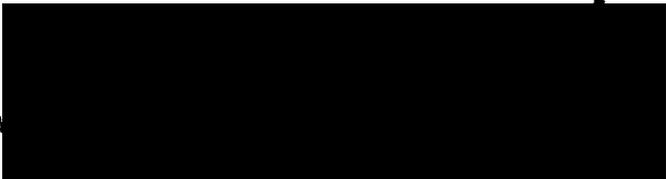


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DR

JUN 01 2005

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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 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 dermatology clinic. In order to employ the beneficiary as a medical researcher, 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 director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

In its October 13, 2003 letter submitted on appeal, the petitioner contends that the evidence of record about the proffered position establishes that it "can only be performed by an experienced individual with a baccalaureate degree in medicine or medical science." As a supporting authority, the petitioner refers to a 1994 unpublished decision of the Administrative Appeals Unit (AAU), as the AAO was previously designated, that determined that a medical research assistant position qualified as a specialty occupation. The petitioner asserts that the data gathered by its medical researcher "will genuinely guide [it] in arriving at an intelligent and soundly grounded professional decision involving its clients." According to the petitioner, its "advancement and operational success may be slow in coming" without a medical researcher's "research studies on diseases peculiar to specific clients and medications."

The AAO has determined that the director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which also includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and the accompanying letter from the petitioner, dated October 17, 2003. As will be discussed below, the record's information about the proposed duties is insufficient for the AAO to reasonably conclude that the proffered position is a specialty occupation.

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner’s letter of response to the RFE states that the petitioner’s client base is a mixture of Asians and Americans with different dermatological characteristics. The letter also notes that the petitioner plans on opening another branch, as well as expanding operations at its present site. The letter includes this information about the proposed duties:

Fifty percent (50%) of [the beneficiary's] time will be utilized in:

- researching and/or reviewing major medical issues, innovations and developments that are particularly relevant to [the] petitioner's patients, and for diagnosing and treating human diseases, particularly in the field of dermatology;
- analyzing medical literature to find research suggestions concerning medications, application of superficial radiotherapy and other new modes of localized treatments;
- providing physicians and surgeons with [the] latest information from medical literature[;] planning, organizing and conducting research[;] and analyzing data for use by physicians and nursing staff.

Another fifty percent (50%) will be devoted in:

- making various chemical and biological analyses and other tests to identify disease-causing organisms or pathological conditions;
- discussing with the physician/dermatologist the patients' charts and files, and eliciting detailed patient's [sic] histories;
- report[ing] study progress to include site issues and pitfalls to management of the clinic; [and]
- develop[ing] study budgets.

To support the proposition that the duties are "complex and unique," the letter notes that the proffered position requires that the beneficiary "study and analyze developments in the field of dermatology as she reviews literature and journals on the subject matter to highlight issues relevant to the field and to particular clients." For job complexity, the letter also asserts that the beneficiary "will have to elicit detailed patient histories, discuss patient's [sic] records and files with the doctor[,] and utilize her research to suggest and recommend courses of action." The letter further contends that that the job's responsibilities "would demand the use of highly technical and analytical skills associated with a baccalaureate background in a general science or a medical field."

The petitioner's October 2003 letter on appeal includes the following comments about the position:

Petitioner envisions the Medical Researcher it needs to be employed to undertake research on dermatology matters that are particularly relevant to its patients, by gathering new medical and scientific inputs or data about peculiar [sic] dermatological issues and concerns prevalent among [the] petitioner's clients[,] some of whom are Asians, as compared to other patients who are Americans, as well as streamlin[ing] said data[,] and to record any and all applied medications thereto appurtenant. Thereupon, biological and chemical tests shall be

done to identify the disease-causing organisms or pathological conditions of the patients and discussing the charts/files of the clients with the Physician.

Medical Researcher is the position or job title given[,] although the beneficiary shall be performing other specialized medically related functions, as well. As stated, research is only 50% of the beneficiary's workload.

....

Furthermore, Petitioner could not have presented any evidence to clearly establish that there was going to be research to be done. Petitioner can mention the word "research" in general term[s] but the said word implies so many things and implies a plan, methodology and conclusion. Which explains why the Petitioner needs a medical researcher with the duty of "researching" as submitted in this case because the said research work, scientific as its is, shall evolve on its own as it is going on considering that the results shall be peculiar to each client's records and charts, be it Asian or American.

