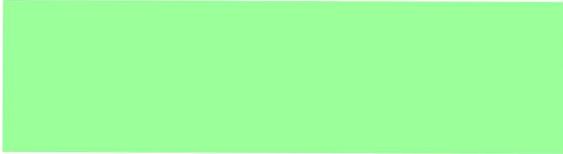


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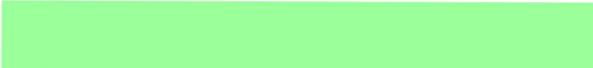
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

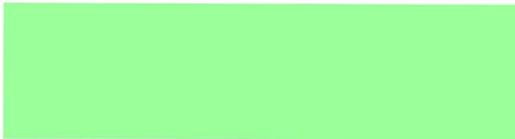


DATE: **JAN 29 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a research company. It seeks to permanently employ the beneficiary in the United States as a research assistant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Under section 203(b)(2) of the Act immigrant classification may be granted to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in pertinent part, that:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent.

In this case, the immigrant visa petition (Form I-140) was filed on April 4, 2011. It was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the United States Department of Labor (DOL) on February 7, 2011, and certified by the DOL on March 9, 2011.

Following a request for evidence (RFE) from the Director and a response from the petitioner, the Director issued a decision denying the petition on May 2, 2011. In her decision the Director noted that the ETA Form 9089 (labor certification) requires a Doctor of Medicine (M.D.) or foreign equivalent and, based on the job duties described in the labor certification, determined that the job offer is for a Doctor of Medicine, or physician, who would be performing duties in violation of the unqualified physician inadmissibility provision in section 212(a)(5)(B) of the Act, 8 U.S.C. § 1182(a)(5)(B). The Director reviewed the qualifying requirements for a practicing physician seeking immigrant classification as an advanced degree professional. Addressing the petitioner's assertion in response to the request for evidence that the beneficiary would be performing the services of a research assistant, not those of a physician, the Director stated that "the position clarified by counsel differs materially from the position described in the . . . labor certification and the . . . petition." In the Director's view, the DOL did not have the opportunity to evaluate the duties of "the position newly clarified by counsel." Accordingly, the Director rejected counsel's clarification of the job duties as an "alteration and amendment of the job opportunity's job duties

without DOL's acknowledgment and approval" subsequent to the certification of the ETA Form 9089. The Director concluded that the evidence of record did not establish that the beneficiary meets the admissibility requirements for a physician under the Act and did not establish that the beneficiary is qualified for the proffered position. Finally, the Director cited an apparent redaction by the petitioner on the ETA Form 9089 without annotation by the DOL, and indicated that the labor certification could be invalidated if it was determined that fraud or misrepresentation was intended.

The petitioner filed a timely appeal, accompanied by a brief from counsel and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

In his appeal brief counsel reiterates its contention that the proffered position is that of a research assistant, not a practicing physician. According to counsel, the beneficiary will accompany a physician on clinical rounds for the purpose of collecting data for research, but will not engage in any direct care of patients. Counsel suggests that the occupation best describing the proffered position in the DOL's Occupational Outlook Handbook (OOH) is Medical Scientists, who generally have a Ph.D or an M.D. As for the redaction on the ETA Form 9089, counsel states that the error was inadvertent and did not involve any substantive alteration of the document.

As a preliminary matter, the AAO accepts counsel's explanation for the redaction on the ETA Form 9089 (three lines in Part K.b.9) as an innocent mistake which is immaterial to the instant petition. Accordingly, it does not warrant the invalidation of the labor certification or any further action by U.S. Citizenship and Immigration Services (USCIS).

In determining the nature of the proffered position, the AAO will begin by reviewing the language utilized by the petitioner on the labor certification and the visa petition to describe the job. On both the ETA Form 9089 (Part H, Box 11) and the Form I-140 (Part 6, Box 3) the job duties of the "research assistant" are described as follows:

Participate in nephrology research studies on kidney disease patients who are undergoing dialysis. Help monitor patients from admission into the research program through their post trial/procedure follow up appointments. Take part in recording patient histories, performing clinical rounds, setting daily disease management plans, and administering direct patient care. Assist with physical examinations and collecting test samples. Track and record patients' symptoms and general progress throughout the research program. Analyze experimental data using statistical analysis, and co-author nephrology articles detailing research conclusions.

