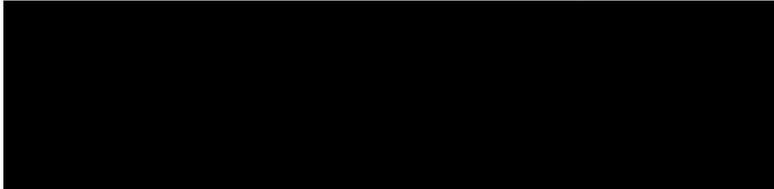


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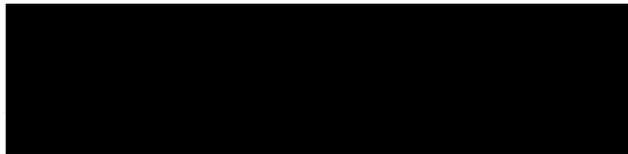


D2

FILE: SRC 04 251 54538 Office: TEXAS SERVICE CENTER Date:

NOV 28 2006

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 director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a medical office that seeks to employ the beneficiary as a medical laboratory technician. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, initially filed on September 27, 2004; (2) the director's approval of the petition, dated October 5, 2004; (3) the director's July 7, 2005 NOIR; (4) the petitioner's August 3, 2005 response to the NOIR; (5) the director's September 6, 2005 revocation; and (6) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

After obtaining the H-1B approval notice, the beneficiary appeared at the United States consulate in Mumbai, India to obtain the visa. The interviewing officer denied the visa and returned the petition to the service center. The interviewing officer had concerns regarding the qualifications of the beneficiary to perform the duties of the proposed position. Specifically, the interviewing officer noted that the beneficiary does not speak English. Noting that the petition did not indicate that the beneficiary could conduct her job duties in the Gujarati language, the interviewing officer questioned whether she could carry out performance of the proposed job duties.

The interviewing officer relayed these concerns to the service center, and the director, finding that these issues constituted good and sufficient cause, issued the NOIR on July 7, 2005. Specifically, the director stated the following:

[The beneficiary] does not speak the English language. For the interview, she requested a Gujarati translator. She signed a sworn affidavit, included in the consular officer's report to this CIS office, stating that she does not speak well enough to function in the English language. It is not clear how the applicant would be able to perform the job duties of [a] medical technologist without the ability to understand and speak English. The petition and supporting documents do not mention that the job can be conducted in the applicant's native language of Gujarati.

Further, the applicant stated that her uncle owns the clinic and arranged for the H[-]1B petition on her behalf. She was unsure of the nature of the job responsibilities at the clinic, and did not know how to describe exactly what she would be doing.

It appears the beneficiary is not eligible for the referenced job position and could not function appropriately within the setting of the United States petitioning company. Because of the indications stated above, it is the belief of [the director] that the [approval of the] petition for the applicant should be revoked.

The NOIR provided the petitioner 30 days during which to address these concerns.

Counsel's August 3, 2005 NOIR response highlighted the beneficiary's qualifications to perform the duties of the proposed position, including her education and work experience. Counsel stated the following with regard to the beneficiary's English language skills:

The Notice of Intent to Revoke indicates that [the beneficiary's] English proficiency was not sufficient for visa issuance. **The refusal to issue a visa on this basis constitutes an abuse of discretion.** First, [the beneficiary's] English skills are more than sufficient to perform her duties as listed in the position offered portion of this document. Nevertheless, there is no provision in the Act that requires an individual to possess a certain proficiency in the English language for visa issuance.<sup>1</sup> The only individuals required to establish their English language competence for H-1B issuance are physicians [emphasis in original].

Counsel then contended that the beneficiary in fact possesses English skills requisite for the position:

The classes she took to attain this degree were taught in the English medium. [The beneficiary] is able to proficiently read and write English. She is fluent in the language of science/biology . . . When the consular officer judged her spoken English skills, she was extremely nervous.

