

...copying data deleted to  
prevent disclosure of information  
invasion of personal privacy

**PUBLIC COPY**



**U.S. Citizenship  
and Immigration  
Services**

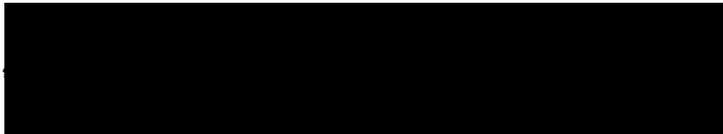


*DA*

**FEB 08 2005**

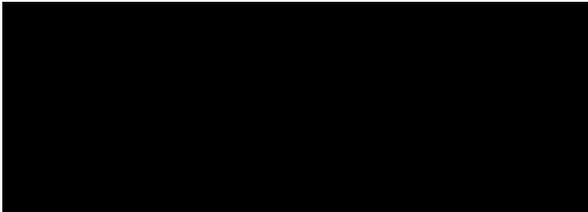
FILE: WAC 03 220 52725 Office: CALIFORNIA SERVICE CENTER Date:

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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**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 conducts phases II-IV of the clinical trials that the U.S. Food and Drug Administration requires for the approval of medications. It seeks to employ the beneficiary as a clinical research associate. 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 beneficiary is not qualified to perform the duties of the proffered position. On appeal, counsel states that the beneficiary is qualified for the proffered position, and submits additional evidence.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (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 clinical research associate. The petitioner stated that it requires a candidate to possess a bachelor's degree in health or life sciences, or the equivalent.

The director referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) to state that the beneficiary's duties are performed by physician assistants, an occupation that requires certification. According to the director, the petitioner failed to establish that the beneficiary was qualified to perform the proffered position's duties because she did not possess proper certification to provide services as a physician assistant.

Counsel states that the beneficiary is qualified for the proffered position. According to counsel, because the proffered position differs from a physician assistant it does not require licensure. Counsel contends that the beneficiary, under the supervision of a physician, will mainly perform clinical research and trials. Counsel states that although the *Handbook* does not specifically discuss a clinical research associate, its description of a biological and medical scientist working in applied research is similar to the proffered position. Counsel emphasizes that the beneficiary will not perform medical procedures or treat patients. On appeal, counsel submits a letter from the petitioner that outlines the differences between the proffered position and a physician assistant.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform the proffered position.

As already discussed, Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation.

According to the petitioner's job posting dated December 1, 2002, the beneficiary would perform duties that entail participating in meetings and conferences held by pharmaceutical and research companies prior to a research project in order to develop and finalize the project's procedures and protocols; proposing amendments to protocols; performing medical examinations and assisting the principal research investigator in minor surgical procedures for diagnostic purposes; taking medical histories; performing physical examinations; ordering and interpreting laboratory tests; recording data gathered from examinations and tests; administering medications to patients, and educating patients on the proper use of medication; following up with patients; reviewing and analyzing professional, scientific, and medical journals regarding the health issue and developments relevant to the patient in the study to determine the patients' effect on the study.

The record of proceeding contains an amended job posting dated December 1, 2002 that was submitted by the petitioner in response to the request for evidence. The duties in this posting differ markedly from those of the initial job posting. For instance, in the amended posting the petitioner did not indicate that the beneficiary will administer medications to patients, educate patients about the use of medication, or follow-up with patients. The amended posting emphasized that the duty of ordering and interpreting of laboratory tests will require the final approval of the physician and director of clinical operations.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 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. As such, the AAO will not consider on appeal the duties in the job posting that was submitted in response to the request for evidence that differ from the initial job description.

Based on the evidence in the record, the director properly concluded that the *Handbook* reveals that the beneficiary's duties are performed by a physician assistant, an occupation that requires certification. Because no evidence in the record indicates that the beneficiary possesses the necessary certification, the beneficiary is not qualified to perform the proffered position's duties.

The AAO notes that 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 beneficiary is qualified to perform a particular specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. 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.