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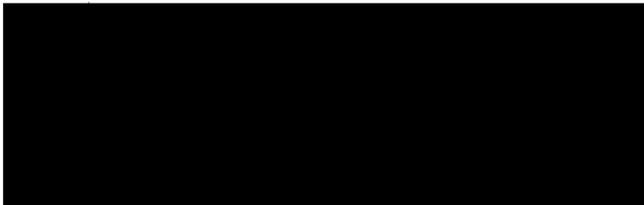
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FILE: WAC 05 150 51748 Office: CALIFORNIA SERVICE CENTER Date: Nov 29 2006

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*for* *Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a medical group. It seeks to employ the beneficiary as a medical researcher and to classify him 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 ground that the record failed to establish that the proffered position is 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.

As provided in 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 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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In the Form I-129 and an accompanying letter the petitioner described itself as a provider of primary medical care services, established in 1982, with eleven employees and a gross annual income of \$1,186,000. According to the petitioner, "a vital segment of our practice must be devoted to medical research to

comprehend the most fundamental aspects of coronary disease,” which “will not only form the basis of our continued success with our patients, but will lead to recognition as a force in the field of coronary medicine.” The petitioner proposes to employ the beneficiary as a medical researcher and described the research protocol in the following language:

The beneficiary will conduct related research and perform his duties through the analysis and comparison of empirical data gathered by physicians who would be called upon to cooperate with the underlying study by providing samples and data from their patients to “Determine the Effect of Cigarette Smoking on Coronary Artery Restenosis after PTCA (Percutaneous Transluminal Coronary Angioplasty) or Coronary Stent Insertion [CSI].”

[I]t is very hard for many smoking patients with IHD and acute coronary syndromes who have undergone PTCA or CSI for their occluded coronary arteries to quit cigarettes and they continue to smoke after such expensive procedures. So we decided to evaluate the effect of such a cigarette smoking continuation on coronary artery restenosis through outpatient echocardiographic changes of coronary flow rate, which has never been done in reviewing of the articles in the Med-Line during the last four years.

By reviewing previous articles and medical references, we can simply realize that many factors such as cigarette smoking are in close relation with coronary arteries occlusion and also evaluation of coronary artery occlusion by means of coronary flow rate would be possible and reliable via echocardiographic studies.

According to these presumptions, echocardiographic follow up with stress on changing in coronary flow rate in patients with past history of PTCA or CSI, would lead to evaluation of restenosis and our main goal is to compare this issue in smoker and non-smoker patients with the same conditions.

Among referral out-patients with IHD and past history of PTCA or CSI, we divide them into two groups on the basis of their current history of cigarette smoking, and then at regular intervals echocardiographic studies with stress on coronary flow rate will be done for them.

Finally, by comparison of results between the two groups, our main goal would be achievable.

The petitioner described the beneficiary’s specific duties, and the percentage of time required by each duty, as follows:

- Conduct research to develop methodologies and procedures for medical application of the research results, analyzing data and presenting findings (25-30%).
- Plan and direct studies to investigate the effects of cigarette smoking on coronary artery restenosis, preventive methods, and treatments for disease (20-25%).
- Prepare and analyze empirical data on tissue and cell samples or laboratory results related thereto, provided by participating physicians to identify toxicity, or to study cell structure related to the research (15-20%).

- Study human health and physiological processes in connection to the effects of smoking in coronary artery restenosis and the changing coronary flow rates in patients with past history of PTCA or CSI (20-25%).
- Consult with and advise physicians regarding medical applications of the research data and results (15-20%).

The petitioner asserted that the proffered position accords with that of a medical scientist, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, which requires a doctoral degree in medicine. The beneficiary is qualified for the position, the petitioner declared, by virtue of his doctorate of medicine from Shiraz University of Medical Sciences & Health Services in Iran, awarded on September 21, 2000. According to the report of an educational credentials evaluation service in Miami Beach, Florida, the beneficiary's education in Iran is equivalent to a doctor of medicine degree from an accredited university in the United States.

In response to the RFE, in which the director asked for a more detailed description of the work to be performed by the beneficiary and an explanation as to why it required a degree in the field, counsel repeated the job description already provided in the petitioner's initial letter and asserted that the proffered position falls under the *Handbook's* occupational categories of biological and medical scientists, which require a specialty degree. Counsel also submitted some company documentation such as tax filings, employee records, and the petitioner's business license.

In his decision the director determined that the proffered position is not a specialty occupation. Though the petitioner maintained that the position fits the description of a biological or medical scientist, as described in the DOL *Handbook*, the director found that the record failed to establish that there is a bona fide medical research position available for the beneficiary. Noting that the petitioner is in the business of primary medical care, that extensive research has already been conducted on cigarette smoking and coronary artery restenosis, that the petitioner had not differentiated the intended research from that already conducted in the field, and the lack of any involvement by a product manufacturer (such as a stent manufacturer) or the Food and Drug Administration, the director concluded that the record does not establish that there is medical research work to support the beneficiary in a specialty occupation.

On appeal counsel asserts that the director's reasoning was faulty. Counsel contends that the petitioner's research protocol, provided in its initial letter to the service center, explains the research project in detail including the resources and means for conducting the research, the need for additional research in the field of coronary heart disease, that the research the petitioner intends to conduct differs from previous research, and that there is no need for stent manufacturers or the FDA to be involved. Counsel reiterates the petitioner's assertion that the proffered position of medical researcher requires a medical degree and thereby qualifies as a specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

In accord with the director's decision, the AAO determines that the proffered position does not fit the *Handbook's* description of a biological or medical scientist. In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are determinative, not the title of the position. The petitioner must show that the duties of the position normally require a degree in a specialty field. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. Cf. *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The DOL *Handbook*, 2006-07 edition, at 150-51, describes the occupation of biological scientist, in pertinent part, as follows:

Biological scientists study living organisms and their relationship to their environment. They research problems dealing with life processes and living organisms. Most specialize in some area of biology such as zoology . . . or microbiology . . . .