Counsel contended further that English fluency was not required for the beneficiary to carry out her job functions in the proposed position:

She possesses the skills necessary to perform the proffered position. The position offered is clearly a specialty occupation. Hence, a visa should be issued on this basis alone. Again, there is no English requirement for this type of position.<sup>2</sup> The position simply does not require [the beneficiary] to interact with patients. Hence, the proficiency of her English may not legally be a factor in the decision-making calculus. It must be stressed, that [the beneficiary's] knowledge of the Gujarati language can only be of assistance in

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<sup>1</sup> The AAO disagrees with counsel's assertion regarding the Department of State's refusal to issue the visa. Section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), which requires that certain healthcare workers obtain a certificate that (1) verifies that the alien's education, training, licensure, and experience meet all applicable statutory and regulatory requirements for entry into the United States under the requested classification, are comparable to those required for American healthcare workers of the same type, and are authentic; (2) that the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate to the type of healthcare work in which the alien will be engaged; and (3) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, that the alien has passed such a test or such an examination. In a September 22, 2003 memorandum entitled *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31*, CIS Associate Director for Operations William B. Yates noted that the health care occupations requiring certification are nurses, physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists, medical technicians, and physician assistants. Effective July 26, 2004, aliens who do not present such a certificate (part of which, as noted previously, must demonstrate a level of competence in oral and written English) are inadmissible. However, the AAO cannot adjudicate the issue of admissibility, as jurisdiction over that issue is within the purview of the Department of State.

<sup>2</sup> The AAO refers counsel to footnote 1.

her work. The sizeable Gujarati community of Houston would take great comfort knowing that a Gujarati proficient speaker was working inside the lab. This should not be viewed as detrimental, but a benefit. [The beneficiary] speaks English well enough to perform her duties. Furthermore, she has been taking English classes in India to hone [her] skills. [The beneficiary] has informed us that she was extremely nervous during the interview and was not able to be herself. She is extremely intelligent and bright.

The director revoked the petition's approval on September 6, 2005, stating the following:

When a consular officer interviews an alien individual, he or she has access to information that is not necessarily available to the adjudicating officer at a service center. The consular officer's findings included the fact that [the beneficiary] does not speak the English language. She signed a sworn statement in affidavit form that stated clearly she did not function in the English language. Furthermore, [the beneficiary] was unsure of the exact job responsibilities of the proposed job, and she was unable to describe the nature of the proposed duties for the job in question. Consequently, the alien does not appear to be able to function in the proposed job situation.

On appeal, counsel asserts that the director's decision was "clearly erroneous and an egregious abuse of discretion," and that CIS "has absolutely no right in law or regulation to transfer implicit requirements for H-1B eligibility." Counsel repeats his assertion that English language skills are not required by the Act, and that the beneficiary's English skills are "more than sufficient" to adequately perform her proposed duties. Counsel highlights the beneficiary's degree and the educational evaluation that found it equivalent to a bachelor's degree in medical technology from an accredited institution of higher education in the United States.

The AAO does not agree. Upon review, the petitioner has failed to overcome the director's revocation.

The issue before the AAO is whether, at the time the petition was filed, the beneficiary qualified to perform the duties of the proposed position. 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.

Here, the beneficiary appears to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), which requires a demonstration that the beneficiary holds 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. As noted previously, an evaluation contained in the record states that the beneficiary has the equivalent of a bachelor's degree in medical technology.

However, the record does not demonstrate that the beneficiary is qualified to perform the duties of the proposed position. According to the petitioner's September 16, 2004 letter of support, the beneficiary will be required, in part, to analyze the results of tests, and relay those results to physicians. She would also develop and modify the petitioner's procedures and establish and monitor programs to ensure the accuracy of tests.

The record does not establish that the physicians to whom the beneficiary would report the results of her test speak the beneficiary's language. The record does not establish that the beneficiary's job duties to develop and modify the petitioner's procedures and monitor programs to ensure the accuracy of tests will or may be performed in the Gujarati language. While counsel states that the beneficiary will be serving the large Gujarati population of Houston, the record does not establish that the petitioner's clientele speak Gujarati. Going on record without supporting documentary evidence is not sufficient for the purpose 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 record does not establish that the beneficiary will be able to perform the duties proposed by the petitioner without a command of the English language.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation because the beneficiary is not qualified to perform the services of the specialty occupation.

The petitioner has failed to overcome the director's revocation of the petition's approval. Accordingly, the AAO will not withdraw the director's decision.

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 approval of the petition is revoked.