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U.S. Citizenship
and Immigration
Services

DJ

FILE: SRC 04 137 50187 Office: TEXAS SERVICE CENTER Date: DEC 13 2005

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center 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 veterinary hospital, with 13 employees. It seeks to employ the beneficiary as a research assistant 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 he determined the proffered position did not meet the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director; (4) the director's denial; and (5) Form I-290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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:

An 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, 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 the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary's services as a research assistant. Evidence of the beneficiary's duties includes: the Form I-129; a letter of support from the petitioner accompanying the Form I-129; and counsel's May 19, 2004 response to the director's request for evidence.

At the time of filing, the petitioner stated the proffered position would require the beneficiary to:

- Be responsible for research in the usage of different types of antibiotics on the treatment of respiratory, gastrointestinal, and neurological diseases;
- Evaluate the relationship between costs and effectiveness in applying these therapies to give proper orientation to the medical staff as to which therapy should be continued and which should be modified;
- Review major professional veterinary medical journals for health issues and developments that are particularly relevant to the petitioner's patients;
- Elicit detailed patient histories;
- Discuss patients' charts and files with the veterinarian; and
- Research medical literature to find research suggestions of modes of treatment for possible diagnosis for unusual cases, and suggest possible tests or procedures based on research.

In his May 19, 2004 response to the director's request for evidence, counsel clarified that all of the research duties indicated above would generally be limited to the review of professional veterinary medical journals for health issues and development.

To determine whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique

that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; 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)).

Although the petitioner has identified the proffered position as that of a research assistant, the AAO's review of the position's duties and the 2004-2005 edition of the *Handbook* has led it to conclude that it might also be characterized as a veterinary technologist or technician, an occupation discussed at pages 336-337 of the 2004-2005 edition of the *Handbook*:

Owners of pets and other animals today expect state-of-the-art veterinary care. To provide this service, veterinarians use the skills of veterinary technologists and technicians, who perform many of the same duties for a veterinarian that a nurse would for a physician, including routine laboratory and clinical procedures. Although specific job duties vary by employer, there often is little difference between the tasks done by technicians and by technologists, despite some differences in formal education and training. As a result, most workers in this occupation are called technicians.

Veterinary technologists and technicians typically conduct clinical work in a private practice under the supervision of a veterinarian – often performing various medical tests along with treating and diagnosing medical conditions and diseases in animals. For example, they may perform laboratory tests such as urinalysis and blood counts, assist with dental prophylaxis, prepare tissue samples, take blood samples, or assist veterinarians in a variety of tests and analyses in which they often utilize various items of medical equipment, such as test tubes and diagnostic equipment. While most of these duties are performed in a laboratory setting, many tasks are not. For example, some veterinary technicians obtain and record patient case histories, expose and develop x-rays, and provide specialized nursing care. Additionally, experienced veterinary technicians may discuss a pet's condition with its owners and train new clinic personnel

In addition to working in private clinics and animal hospitals, veterinary technologists and technicians also may work in research facilities. There, they may administer medications orally or topically, prepare samples for laboratory examinations, and record information on genealogy, diet, weight, medications, food intake, and clinical signs of pain and distress At research facilities, veterinary technologists typically work under the guidance of veterinarians, physicians, and other laboratory technicians

Although the *Handbook's* description of the work performed by veterinary technologists and technicians does not specifically discuss whether such employment requires incumbents to review medical literature in the field of veterinary science, such responsibilities appear to fall within those research activities routinely performed by veterinary clinics and hospitals as part of patient treatment programs. As such, they do not constitute the type of analysis or original research that would place this work beyond the abilities of veterinary technologists or technicians who work closely with veterinarians in the identification of medical conditions and disease. In reaching this conclusion, the AAO has noted the *Handbook's* description of the education and training required for those who seek employment as veterinary technologists and technicians. As stated at page 337:

There are primarily two levels of education and training for entry to this occupation – a 2-year program for veterinary technicians and a 4-year program for veterinary technologists. Most entry-level veterinary technicians have a 2-year degree, usually an associate degree, from an accredited community college program in veterinary technology, in which courses are taught in clinical and laboratory settings using live animals. A few colleges offer veterinary technology programs that are longer and that may culminate in a 4-year bachelor's degree in veterinary technology. These 4-year colleges, in addition to some vocational schools, also offer 2-year programs in laboratory animal science.

[E]ach State regulates veterinary technicians and technologists differently; however, all States require them to pass a credentialing exam following coursework. Passing the State exam assures the public that the technician or technologist has sufficient knowledge to work in a veterinary clinic or hospital. Candidates are tested for competency through an examination that includes oral, written, and practical portions. This process is regulated by the State Board of Veterinary Examiners, or the appropriate State agency. Depending on the State, candidates may become registered, licensed or certified

Based on its determination that the proffered position is that of a veterinary technologist/technician and that the *Handbook* states that entry-level positions for such employment may be filled by applicants with degrees from both two-year and four-year programs, the proffered position does not meet the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish the petitioner's degree requirement as an industry norm, counsel, on appeal, again offers evidence initially submitted in his May 19, 2004 response to the director's request for evidence – seven Internet job advertisements for research assistants. These announcements do not, however, satisfy the criterion's first prong, which stipulates that the degree requirement be established in parallel positions among similar organizations.

Of the seven advertisements, none are published by organizations similar to the petitioner, a veterinary hospital. Instead, they advertise for research assistant positions at a behavioral sciences research company, a financial services firm, an educational evaluation and research business, an agri-business company, a university medical school and a university department of dermatology. Further, the positions described in these on-line advertisements are not parallel to the proffered position, as described by the petitioner. Accordingly, they do not establish the proffered position as a specialty occupation under the criterion's first prong.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. The AAO finds no evidence in the record that would distinguish the proffered position from similar non-degreed employment. Therefore, the petitioner cannot establish the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally 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 his May 19, 2004 response to the director's request for evidence, counsel indicated that the proffered position is newly created. Accordingly, the AAO concludes that the proffered position cannot be established as a specialty occupation based on the petitioner's past hiring practices.

In assessing whether the petitioner has met its burden with regard to the fourth criterion – the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree – the AAO has again reviewed the duties of the proffered position and the evidence of record. It finds nothing in the record to indicate that the tasks to be performed by the beneficiary would require him to have greater knowledge or skill than that normally needed by veterinary technicians. The record does not establish that the beneficiary would perform the complex testing and diagnostic duties of a veterinary technologist, which might require a four-year baccalaureate degree. Nor does the record establish that the proffered position represents a combination of jobs that would require the beneficiary to have a unique set of skills not normally possessed by a veterinary technologist/technician. In reaching its decision, the AAO has considered counsel's contention on appeal that the on-line job announcements submitted by the petitioner establish the complex and specialized nature of the proffered position's duties. However, as previously noted, these advertisements do not describe employment that is parallel to the proffered position and are, therefore, of no evidentiary value in establishing the nature of its duties. Accordingly, the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response to the director's request for evidence and, again, on appeal, counsel contends that the instant petition should be approved because the AAO has consistently held that the occupation of medical research assistant is a specialty occupation. However, the record does not establish that the proffered position is that of a medical research assistant. Accordingly, the decisions cited by counsel are of little probative value for the purposes of these proceedings. However, the AAO also notes that its approval of a petition for what appears to be a similar position would not provide a basis for approving this petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO will not disturb the director's denial of the petition.

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 petition is denied.