

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

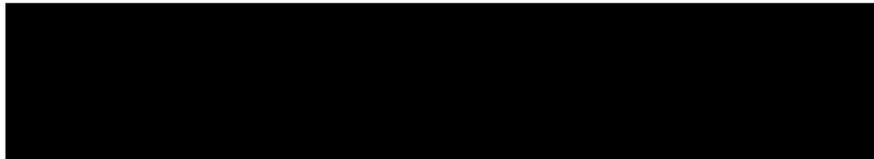
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

D2



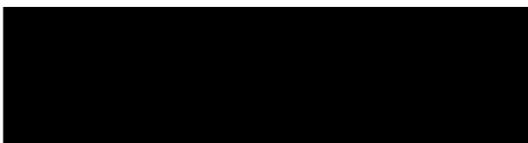
FILE: WAC 06 251 53513 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 2007

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 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 retail pharmacy store that seeks to employ the beneficiary as a pharmacy assistant. 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 because the proffered position did not qualify as a specialty occupation. On appeal, counsel submits a brief and additional information stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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.

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 are 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 proceedings before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for evidence; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a pharmacy assistant. The petitioner first described the duties of the proffered position as follows in its letter of August 1, 2006:

- Aid the licensed pharmacists in dispensing prescriptions and maintain automated confidential patient information, disease conditions and drug profiles;
- Aid in counseling patients on proper drug usage, interactions, side effects, dosage and storage of pharmaceuticals;
- Aid in counseling patients with special nutritional needs and disease conditions like Diabetes, Obesity, High Cholesterol, Renal Insufficiency, AIDS/HIV, Chemo and Radiation Therapy, etc.;
- Aid in compounding and dispensing prescribed medications, using standard formulas and processes such as weighing, measuring and mixing ingredients - special pediatric, geriatric and veterinary prescriptions and other pharmaceuticals for patient care, according to professional standards and state and federal requirements;
- Prepare prescription labels, select prescription containers, and affix the prescription and auxiliary labels to the container;
- Interact and report to doctors regarding drug-drug and drug-food interactions;
- Maintain narcotic ordering and inventory drugs reports for the pharmacist;
- Aid in recommending over the counter medications for customers;
- Aid in ordering inventory replenishments from wholesalers and scheduling mail order prescriptions for timely delivery of medications;

- Review prescriptions issued by physicians to assure accuracy and determine formulas and ingredients needed;
- Maintain patient profiles and prepare insurance claim forms, and stock and take inventory of prescription and over-the-counter medications;
- Help in maintaining established procedures concerning quality assurance, security of controlled substances and disposal of hazardous waste drugs;
- Enter data such as patient name, prescribed medication and cost, to maintain pharmacy files, charge system and inventory; and
- Clean the pharmacy equipment and supplies and manage the cash register.

The petitioner requires a minimum of a bachelor's degree in pharmacy for entry into the proffered position.

In response to the director's request for evidence, the petitioner substantially changed the duties to be performed by the beneficiary from those of assisting the pharmacist, to duties which are substantially those of a pharmacist. Those duties were detailed as follows:

- Compound and dispense medications following prescriptions issued by medical practitioners;
- Weigh, measure and mix drugs and other medical compounds and fill bottles or capsules with correct quantity and composition of preparation;
- Maintain patient profiles and prepare insurance claim forms;
- Dispense non-prescription drugs to the public;
- Provide information to customers on potential drug interactions and potential adverse reactions;
- Provide guidance to customers in respect to storage of medications;
- Make sure insurance patients have understanding of prescribed instructions;
- Order supplies from wholesalers; and
- Conduct inventory of prescriptions and over the counter medications to maintain adequate stock to meet the needs of the pharmacy.

