner described the duties of the proffered position as follows:

The petitioner require[s] the services of a full time [p]harmaceutical [d]etailer to promote [the] use of and sale of ethical drugs and other pharmaceutical products to physicians, hospitals, HMOs, retail and wholesale drug establishments. . . .

Utilizing knowledge of medical practices, drugs and medicines, the [p]harmaceutical [d]etailer would promote and sell pharmaceutical products and durable medical equipments manufactured by companies by discussing and explaining characteristics and clinical studies conducted with such products to the physicians, hospitals and other health care facilities by explaining the new treatment options available with each product. The pharmaceutical detailer will provide samples of new drugs after discussing dosage, use, effect and medicinal preparations. Pharmaceutical detailer may conduct seminars [sic] presentations for the promotion of the pharmaceutical products.

In addition, the petitioner noted that the pharmaceutical detailer must have excellent presentation and selling skills in addition to exceptional communication abilities. The petitioner provided two letters: one from Dr. Donald M. Gelb, Director of Geriatrics, Coast Plaza Doctor's Hospital; and the other from Dr. Aida Salatinjants, a family physician. Both stated that the position of pharmaceutical detailer required a baccalaureate in science. Dr. Salatinjants specified that the required degree should be a degree in science, pharmacy, or a related degree. In addition, the petitioner submitted an excerpt from the Department of Labor's *Occupational Outlook Handbook (Handbook)* on sales representatives for firms selling complex, technical products.

The petitioner described itself as a mid-sized retail drug store that also acts as a distributor for new pharmaceutical products, ethical drugs, medical devices (i.e. diabetes, glucose testing), and durable medical equipment. The petition promotes and sells

these new pharmaceutical products by explaining the characteristics, clinical studies and effects of these new products to physicians, hospitals and other retail/wholesale drug establishments.

On May 26, 2002, the director asked for further information with regard to whether the beneficiary was qualified to perform the duties of the proffered position. In particular, the director requested evidence that the beneficiary had a permanent California Pharmaceutical license, or evidence that the beneficiary may practice the pharmaceutical detailer position without a license.

In response, the petitioner submitted a letter signed by Virginia Herold, Assistant Executive Officer, of the California State Board of Pharmacy. The letter stated the following: "The Board of Pharmacy licenses pharmacies and certain staff that work in pharmacies-pharmacists, pharmacy interns and pharmacy technicians. The board also licenses drug wholesalers and certain specialized staff that work in wholesale facilities. The board does not license drug manufacturers, nor the staff that work for drug manufacturers, such as 'detail persons.'"

On June 10, 2002, the director denied the petition and stated that the proffered position was analogous to the position of a pharmacy technician and assistant as described in the 2000-2001 edition of the *Handbook*. The director determined that an experienced individual with less than a baccalaureate degree could perform the proffered position.

On appeal, counsel asserts that the position of pharmaceutical detailer is a specialty occupation that requires at a minimum a baccalaureate degree in science. Counsel also states that such a degree would give the person performing the duties of a detailer the requisite body of knowledge of medicine, drugs and other pharmaceutical products to allow the person to discuss clinical studies and the characteristics of each product with doctors, hospitals and wholesale/retail drug establishments. The record also contains a letter that states the beneficiary was accepted to take the Foreign Pharmacy Graduate Equivalency Examination (FPGEE) in June of 2003.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)

Citizenship and Immigration Services (CIS) often looks to the

Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

Counsel's assertion with regard to the position not being a pharmacy technician appears well founded. The basic duties of pharmacy technicians as outlined in the 2002-2003 edition of the *Handbook* on page 295 are as follows: "Pharmacy technicians help licensed pharmacists provide medication and other healthcare products to patients. Technicians usually perform routine tasks to help prepare prescribed medication for patients, such as counting tablets and labeling bottles. Technicians refer any questions regarding prescripts, drug information, health matters to a pharmacist."

Nevertheless when examining the position of sales representative in a medical field, the *Handbook* description of sales representative to which counsel refers does not appear relevant to the proffered position. Both the *Handbook* and the letter from the California Board of Pharmacy refer to such sales representatives as being employees of a manufacturer, and/or representing a manufacturer of medical products and drugs. The beneficiary will be the employee of a retail drug store that is distributing durable medical supplies, medical equipment, and medicines. As such the beneficiary will be representing the pharmacy. Any information with regard to the significance of medical trials or clinical studies would be generated and forthcoming from the manufacturer, not from the petitioner or the beneficiary. As such the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty as a minimum for entry into the position.

II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)

A. Degree Requirement is Common to the Industry

Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook's* conclusions about a degree requirement for a pharmaceutical detailer or sales representative, medical supplies, position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry

standard, the petitioner submitted a letter from Aida Salatinjants, a family practitioner, who stated that her office's pharmaceutical detailer is required to possess at least a bachelor degree in science, pharmacy or a related degree. She also added that more important than advanced education, it was necessary for a pharmaceutical detailer to have an understanding of the basic concepts of many scientific areas to promote the use and sale of drugs. It is not clear from this letter whether the letter writer's office has its own pharmaceutical detailer on staff, or whether the duties of the position require a baccalaureate degree in a specific specialty or just experience in selling new drugs. The petitioner also submitted the letter from Dr. Donald Gelb, the director of geriatrics for a California hospital. Dr. Gelb stated that it is imperative for the pharmaceutical detailer to have a bachelor degree in science with a body of knowledge of medicine, drugs, and other pharmaceuticals to facilitate the process of promoting products as well as discussing and explaining the characteristics and clinical studies conducted with such products.

To the extent that these two letters are not from pharmacies or similar firms that employ pharmaceutical detailers or sales representatives of medical supplies, they do not provide significant weight with regard to establishing the industry standard. The petitioner also provided one vacancy announcement for the position of pharmaceutical sales representative placed on the Internet by Pharmacia. Pharmacia is described as the world's fastest-growing pharmaceutical company with a strong portfolio of products, a robust pipeline of new drugs in development and an annual research and development investment of more than two billion dollars. The advertisement notes that the position required a bachelor's degree, preferably in science, with two years of documented sales success. This vacancy announcement does not appear to be for a parallel position within a similar firm, and is given no weight in this proceeding. Without more persuasive evidence, the petitioner has not established that the industry standard for the proffered position is a baccalaureate degree in pharmacy.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)

The petitioner has submitted no information with regard to other employees with similar duties and their academic credentials. There is no information in the record that the petitioner has hired individuals in the proffered position previously. Without more persuasive evidence, the petitioner has not established this criterion.

IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)

To date the petitioner has placed no information on the record

with regard to the specialized and complex nature of the proffered position. For example, the petitioner provided no information with regard to specific medical supplies or products to be promoted by the beneficiary to the pharmacy customers, physicians or other medical entities that would be regarded as either complex or specialized products or procedures. There is no information on the record as to the volume of such work presently done by the petitioner, and its complexity or specialization. Without more persuasive evidence as to the specialized or complex nature of the proffered position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.