

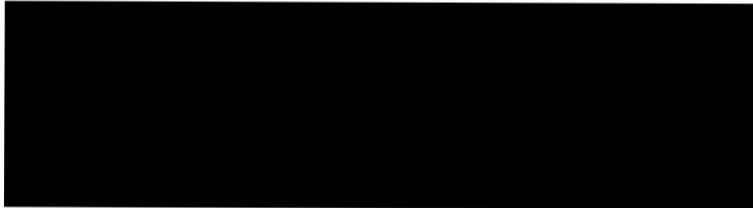
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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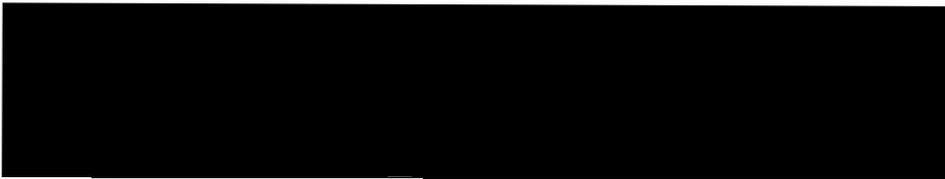
FILE: WAC 02 227 51828 Office: CALIFORNIA SERVICE CENTER Date:

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) withdrew the decision, remanded the matter to the director for entry of a new decision, and ordered that if the decision was adverse to the petitioner it was to be certified to the AAO for review. On remand, the director denied the petition and certified his decision to the AAO for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a general pediatrics clinic that seeks to employ the beneficiary as a medical writer/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 nonimmigrant visa petition on the ground that the offered position does not qualify as a specialty occupation. The AAO withdrew the decision, finding that the position qualifies as a specialty occupation, and remanded the matter to the director to determine whether the beneficiary is qualified for the position, which the AAO found to require licensure to practice medicine in the state of California and passage of parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), and competency in oral and written English. The AAO ordered that if the director's decision was adverse to the petitioner it was to be certified to the AAO for review.

On remand, the director issued a request for evidence, dated February 16, 2006, which sought evidence that would establish that the beneficiary is qualified to perform the proposed position,

In response to the request for evidence, counsel submitted a letter, dated May 9, 2006, stating that the proposed duties are not those of a physician and that they "involve no patient care and no patient contact." According to counsel, the physician to whom the research results are provided will make "the sole determination of the appropriate medical treatment for patients." Counsel cited to prior AAO decisions to establish that the instant position does not require licensure to practice medicine. Counsel stated that certification from the Commission of Graduates of Foreign Nursing Schools (CGFNS) is not required for the proposed position.

In his September 25, 2006 decision, the director concluded that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proposed position. The director certified his decision to the AAO for review.

On certification, counsel states that the beneficiary was invited by the petitioner to conduct research and that certification from the CGFNS is not required for the proposed position. Counsel contends that the beneficiary will not be involved in patient care or contact and that the offered position is not that of a physician. Counsel cites to prior AAO decisions to show that the instant position does not require licensure to practice as a physician.

Upon review of the record, the AAO finds that the beneficiary is not qualified to perform the duties of the proposed position.

The prior AAO decisions fail to overcome the conclusion that the proposed duties resemble those of a physician. Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation that does not require licensure since CIS has approved other, similar petitions in the past.¹ This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the references to other cases and documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition. 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).

Counsel states that the proposed duties are not those of a physician. As described by the petitioner in the June 25, 2002 letter, the beneficiary will:

[P]rovide complete analyses of the patients' injuries based upon the physicians' reports, medical history[,] and laboratory results. Based on all of the information supplied, [she] will keep up to date on the latest medical research results and utilize the medical library to perform the research necessary to make prognoses on the cases that given to her.

The beneficiary will also:

[W]ork with the physicians and our staff and will analyze the medical significance of the treatments/injuries. In addition [she] will also provide prognoses and will advise (if necessary) treatment programs to the physicians based upon her research.

The beneficiary will use medical journals, text books, and medical research materials to "obtain the analyses and evaluation of patients' conditions."

According to the California Business and Professions Code, such duties entail the practice of medicine in the state of California as the beneficiary will diagnose, make prognoses on cases, and treat injuries. The California Business and Professions Code, Chapter 5, Medicine, Article 3, Section 2052 states:

¹ The AAO notes that counsel indicates that two of the cases, LIN 94-109-51878 and EAC 94-164-51260, were found by the AAO to be similar to a physician's assistant. Under the laws of the state of California, a person is required to pass an approved program and hold certification to render medical services as a physician's assistant. *See* California Business and Professions Code, Chapter 7.7, Physician Assistants.

a) Notwithstanding Section 146, any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked, or unsuspended certificate as provided in this chapter or without being authorized to perform the act pursuant to a certificate obtained in accordance with some other provision of law is guilty of a public offense, punishable by a fine not exceeding ten thousand dollars (\$10,000), by imprisonment in the state prison, by imprisonment in a county jail not exceeding one year, or by both the fine and either imprisonment; (b) Any person who conspires with or aids or abets another to commit any act described in subdivision (a) is guilty of a public offense, subject to the punishment described in that subdivision; (c) The remedy provided in this section shall not preclude any other remedy provided by law.

As stated in the AAO decision dated November 1, 2005, the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) depicts a physician as performing the beneficiary's duties.

Based on the evidence of record, the AAO finds that: (1) the proposed position requires licensure to practice as a physician in the state of California and passage of parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), and competency in oral and written English; and (2) the petitioner submitted no evidence of the beneficiary's qualifications to satisfy these requirements.

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 on this ground.

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 director's September 25, 2006 decision is affirmed. The petition is denied.