The purpose of a 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 that was offered to the

beneficiary at the time the Form I-129 petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 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. The AAO will, therefore, not consider the duties detailed by the petitioner in response to the director's request for evidence and the appeal will be adjudicated based on the duties set forth by the petitioner in its August 1, 2006 support letter.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for pharmacy technicians. These individuals help licensed pharmacists provide medication and other health care products to patients. Technicians who work in retail or mail-order pharmacies have varying responsibilities, depending on State rules and regulations. They receive written prescriptions or requests for refills from patients. They may also receive prescriptions electronically from the doctor's office. They must verify that the information on the prescription is complete and accurate. In preparing prescriptions technicians must retrieve, count, pour, weigh, measure and sometimes mix the medication. They then prepare prescription labels and select the type of prescription container. The prescription must be checked by the pharmacist before it is given to the patient. Technicians also maintain patient profiles, prepare insurance claim forms, and stock and take inventory of prescriptions and over-the-counter medications. The *Handbook* notes that although most pharmacy technicians receive informal on-the-job training, employers favor those who have completed formal training and certification. However, there are currently few State and no Federal requirements for formal training or certification of pharmacy technicians. In addition to the military, some hospitals, proprietary schools, vocational or technical colleges, and community colleges offer formal educational programs. A baccalaureate level education in a specific educational discipline is not normally the minimum requirement for entry into the proffered position and the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner asserts that a degree requirement for the position is common to the industry in parallel positions among similar organizations and in support of that assertion submitted (on appeal) six opinion letters from other pharmacists. Each opinion letter states that the duties of the proffered position are of a professional nature and that only an individual holding at least a minimum of a baccalaureate degree in pharmacy and/or qualified work experience in the field would be qualified for the position. The opinion writers do not indicate which job duties they relied upon to make their assessments. As the AAO will not accept the expanded job duties submitted in response to the RFE, the opinions which may be based on such duties have not been shown to be based on the facts of record. The opinion writers do not specifically state that a degree requirement in a specific educational discipline is common in the industry for the position, however, and further state that related work experience could also qualify an applicant for the position. This is consistent with the *Handbook's* discussion of the educational requirements for pharmacy technician positions which notes that one avenue of training for the position is on-the-job training. The letters are identical and do not appear to have been drafted by the respective signatories, further diminishing their evidentiary weight. The opinion writers offer no evidence or reference any authority to establish that a degree requirement in a specific educational discipline is common in the industry for the offered position, and their opinions shall accordingly be given little weight. CIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept, or may give less weight, to that evidence. *Matter*

of *Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. In the instant case, the petitioner has submitted no evidence regarding its hiring practices. Accordingly, the record does not establish the proffered position as a specialty requirement under the third criterion. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

As described by the petitioner, the duties to be performed by the beneficiary are not so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can be performed only by an individual with a degree in a specific specialty. There is nothing in the record to establish that performance of the duties of the position requires the theoretical and practical application of a body of highly specialized knowledge. Nor does the record establish that the duties to be performed by the beneficiary are any more unique, or specialized and complex, than the duties referred to in the *Handbook* that are routinely performed by pharmacy technicians who are not required to have a bachelor’s degree in a specific educational discipline. As such, the petitioner has failed to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

Further, the petitioner states that the offered position is “somewhat parallel” to that of a pharmacy intern. Counsel notes in his appellate brief that students serve as pharmacy interns in preparation for graduation and licensure to become a pharmacist. By counsel’s own statement, pharmacy interns are staffed by pharmacy students who have not yet obtained their pharmacy degrees, but are working toward fulfillment of degree requirements. NYS Article 137 § 6806 provides for the issuance of limited permits for employment as a pharmacy intern. Such permits may be issued to students enrolled in the last two years of a registered program in pharmacy, or to graduates of pharmacy programs who are engaged in meeting the experience requirements or whose application for initial licensure is pending. Pharmacy interns in New York may practice as a pharmacist under the immediate personal supervision of a licensed pharmacist before they have obtained their bachelor’s degrees. Thus, the position of pharmacy intern in New York does not require a degree in pharmacy and is not generally a specialty occupation.

The AAO notes further that the record does not establish that the beneficiary has been issued a limited permit to work as a pharmacy intern, and thus is not qualified to perform the duties of a pharmacy intern in New York. NYS Article 137 § 6806. For this additional reason, the petition could not be approved were the position established to be that of a pharmacy intern.

As always, 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 failed to sustain that burden.

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