

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D 2

FILE: LIN 02 295 53721 Office: NEBRASKA SERVICE CENTER

Date: AUG 11 2005

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

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 appeal will be dismissed. The petition will be denied.

The petitioner is a nursing facility for the developmentally disabled. It seeks to hire the beneficiary as an medical writer/researcher. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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:

An 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as a medical writer/researcher. Evidence of the beneficiary’s duties includes: the Form I-129; a September 23, 2002 letter from the petitioner; and counsel’s January 31, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner stated that the beneficiary would be required to determine the effect of the physical/mental condition or disease that the patient is exhibiting, or prepare a complete report of analysis of the patients’ illness or injury based on the information provided by the visiting medical personnel; working with the medical staff and analyzing the medical significance of the physical/mental injury or disease; writing reports to be used by health or work insurance companies (e.g. Medicare and MediCal) and by other physicians; keeping up-to-date on the latest medical research results and utilizing the medical library to perform the research necessary; utilizing medical journals, textbooks and medical research materials to obtain the analysis and evaluation of the patients’ condition; the amount of time spent on research will be determined by the extent of the injuries or rarity of the diseases incurred for each case.

The petitioner noted that the beneficiary would not be providing any patient care activities. The petitioner indicated that the proffered position requires a strong medical background in order to understand not only the terminologies, but also to understand, interpret and evaluate the physicians’ diagnoses. The petitioner indicated that knowledge of these areas is normally acquired through the attainment of a Bachelor’s degree or its equivalent.

The director issued a request for evidence specifically requesting documentation to establish that the petitioner is a non-profit entity. Additionally, the director requested evidence that the position meets one of the listed criteria pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that alien physicians involved in teaching or conducting research at a for-profit institution or agency shall be accompanied by additional evidence regarding the physician’s qualifications.

In response, counsel provided an IRS tax exemption form to establish that the petitioner is operating as a non-profit corporation. Counsel referred to the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) and indicated that the proffered position is similar to that of a writer or editor. Counsel referred to the *Handbook* as stating, “For those who specialize in a particular area, such as fashion, business, or legal

issues, additional background in the chosen field is expected.” Counsel stated that as the beneficiary’s area of specialty is medicine and health and because she is a licensed physician in the Philippines, she more than satisfies the additional background requirement to specialize as a medical writer/researcher.

Counsel noted that any research the beneficiary may employ in her activities will only be to theoretically reference certain medical conditions or injuries through published medical journals and texts in order to assist in the written reports necessary as a medical writer. Counsel specifically noted that the beneficiary will not be engaged in any form of practical medical research.

In his denial, the director noted that the duties of the position appear to be closely related to those performed by a medical transcriptionist. The director referred to the *Handbook*’s description:

To understand and accurately transcribe dictated reports into a format that is clear and comprehensible for the reader, medical transcriptionists must understand medical terminology, anatomy and physiology, diagnostic procedures, pharmacology, and treatment assessments. They also must be able to translate medical jargon and abbreviations into their expanded forms. To help identify terms appropriately, transcriptionists refer to standard medical reference materials—both printed and electronic; some of these are available over the Internet. Medical transcriptionists must comply with specific standards that apply to the style of medical records, in addition to the legal and ethical requirements involved with keeping patient information confidential.

The *Handbook* states the following regard training of medical transcriptionists:

Employers prefer to hire transcriptionists who have completed postsecondary training in medical transcription, offered by many vocational schools, community colleges, and distance-learning programs. Completion of a 2-year associate degree or 1-year certificate program—including coursework in anatomy, medical terminology, legal issues relating to healthcare documentation, and English grammar and punctuation—is highly recommended, but not always required. Many of these programs include supervised on-the-job experience. Some transcriptionists, especially those already familiar with medical terminology due to previous experience as a nurse or medical secretary, become proficient through on-the-job training.

The director noted that the *Handbook* does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for entry into the field of medical transcription.

Additionally, the director noted that the petitioner asserted that the duties of proffered position are similar to those performed by a technical writer. The director was not convinced that the proffered position is of the same scope and complexity as a technical writer in the medical field.

On appeal, counsel asserts that the beneficiary's duties as a medical writer/researcher are closely related to those of a technical writer in a specialized field. Counsel asserts that the proffered position is not merely a medical transcriptionist. Counsel contends that the proffered position's duties are "geared toward providing paperwork that will not necessarily be given [only] to medical personnel. . . . petitioner must be able to provide paperwork to be reviewed by those funding the organization, which accurately reflect and explain the continuing treatment and progress of its programs." Counsel contends that the previously submitted

documentation supports her contention that the petitioner established that the degree requirement is common to the industry in analogous positions.

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 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

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.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are presented in such vague and generic terms, however, that it is impossible to determine precisely what tasks the beneficiary would perform on a daily basis. For example, the beneficiary will be keeping up-to-date on the latest medical research results and utilizing the medical library to perform the research necessary and utilizing medical journals, textbooks and medical research materials to obtain the analysis and evaluation of the patients' condition. The tasks to be carried out in performing these duties are not specifically detailed so that it is impossible to determine the complexity of the tasks to be performed. The duties could involve a looking up a more complete definition of a condition, or involve tasks of much greater complexity.

The petitioner states that it operates three facilities with six beds in each facility. The petitioner does not document the duties in relation to its business. While the petitioner has submitted three licenses, the petitioner has not provided evidence of the number of patients cared for, or the extent to which the homes are involved in the provision of medical services. Counsel alludes to a duty that the beneficiary would prepare reports to assist the petitioner in obtaining funding. The petitioner has not provided evidence of such reports or the potential for funding, or that a degree in a specific specialty would be the minimum requirement in order to perform this duty. It is incumbent upon the petitioner to describe the duties of the proffered position in sufficient detail to permit an analysis of the position and to determine the nature and complexity of the duties to be performed. This, the petitioner failed to do. As such, it cannot be determined that: a baccalaureate or higher degree is normally the minimum requirement for entry into the position; the duties of the position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty; or the position's duties are so specialized and complex that knowledge required to perform them is usually associated with attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), and (4).

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on three internet job postings for a medical writer. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Some postings state that the positions require a bachelor's degree and another posting indicates that a master's degree is required. Another deficiency in the postings is that the companies are either obviously dissimilar to the petitioner or their nature is undisclosed. Moreover, most of the advertised job descriptions are patently dissimilar to the proffered position. For instance, MedFocus's posting for a medical writer must have anesthesiology experience and be familiar with writing protocols, reports and regulatory documentation; and the position description from the recruitment firm, Top Echelon, indicates that two years of writing in the pharmaceutical industry is required and the ability to research, write and edit clinical study reports. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

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.