Many biological scientists work in research and development. Some conduct basic research to advance knowledge of living organisms, including viruses, bacteria, and other infectious agents . . . . Biological scientists mostly work independently in private industry, university, or government laboratories, often exploring new areas of research or expanding on specialized research started in graduate school . . . .

Biological scientists who work in applied research or product development use knowledge provided by basic research to develop new drugs and treatments, increase crop yields, and protect and clean up the environment . . . .

Those who conduct research usually work in laboratories and use electron microscopes, computers, thermal cyclers, or a wide variety of other equipment. Some conduct experiments using laboratory animals or greenhouse plants. For some biological scientists, research also is performed outside of laboratories [in natural outdoor locales]...

Most biological scientists are further classified by the type of organism they study or by the specific activity they perform. . . . [such as] aquatic biologists . . . marine biologists . . . limnologists . . . biochemists . . . botanists . . . microbiologists . . . physiologists . . . biophysicists . . . zoologists and wildlife biologists . . . [and] ecologists.

The proffered position does not fit any of the biological scientist classifications discussed in the *Handbook*, and the nature of its duties are clearly not those of a biological scientist. The duties described by the petitioner do not involve any outdoor research of living organisms and their relationship to the environment, do not involve any basic research to advance knowledge of living organisms, and do not involve any applied research to develop new products or drugs. Furthermore, the job duties do not appear to involve any

laboratory research that would be conducted directly by the beneficiary. The AAO concludes that the proffered position is not that of a biological scientist.

As for medical scientists, the *Handbook* describes that occupation, in pertinent part, as follows:

Medical scientists research human diseases in order to improve human health. Most medical scientists conduct biomedical research and development to advance knowledge of living organisms, including viruses, bacteria, and other infectious agents. Past research has resulted in the development of vaccines, medicines, and treatments for many diseases. Basic medical research continues to provide the building blocks necessary to develop solutions to human health problems, such as vaccines and medicines. Medical scientists also engage in clinical investigation, technical writing, drug application review, patent examination, or related activities.

Medical scientists study biological systems to understand the causes of disease and other health problems and to develop treatments and research tools and techniques, many of which have medical applications . . . . In addition to developing treatments for health problems, medical scientists attempt to discover ways to prevent health problems, for example, by affirming the link between smoking and lung cancer or between alcoholism and liver disease.

Many medical scientists work independently in private industry, university, or government laboratories, often exploring new areas of research or expanding on specialized research that they started in graduate school . . . .

Medical scientists who work in applied research or product development use knowledge provided by basic research to develop new drugs and medical treatments . . . .

Medical scientists who conduct research usually work in laboratories and use electron microscopes, computers, thermal cyclers, or a wide variety of other equipment. Some may work directly with individual patients or larger groups as they administer drugs and monitor and observe the patients during clinical trials . . . .

*Handbook, id.*, at 156-57. The nature of a medical scientist's work resembles that of a biological scientist insofar as it focuses on basic or applied research to advance knowledge in the field and/or develop new drugs and treatments. The distinction between the two occupations is that medical scientists research areas of human health, whereas biological scientists research areas of the broader environment.

The proffered position in this case does not fit the *Handbook's* description of a medical scientist. The duties described by the petitioner do not include any laboratory research of human diseases to be conducted directly by the beneficiary. The proffered position does not involve any technical writing, drug application review, patent examination, or related activities. Nor does it involve any work administering drugs and treatments to patients in clinical trials. The petitioner refers generally to "ethocardiographic studies" on out-patients with histories of PTCA or CSI, but provides little information about how such studies would be conducted and the level of sophistication involved. The AAO determines that the evidence of record fails to establish that the beneficiary would be performing the duties of a medical scientist in the proffered position.

Furthermore, the medical research duties of the proffered position are too vaguely described for the AAO to conclude that they require the theoretical and practical application of a body of highly specialized knowledge and a baccalaureate or higher degree in a specific specialty to perform. As far as the record shows, the beneficiary may be doing little more than collating medical data gathered by other physicians. The AAO concludes that the petitioner has failed to establish that a baccalaureate or higher degree in a specific specialty is the normal minimum requirement for entry into the proffered position, as required for it to meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), the record includes job advertisements for eight research positions variously called medical researcher, health researcher, clinical researcher, biological researcher, or simply researcher, most of which require the applicants to have a baccalaureate or higher degree in a specific specialty. None of the advertising companies is in the same line of business as the petitioner, however, or comparable to the petitioner in their scale of operations. In contrast to the petitioner, a medical practice with eleven employees and gross annual income of approximately \$1.2 million, the advertising entities are pharmaceutical companies, research institutes, and consulting firms, all of which appear to have a scale of operations considerably larger than the petitioner's. Accordingly, the job announcements do not demonstrate that the requirement of a specialty degree is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proffered position does not meet the third alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – “the employer normally requires a degree or its equivalent for the position” – because the subject position is new and the petitioner has no hiring history for it.

Lastly, the record does not establish that the duties of the proffered position are so specialized and complex that they require a level of knowledge associated with the attainment of a baccalaureate or higher degree in a specific specialty, as required for the position to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As previously discussed, the job description in the record is too vague to show that a baccalaureate level of knowledge in a specific specialty is required to perform the services of the job.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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