

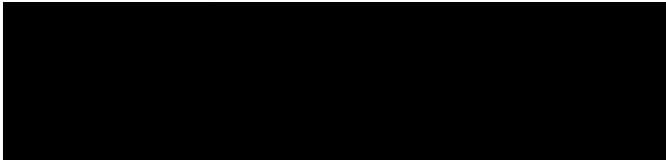
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



FILE: LIN 02 077 52086

OFFICE: NEBRASKA SERVICE CENTER

DATE: JAN 08 2004

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)

IN BEHALF OF PETITIONER:



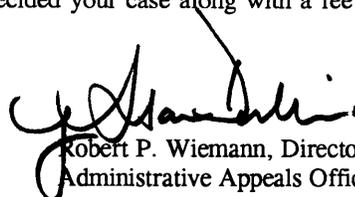
INSTRUCTIONS:

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 of the Nebraska Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to him for entry of a new decision.

The petitioner is a physical therapy facility that employs thirteen persons and has a gross annual income of \$600,000. It seeks to employ the beneficiary as a physical therapy program advisor. The director denied the petition because the beneficiary was considered to be an alien coming to the United States to practice in a medical profession under circumstances other than those allowed by current U.S. immigration regulations.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that physical therapists are not members of a medical profession, hence, the beneficiary is not subject to the regulations pertaining to aliens coming to practice in a medical profession.

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 for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Because the beneficiary is the graduate of a foreign medical school, the director applied section 212(j)(2) of the Act, 8 U.S.C. § 1182 (j)(2), which states:

An alien who is a graduate of a medical school and who is coming to the United States to perform services as a member of the medical profession may not be admitted as a nonimmigrant under section 101(a)(15)(H)(1)(b) unless—

- (A) the alien is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency, or
- (B) (i) the alien has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an

equivalent examination as determined by the Secretary of health and Human services, and (ii)(I) has competency in oral and written English or (II) is a graduate of a school of medicine which is 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).

The director applied regulatory guidelines pertaining to foreign medical graduates found at 8 C.F.R. § 214.2(h)(4)(viii)(B). Per these provisions, the petitioner must establish that the alien physician:

- (1) is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or
- (2) the alien has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services); and
 - (i) has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates; or
 - (ii) is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

In the original filing, the petitioner described the duties of the proffered position thusly:

Beneficiary will advise Physical Therapists on treatment programs with an emphasis on exercise therapy. His duties will include analyzing patient information and records, grouping relevant medical data, and determining muscles [sic] groups that require special attention. He will then perform research on new inspiring physical therapy treatments

and advise physical therapists on the benefits of certain exercise programs to certain muscle groups. Based on his research [the beneficiary] will create and implement unique and modified therapy and exercise programs for patients suffering from injuries, muscle, nerve, joint and bone disease, patients with prosthetic limbs, and geriatric patients. He will provide reports on the benefits of programs, instruction in the practice of the programs, and guidance in treating patients for physical therapists. He will analyze the effectiveness of various programs based on patient results reported in draft form by physical therapists on a regular bases. He will then draft reports and recommendations for treatment and exercise programs for physical therapists based on patient progress.

The Physical Therapy Program Advisor will have no direct patient contact and will not evaluate or establish treatment plans for any individual patient. He will receive assignments directly from the physical therapists of the program. He will be closely supervised by the individual physical therapists and the director of the program.

The director requested further evidence that the beneficiary was qualified, as an alien physician involved in teaching or conducting research, to perform the proffered duties under section 212(j)(2) of the Act. In response, counsel submitted a copy of *Matter of Sheikh*, 17 I&N Dec. 634 (1980). Counsel asserted that the holding in *Matter of Sheikh* supported counsel's opinion that, since the beneficiary was not coming to work as a physician, he was not required to comply with section 212(j)(2) of the Act, 8 U.S.C § 1182(j)(2), or 8 C.F.R. § 214.2(h)(4)(viii)(B). The director denied the petition, finding that the beneficiary was not qualified to perform the duties of the proffered position.

On appeal, counsel states that, because the position of physical therapist does not require a medical degree, it is not among the medical professions and, thus, not subject to the requirements of 8 C.F.R. § 214.2(h)(4)(viii)(B).

Upon review of the case, it is found that the beneficiary would not be coming to the United States as a physician and, therefore, would not be subject to the restrictions found at 8 C.F.R. § 214.2(h)(4)(viii). The proffered position is a

physical therapy advisor. The evidence must be analyzed in order to determine whether the position is a specialty occupation and whether the beneficiary is qualified to perform the job.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. It has not been determined whether the petitioner has established that the proffered position is a specialty occupation, nor has the issue of whether the beneficiary is qualified to perform the job been resolved. The petition is remanded to the director to determine whether the proffered position qualifies as a specialty occupation and whether the beneficiary is qualified to perform the duties of the proffered position. The director may request any additional evidence deemed necessary to assist him with his determination.

ORDER: The director's decision is withdrawn. The case is remanded for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.