The minimum educational requirement for the position, as specified in Part H, boxes 4-A, 4-B, and 9, is a Doctor of Medicine (M.D.) or a foreign educational equivalent.¹ The ETA Form 9089 further

¹ The record contains copies of the beneficiary's medical degree and transcripts which show that he was awarded a Bachelor of Medicine & Bachelor of Surgery from the [REDACTED] on April 8, 2006, following completion of a five-year course of study.

specifies that no alternate degree or field of study is acceptable, nor any alternate combination of education and experience (Part H, boxes 7, 8, and 8-A).

On the ETA Form 9089 (Part F, items 2 and 3) the petitioner identified the occupation title in the OOH as "biochemists" with a SOC/O*NET² code of 19-1021.01 (Biochemists and Biophysicists). On the Form I-140 the proffered position was likewise identified by the SOC code of 19-1021. The OOH, 2012-13 Edition, states that "[b]iochemists and biophysicists study the chemical and physical principles of living things and of biological processes such as cell development, growth, and heredity." The duties of a biochemist or biophysicist are listed as follows:

- Plan and conduct complex projects in basic and applied research.
- Manage laboratory teams and monitor the quality of their work.
- Isolate, analyze, and synthesize proteins, enzymes, DNS, and other molecules.
- Research the effects of substances such as drugs, hormones, and food on tissues and biological processes.
- Prepare technical reports, research papers, and recommendations based on their research.
- Present research findings to scientists, engineers, and other colleagues.

The OOH goes on to state that:

Biochemists and biophysicists who do applied research develop products and processes that improve our lives. For example, in medicine, [they] develop tests used to detect diseases, genetic disorders, and other illnesses. They also develop new drugs and medications, such as those used to treat cancer or Alzheimer's disease.

As far as education is concerned, the OOH indicates that biochemists and biophysicists need a Ph.D. in that field to work in independent research and development positions. "Most biochemistry and biophysics Ph.D. holders begin their careers in a temporary postdoctoral research position," the OOH states, "which typically lasts 2 to 3 years."

In her RFE the Director focused on the language in Part H, box 11 of the ETA Form 9089 stating that the beneficiary would be "taking part in performing clinical rounds, setting daily disease management plans, administering direct patient care, and assisting with physical examinations," and determined that "these duties of the proffered position involve patient care and require that the beneficiary be a qualified, licensed physician, or eligible for such a license." In response to the RFE counsel disagreed with the Director's characterization of the job and offered a clarification of the key job duties highlighted by the Director. As explained by counsel:

The position . . . involves conducting nephrology research studies on kidney disease patients undergoing dialysis. The beneficiary will be responsible for collecting and compiling data from the patients. In order to collect the proper data, it requires the beneficiary to accompany the physicians in their clinical rounds and observe and not treat the patient's symptoms and progress throughout the research program. It

² Standard Occupational Classification / Occupational Information Network.

requires the beneficiary to record data pertaining to the physician's assessment of the patient and to analyze the data. The position offered is strictly to study the findings of the physicians and draw conclusions based on those findings.

In clarifying the job duties as described in the application, we wish to state that the Research Assistant while accompanying the physician on their [sic] clinical rounds merely performs administrative tasks in the physician's direct patient care and physical examinations. The job duties as already stated are strictly the duties of a Research Assistant and not of a Physician and the Research Assistant does not get involved in direct or indirect patient care.

The Director was not persuaded by counsel's clarification. Instead, the Director confirmed her prior determination that the proffered position was that of a practicing physician, and denied the petition on the ground that the petitioner failed to submit any of the requisite documentation to establish the beneficiary's qualification for admission to the United States to practice medicine. The Director also found that the job clarification submitted in response to the RFE constituted a material change to the position described in the labor certification, which necessitated its rejection.

On appeal counsel does not contest the Director's determination that the beneficiary does not qualify for admission to the United States as a practicing physician. Rather, he reiterates the petitioner's claim that the proffered position does not involve any medical treatment of patients and should not be confused with a physician. According to counsel, the occupational category in the OOH best suited to the proffered position is that of "medical scientists" (SOC/O*NET code 19-1042.00), the educational requirement for which is a Ph.D. or sometimes an M.D. Counsel submits an O*NET printout for medical scientists, dated May 31, 2011, which states that they "[c]onduct research dealing with the understanding of human diseases and the improvement of human health. Engage in clinical investigation or other research, production, technical writing, or related activities." The tasks of a medical scientist are listed in O*NET as follows:

- Conduct research to develop methodologies, instrumentation and procedures for medical application, analyzing data and presenting findings.
- Plan and direct studies to investigate human or animal disease, preventive methods, and treatments for disease.
- Follow strict safety procedures when handling toxic materials to avoid contamination.
- Evaluate effects of drugs, gases, pesticides, parasites, and microorganisms at various levels.
- Teach principles of medicine and medical and laboratory procedures to physicians, residents, students, and technicians.
- Prepare and analyze organ, tissue, and cell samples to identify toxicity, bacteria, or microorganisms or to study cell structure.
- Standardize drug dosages, methods of immunization, and procedures for manufacture of drugs and medicinal compounds.
- Investigate cause, progress, life cycle, or mode of transmission of diseases or parasites.

- Confer with health departments, industry personnel, physicians, and others to develop health safety standards and public health improvement programs.
- Study animal and human health and physiological processes.

As far as the educational requirements for medical scientists are concerned, O*NET states that most require master's degrees and some require a Ph.D. or an M.D. (or even a J.D.). The OOH excerpt submitted by counsel (2010-11 Edition) elaborates on the educational requirements, stating that "[a] Ph.D. in biological science is the minimum education required for most prospective medical scientists. However, some medical scientists also earn medical degrees in order to perform clinical work."

Based on the entire record, the AAO agrees with the Director insofar as the job duties described in Part H, box 11 of the ETA Form 9089 and in Part 6, box 3 of the Form I-140 do not establish that the proffered position excludes any and all prohibited duties of a physician. The labor certification states that one duty of the research assistant will be to "[t]ake part in . . . performing clinical rounds . . . and administering direct patient care." This language more likely than not describes tasks normally performed by a physician. In accord with the Director's primary ground for denial, the AAO agrees that the beneficiary does not qualify for admission to the United States as a practicing physician. See section 212(a)(5)(B) of the Act, 8 U.S.C. § 1182(a)(5)(B).

In his job clarification counsel deletes the language quoted above and substitutes new language stating that the beneficiary will "accompany the physicians . . . and observe and not treat the patient's symptoms and progress throughout the research program." Further emphasizing the non-medical aspects of the job, counsel states that the research assistant "merely performs administrative tasks" in support of the physician and "does not get involved in direct or indirect patient care." Had the petitioner meant to exclude all medical tasks from the position description in the ETA Form 9089 and the Form I-140, that intention should have been expressed in unambiguous language like that employed by counsel in the job clarification. In accord with the Director's determination, the AAO finds that the job clarification constitutes a material change to the labor certification and the petition. A petitioner may not make material changes to a petition during the adjudication process in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). USCIS may not ignore a term of the labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986).

In addition to the job clarification, counsel's claim on appeal that the "research assistant" position most closely resembles the OOH occupational category of medical scientist represents another material change. As previously discussed, the proffered position is categorized on the labor certification under the occupational title of biochemist (SOC/O*NET code 19-1021.00). The same SOC code was used on the immigrant petition that followed. While counsel asserts in his appeal brief that the occupational title and SOC/O*NET code were assigned by the DOL, in fact it was the employer/petitioner that chose the occupational category in coordination with its prevailing wage request. The OOH indicates that a Ph.D. in biochemistry is the standard degree for a biochemist in an independent research and development position. No mention is made of an M.D. serving as an acceptable degree for a biochemist in the field of research. As for medical scientists, the OOH indicates that most have a Ph.D. in the biological sciences, though some have a medical degree instead, and others have both a Ph.D. and an M.D. In the instant case, the ETA Form 9089 specifies

that a Doctor of Medicine or foreign equivalent is the only acceptable degree to qualify for the proffered position of research assistant. This degree requirement is not suitable for a biochemist, but could be for a medical scientist. The AAO finds, therefore, that counsel's re-categorization of the proffered position as a medical scientist rather than a biochemist constitutes a material change to the labor certification and the petition. As stated above, a petitioner may not make material changes to a petition during the adjudication process. *See Matter of Izummi, supra.* A labor certification is only valid for the particular job opportunity certified therein. *See 20 C.F.R. § 656.30(c)(2).* A petition for an advanced degree professional must be accompanied by a labor certification valid for the proffered position. *See 20 C.F.R. § 204.5(k)(4).*

For the reasons discussed above, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See section 291 of the Act, 8 U.S.C. § 1361.* The petitioner has not met that burden.

ORDER: The appeal is dismissed.