Thereafter, the Petitioner can establish its own theories or findings, as borne by the raw data gathered. However, to reduce these data into medical or science based on findings to assist the Petitioner in dispensing the required medical procedure to a new client who appear[s] to have similar biological or chemical data as the one who had been earlier tested, will require an employee with a special training or with [a] medical background, [such as] a medical school graduate as the beneficiary herein, [named].

In short, the job title of Medical Researcher, as a whole, can only be performed by an experienced individual with a baccalaureate degree in medicine or medical science.

As indicated above, at all stages of the proceeding the petitioner has limited information about the proposed duties to generic and generalized terms that convey no helpful information about the specific tasks that would engage the beneficiary, or about the particular knowledge, skills, and competencies that the beneficiary would have to apply to perform his duties. Consequently, the petitioner has not presented sufficient evidence to satisfy any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) and thereby establish that the proffered position requires the practical and theoretical application of a body of highly specialized knowledge that is acquired by at least a bachelor's degree, or its equivalent in a specific specialty, as required by the Act.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title or generalized descriptions of duties. It looks primarily for evidence about the specific duties, and about the nature of the petitioning entity's business operations. 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). Neither the title of the position, abstract descriptions of its duties, nor an employer's self-imposed standards are persuasive in the critical assessment that CIS must make: whether the evidence of record establishes that performance of 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 provides no specific information about the dermatological research duties that are to consume 50 percent of the beneficiary's time. Rather, the petitioner describes these duties only in generalized and abstract terms, such as "researching and/or reviewing major medical issues, innovations, and developments"; "analyzing medical literature to find research suggestions concerning medications, application of superficial radiotherapy and other modes of localized treatments"; "planning, organizing and conducting research," "analyzing data for use by physicians and nursing staff"; and "gathering new medical and scientific inputs or data about peculiar [sic] dermatological issues and concerns." This information is too abstract to meet the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO accords no credibility to the petitioner's statements on appeal to the effect that it is not possible to give a more detailed description of the research work that would involve the beneficiary ("Furthermore, Petitioner could not have presented any evidence to clearly establish that there was going to be research to be done. . . ."). Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The same lack of specificity characterizes the record's information about the other 50 percent of the job's duties. The "various chemical and biological and other tests" that the beneficiary would conduct are not specified, and there is no discussion of the type and level of specified knowledge that they require. The petitioner does not describe the detail in which the beneficiary would analyze and discuss the patients' charts, files, and histories. The extent to which the petitioner would rely upon the beneficiary's opinions in the medical area is also not discussed.

This generic and generalized information does not provide a factual basis for the AAO to identify the proffered position with any occupation for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty.

The citations, on appeal and earlier, to AAU decisions on medical and medical research assistants are not persuasive. While 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions, such as those cited in the record, are not similarly binding. Furthermore, 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), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

The record's job vacancy announcements from other employers are not probative, as the positions are materially different than the one proffered here.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the Department of Labor's *Occupational Outlook Handbook (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*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Because of the lack of specificity noted in the discussion of the first section of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the evidence is insufficient to accurately align the proffered position with any occupation for which the *Handbook* reports a requirement for at least a bachelor's degree in a specific specialty. There are no attestations from a professional association or other dermatologists. As already discussed, the few job vacancy advertisements submitted into the record are not probative.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), by which a petitioner can prevail by showing that the particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The record does not develop the proffered position sufficiently to establish such complexity or uniqueness. The level of medical knowledge necessary for the position is not clear. The petitioner's assertions about the requisite complexity are not documented or sufficiently explained. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The criterion at criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor, as the petitioner did not present evidence to establish that the proffered position is one for which the employer has a history of normally requiring at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the

attainment of a baccalaureate or higher degree in a specific specialty. The petitioner's duty descriptions lack the specificity to convey such specialization and complexity.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that, as a result of the general and imprecise nature of the information about this proffered position, it is impossible to determine whether its full performance requires licensure under California law relevant to medical practice and also to medical testing and analysis. Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), 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." Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. As the evidence of record raises but fails to resolve the issue of whether licensure is required, the petition must be denied for this reason also.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.