



U.S. Citizenship
and Immigration
Services

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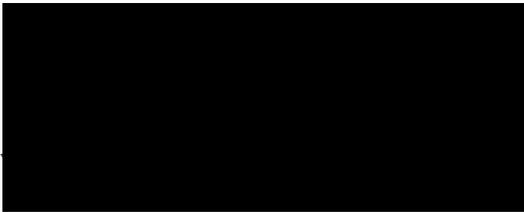


FILE: SRC 03 185 53016 Office: TEXAS SERVICE CENTER Date: OCT 25 2004

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

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DISCUSSION: The director of the service center 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 provides clinical studies. It seeks to employ the beneficiary as a medical research 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 previously submitted and additional evidence.

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.

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 medical research assistant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail researching studies about medical care services and conditions in local, regional, or national areas to determine potential health products and/or services to be used by physicians; conducting chemical and physical laboratory tests to assist physicians in making qualitative and quantitative analyses of blood and solid and liquid materials. Under the direction of a physician, the beneficiary will assist in the examination and treatment of patients; complete and submit case report forms and obtain test results; identify and screen patients to determine eligibility for protocol and schedule protocol-related visits, diagnostic testing, and treatments; collect and maintain study documentation; review medical journals for health issues based on detailed patient histories; discuss patients' charts and files with physicians; research medical literature to find research suggestions; and interview patients, measure vital signs, and record information on patients' charts. The petitioner stated that a candidate for the proffered position must possess a professional degree in medicine.

The director determined that the proffered position was not a specialty occupation. According to the director, the petitioner failed to establish that the duties of the proffered position are so complex that only a person with a bachelor's degree could perform the position. The director found that no evidence established that the petitioner consistently requires a bachelor's degree or that similar clinical organizations require a degree.

On appeal, contends that the proffered position is a specialty occupation. According to counsel, the duties of the proffered position are performed by a physician assistant (PA) as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). The *Handbook*, counsel states, requires that new PAs complete an accredited, formal education program, and asserts that of 129 accredited educational programs, 64 offer a master's degree and the rest offer a bachelor's degree or an associates degree. Counsel avows that the court in *Matter of Caron International, Inc.* 19 I&N Dec. 792 (Comm. 1988), found that some occupations are in transition from non-professional to professional status, and that the proffered position has transitioned from nonprofessional to professional status.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO first considers 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

According to the *Handbook*, the duties of the proffered position would be performed by a physician assistant (PA) who provides healthcare services under the supervision of physicians. The *Handbook* states:

PA's are formally trained to provide diagnostic, therapeutic, and preventive healthcare services, as delegated by a physician. Working as members of the healthcare team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x rays, make diagnoses, and prescribe medications. . . . PA's record progress notes, instruct and counsel patients, and order or carry out therapy. The duties of physician assistants are determined by the supervising physician and by [s]tate law.

The *Handbook* mentions that PA specialty areas include general and thoracic surgery, emergency medicine, orthopedics, and geriatrics.

The *Handbook* reports:

All [s]tates require that new PA's complete an accredited, formal education program. In 2002 there were about 133 accredited or provisionally accredited education programs for physician assistants. Sixty-eight of these programs offered a master's degree, and the rest offered either a bachelor's degree or an associate degree. Most PA graduates have at least a bachelor's degree.

The *Handbook* continued:

All States and the District of Columbia have legislation governing the qualifications or practice of physician assistants. All jurisdictions require physician assistants to pass the Physician Assistants National Certifying Examination, administered by the National Commission on Certification of Physician Assistants (NCCPA) and open to graduates of accredited PA education programs. Only those successfully completing the examination may use the credential "Physician Assistant-Certified."

Counsel relies on the case of *Matter of Caron International, Inc.* to state that the proffered position has transitioned into a professional occupation. Nevertheless, the *Handbook* reveals that a bachelor's degree in a

specific specialty is not required for entry into a PA position; a person may graduate from an associate degree program for PAs and qualify to take the Physician Assistants National Certifying Examination. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

This is a newly created position. Thus, the petitioner cannot establish that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As previously stated, the *Handbook* reports that a bachelor's degree in a specific specialty is not required for entry into a PA job. A person may graduate from an associate degree program for PAs and qualify to take the Physician Assistants National Certifying Examination.

The four submitted AAO decisions are not persuasive in establishing that the proffered position qualifies as a specialty occupation. 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 approvals were granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petitions 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.

Beyond the decision of the director, the beneficiary is not qualified to perform the duties of the proffered position had it been determined to be a specialty occupation. According to the *Handbook's* information, all states require that new PAs complete an accredited, formal education program, and pass the Physician Assistants National Certifying Examination. The record of proceeding contains the beneficiary's diploma from the Universidad Autonoma de Bucaramanga in Colombia, academic record, and educational evaluation which stated that the beneficiary possesses the equivalent of a doctor of medicine degree from an accredited college or university in the United States. There is no evidence in the record establishing that the Universidad

Autonoma de Bucaramanga has an accredited, formal education program for physician assistants that would be acceptable to the state of Florida. Nor does the record contain evidence that the beneficiary possesses certification to practice as a PA. Consequently, the petitioner fails to establish that the beneficiary is qualified to perform the duties of the proffered position had it qualified as a specialty occupation. For this additional reason, the petition will be denied.

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.