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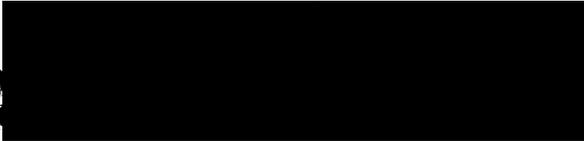
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NOV 8 2004

FILE: WAC 01 250 57880 Office: CALIFORNIA SERVICE CENTER Date:

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)

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 service center director denied the nonimmigrant visa petition on May 31, 2002, and the AAO dismissed a subsequent appeal on June 25, 2003. The petitioner timely filed a motion to reopen and reconsider on July 16, 2003, and the director adjudicated the motion and affirmed his previous decision on August 28, 2003. The petitioner timely filed an appeal from the director's decision. The decision of the director dated August 28, 2003, will be withdrawn. The September 22, 2003 appeal from that decision will thus be moot. The Administrative Appeals Office (AAO) will consider the petitioner's motion to reopen and reconsider. The motion will be granted. The petition will be denied. The previous decision of the AAO will be affirmed.

The petitioner is a health clinic providing Chinese herbal medicines and acupuncture that seeks to employ the beneficiary as an herbal analyst. The petitioner 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 regulation at 8 C.F.R. § 103.5(a)(1)(ii) provides that the official having jurisdiction over a motion to reopen or reconsider is the official who made the latest decision in the proceeding. The petitioner filed a motion to reopen or reconsider on July 16, 2003, following the AAO's dismissal of its appeal of the director's denial of the petition. The director erroneously adjudicated that motion, as the AAO had jurisdiction over the motion. Thus, the director's decision of August 28, 2003, adjudicating the motion is withdrawn, rendering the appeal of the decision moot. The AAO will consider all representations made by the petitioner in its mooted appeal in the adjudication of the motion.

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; (5) the petitioner's motion to reconsider; (6) the director's decision affirming the denial of the petition; and (7) 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 an herbal analyst. Evidence of the beneficiary's duties includes: the I-129 petition; counsel's appeal briefs; counsel's July 16, 2003 motion to reopen and reconsider; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail conducting research, analysis and experimentation of traditional Chinese medicine to develop and improve products and processes used in the petitioner's business.

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 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.Minn. 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. A review of the *Handbook* reveals no job titles or categories that parallel those of herbal analyst. Put another way, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for an herbal analyst job. Further, the petitioner has supplied no evidence that the position is one that normally requires a baccalaureate degree in a specialty field. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position; the petitioner has not met the first criterion.

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. Counsel states that the proffered position has the same job duties as performed by two individuals trained in Chinese traditional medicine. The petitioner asserts that the ones in both of these previous positions held bachelor's degrees in medicine. However, the petitioner did not quantify the similarities between the job duties of these prior positions and that proffered to the beneficiary. As noted by the AAO in its previous decision, these two employees both performed acupuncture, in addition to their duties as herbal analyst, whereas the current position is proffered exclusively as an herbal analyst.

Counsel states that all of the petitioner's employees performing as herbal analyst have held degrees, including the person who the beneficiary would replace. The record, however, does not establish the relevance of the petitioner's past hiring practices to the proffered position, and, therefore, the petitioner has not met its burden of proof in this regard. The petitioner has not submitted employment records of previous employees who have performed services exclusively as herbal analysts. Simply going on record is not sufficient for meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.

To the extent that they are depicted in the record, the duties do 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. The petitioner's March 10, 2002 letter in support of the petition refers to "congressional mandates," the World Health Organization and the National Institutes of Health efforts to "assess the safety and efficacy of herbal medicines." The petitioner recognizes "the expanded potential use of herbal remedies in the United States." Nevertheless, the petitioner has not proven its assertion that the candidate in the position "must have an appropriate basic, fundamental background in medicine, biology, biochemistry, pharmacology." Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of

proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was in fact approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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.