

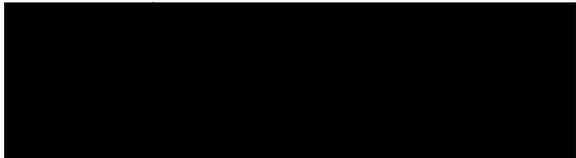
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U.S. Citizenship
and Immigration
Services

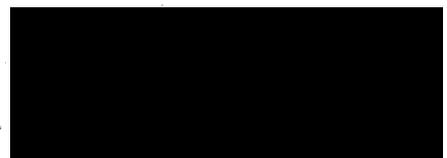


FILE: EAC 02 047 52722 Office: VERMONT SERVICE CENTER Date: **MAR 04 2004**

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:



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 service center director 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 company that provides medical and surgical services for hair restoration. It seeks to employ the beneficiary as a surgical assistant. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and further documentation.

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.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a surgical assistant. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; and the petitioner's February 22, 2002 letter in response to the director's request for further evidence. According to the initial petition, the

beneficiary would perform duties that entail: assisting physicians in all surgical procedures for hair restoration. A job description submitted with the initial petition provided the following information on the major clinical duties of the proffered position: apply principles of aseptic technique and infection control inclusive of PPE; prepare patients for surgical procedures; set up surgical room for procedures; assist physician with surgical procedures; dress wounds as instructed by the physician; give injections per physician's instructions, and maintain clean, safe, and well-stocked operating rooms for surgical procedures. Other duties mentioned in the job description involve possible filing duties and maintenance of medical records. The job description stated the following required education and/or certification criteria: "college preferred/a certificate of completion/diploma from medical vocational training program or surgical technical program, current CPR certification, and 6 months hands-on experience as a surgical assistant preferred."

The director found that the petitioner had not provided sufficient documentation to establish that the proffered position met the definition of a specialty occupation.

On appeal, the petitioner describes the position as a subspecialty of physician assistant, which differs from a medical assistant position. The petitioner describes the following duties that the beneficiary, as a physician (surgical) assistant, would perform and that a medical assistant could not perform:

1. assisting in the procedure of harvesting the donor site for hair grafts that will be transplanted. In cases wherein bigger number of grafts is required, [the beneficiary] will do under the supervision of the physician undermining of the scalp (dissecting thru tissue planes which permits good closure) and suturing of the subcutaneous tissue using absorbable sutures;
2. monitoring that there is no active bleeding from donor sites by using the electrocautery machine or suture ligation if necessary;
3. In isolated cases, providing followup monitoring of patients on weekends or other times and then reporting progress to physician in charge.
4. recognizing and instituting appropriate measures to avoid detrimental side effects when emergencies arise; and
5. performing dividing and placing of grafts into the recipient sites.

The petitioner also submits a description of the physician assistant program at Cornell University, and an excerpt on medical assistants from the Department of Labor's *Occupational Outlook Handbook (Handbook)*.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 14.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. In the instant petition, the AAO finds that the petitioner, in its appeal, submits job duties that are distinct from those listed on the petitioner's job description. The job description in the original petition contained duties for medical or surgical assistants with academic requirements that preferred an unspecified amount of undergraduate training in an unspecified area of studies, as well as completion of a medical vocational training program or surgical technical program. The duties listed and the academic requirements were clearly for a medical or surgical assistant position. In contrast, on appeal, the petitioner describes the position as physician assistant with surgical responsibilities. The petitioner then lists duties that involve specific surgical procedures, beyond the preparation of the patient for surgery, that appear to require much more surgical training and possibly licensure. Furthermore the petitioner states that the position actually requires the academic background of a foreign medical graduate with surgical training.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Therefore, the analysis of the present proceeding will be based on the initial job description that the petitioner submitted. Based on the *Handbook's* description of the academic requirements for medical assistants which would include surgical assistants, the petitioner has not established that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for entry into the proffered position.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no further documentation for academic credentials required of other surgical assistants at similar surgical facilities. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner, in its response to the director's request for further evidence, stated that it employed three other surgical assistants who were also foreign medical graduates, and listed their names. The petitioner provided no further documentation, such as diplomas, or proof of employment to further substantiate its assertion as to its present surgical assistants and their academic credentials. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Based on this documentation, the petitioner has not established that it requires individuals hired as surgical assistants to possess a bachelor's degree in a specific specialty.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. As previously stated, only the duties outlined in the original job description are being considered in this proceeding. Based on these duties, which range from pre-surgical preparation of patients to filing and maintaining medical records, the nature of the duties does not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, if the position had been found to be a specialty occupation. The petitioner has not submitted an educational equivalency document to establish that the beneficiary's foreign medical degree is the equivalent of a baccalaureate degree or higher from an accredited U.S. educational institution. However, as the AAO is dismissing the appeal on another ground, it will not examine this issue further.

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.