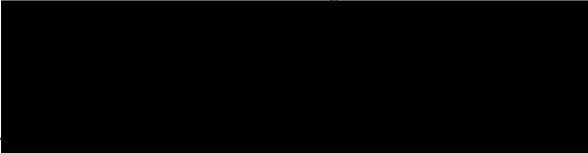




U.S. Citizenship
and Immigration
Services

976



FILE: WAC 03 200 53555 Office: CALIFORNIA SERVICE CENTER Date: OCT 22 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:



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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The service center director 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 The director's decision will be withdrawn. The appeal will be sustained. The petition will be approved.

The petitioner is a surgeon specializing in disorders of the neck and spine. He seeks to employ the beneficiary as an exercise physiologist, and endeavors to classify him 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 on the basis that the offered position was not a specialty occupation. On appeal, counsel submits additional information stating that the proffered position does qualify as a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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 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:

[A]n 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 are 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 proceedings 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) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an exercise physiologist. Evidence of the beneficiary's duties was included with the I-129 petition and in response to the director's request for evidence. According to this evidence the beneficiary would: develop, implement, and coordinate exercise programs under the supervision of a physical therapist in order to program patients to promote physical fitness; explain programs to patients; interview patients to obtain subjective information and document responses; write progress reports describing patients' improving fitness capacity in order to develop exercise programs for each patient; demonstrate the correct use of exercise equipment, such as weight machines, treadmills, bicycles, or the therapeutic band/ball; conduct individual strength, flexibility, and aerobic exercises; observe patients during exercise for signs of stress; answer patients' questions; explain insurance policies to patients and collect the amount of any co-pay; schedule patients for physical therapy and/or functional capacity evaluation (FCE); and through FCE assess patients' blood pressure, resting/post activity heart rate, grip strength, hand dexterity and coordination, sitting/standing/walking tolerances, dynamic/static pushing/pulling tolerances, lifting/carrying tolerances and repetitive foot movements. The petitioner requires a minimum of a bachelor's degree in exercise science/physical education for entry into the proffered position.

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel indicates that the offered position satisfies the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) and qualifies as a specialty occupation.

The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are those of an exercise physiologist, not occupational therapist assistant or aide as stated by the director. The Bureau of Labor Statistics does not collect data on exercise physiologists. Thus, the duties of the proffered position are not covered by the *Handbook*. The Department of Labor's *Occupational Outlook Quarterly* for the Summer of 2001, however, noted that according to industry sources, most exercise physiologists have at least a bachelor's degree in exercise science or exercise physiology. Thus, it would appear that a bachelor's degree is normally the minimum requirement for entry into the proffered position.

The position does, therefore, qualify as a specialty occupation as the position meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

It should further be noted that the petitioner submitted a statement from a rehabilitation center which requires a minimum of a bachelor's degree in exercise science, kinesiology, or athletic training for entry into the proffered position. The petitioner also submitted two job advertisements for exercise physiologists and some additional vocational literature, all of which indicate that a bachelor's degree in exercise physiology, exercise science, or a related field is needed for entry into the field.

The director did not comment on the beneficiary's qualifications to perform the duties of the proffered position as the petition was denied on another ground. The record is, however, sufficient for the AAO to make that determination. The beneficiary holds a Bachelor of Science degree in Exercise Science and Physical Education from Arizona State University. That degree is one that is required by the specialty occupation. The beneficiary is, therefore, qualified to perform the duties of the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(C)(I).

As always, 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 sustained that burden.

ORDER: The director's decision is withdrawn. The appeal is sustained. The petition is approved.