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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 03 246 52326 Office: CALIFORNIA SERVICE CENTER Date: SEP 28 2006

IN RE: Petitioner:
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:

[redacted]

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 of the 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 skilled nursing facility for developmentally disabled adults. In order to employ the beneficiary as a medical writer/researcher, 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

The AAO has determined that the director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which also includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B; and (6) counsel's brief on appeal, and the documents filed with it, including copies of the petitioner's organizational chart and the section on writers and editors from the Department of Labor's *Occupational Outlook Handbook* (*Handbook*).

The AAO notes that on appeal present counsel has not provided any detailed information about the proposed work to supplement the information provided by counsel's February 4, 2004 letter in response to the RFE. There former counsel provided the following description of the proposed duties and the percentage of time that they would involve:

> The Medical Writer/Researcher is responsible for determining the effect of the injury or disease the patient is exhibiting. He will utilize medical journals, textbooks and research materials to prepare an analysis of the patient's condition. The amount of time spent on research will be determined to the extent of the patient's injuries or the rarity of the disease (35%);
>
> Work with the medical staff and analyze the medical significance of the injury or disease. Based on the physician's report, the patient's medical history, and laboratory results, and based on medical research, he will prepare a complete report of the analysis of the patient's illness or injury (35%);
>
> He will utilize the medical libraries to perform the necessary research to keep up to date on the latest developments in medical research and technology (15%);
>
> He will write medical reports that are submitted to the Workman's Compensation Board, our insurance companies, Medicare and Medi-Cal, and to various physicians (15%);
>
> Level of Responsibility: Directly reports to the Administrator/CEO

Works with: Department Heads and Medical Staff
Hours per week: 40
Minimum Requirement of the Position: Degree in Medicine.

This listing of duties is a generalized statement of broad functions. It conveys no substantive information about what actual performance of the job would involve and why that performance would require a medical degree. The record does not define the practical meaning of the "effect of the injury or disease" that would be the focus of research and writing on individual patients. The record does not establish the depth of research required, the nature of analysis that the beneficiary would apply, the types of information and research products to be included in the "complete reports" that the beneficiary produce, or the level of research "necessary" in order to "keep up to date on the latest developments in medical research and technology."

On appeal, counsel recites a list of generalized functions that are substantially the same as those presented in response to the RFE, and he states that they "are so specialized and complex that the knowledge to adequately perform [them] can only be obtained by earning a medical degree or related [degree]" (brief at pages 3 and 8). Counsel's contention is conclusory and unsupported by the evidence of record. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Counsel's assertion that the director's decision is "contrary to binding administrative case law" (brief at page 4) is incorrect. Counsel erroneously cites two unpublished decisions of the Administrative Appeals Unit (AAU), as the AAO was previously designated: a 1993 decision for the proposition that, in counsel's words, the AAO "considers a technical writer to be an H-1B occupation"; and a 1995 decision for the proposition that, in counsel's words, "The AAO also considers both technical writer and medical research assistant positions to be H-1B level occupations." The unreported cases are not binding. While 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all Citizenship and Immigration Services (CIS) employees in the administration of the Act, unpublished decisions, such as those cited in the record, are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding, *see* 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

Furthermore, the cases cited by counsel do not state or reflect an established AAO position to the effect that all technical writing positions and medical research assistant positions are specialty occupations. To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title or generalized descriptions of duties. It looks primarily for evidence about the specific duties, and about the nature of the petitioning entity's business operations. 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). Neither the title of the position, abstract descriptions of its duties, nor an employer's self-imposed standards are persuasive in the critical assessment that CIS must make: whether the evidence of record establishes that performance of 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.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

> which [1] 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 [2] 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. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner has not presented sufficient evidence to satisfy any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) and thereby establish that the proffered position requires the practical and theoretical application of a body of highly specialized knowledge that is acquired by at least a bachelor's degree, or its equivalent in a specific specialty, as required by the Act.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Counsel is incorrect in arguing that the director's denial conflicts with the *Handbook.* The 2006-2007 edition of the *Handbook* does not indicate that technical writer positions normally require at least a bachelor's degree or the equivalent in a specific specialty. As reflected in this decision's earlier discussion of the proposed duties, the record of proceeding does not develop the research duties of the position with sufficient specificity to align them with any occupational category for which a baccalaureate or higher degree or its equivalent in medicine, the life sciences, or another specific specialty is normally the minimum requirement for entry.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the Department of Labor's *Handbook* reports that 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)).

As already noted, the evidence of record does not establish the proffered position as one for which the *Handbook* reports that the industry requires an industry-wide requirement for a degree in a specific specialty. There are no attestations from a professional association or from firms or individuals in the petitioner's industry. The job vacancy announcement submitted into the record is not probative, as the advertising employer is not in the beneficiary's industry, and the record does not establish the required similarity between the advertised duties and the ones proposed here. Further, a single advertisement has little evidentiary significance.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), by which a petitioner can prevail by showing that the particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The record does not develop the proffered position sufficiently to establish such complexity or uniqueness. The level of medical knowledge necessary for the position is not clear. Counsel's assertions about the requisite complexity are not documented or sufficiently explained. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici.* The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) has not been satisfied, as the evidence of record does not establish that the employer has the requisite history of normally requiring at least a baccalaureate degree or its equivalent in a specific specialty. The petitioner's statement that it presently employs "a Medical Writer/Researcher with a Doctor of Medicine degree" has no weight. It is not substantiated by corroborating documentation. *Matter of Soffici.*

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As discussed, the petitioner's duty descriptions lack the specificity to convey such specialization and complexity.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that, as a result of the general and imprecise nature of the information about this proffered position, it is impossible to determine whether its full performance requires licensure under California law relevant to medical practice. Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to

fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. The AAO notes that the petitioner's initial letter in support of the petition states that the beneficiary "will not provide any patient care services" and that his "responsibilities are strictly administrative in nature." However, counsel and the petitioner leave unspecified both the specific topics of and the particular uses to be made of the work product to be produced under such vague functional umbrellas as "determining the effect of the injury or disease on the patient," "analysis of the patient's condition," and "complete report of the analysis of the patient's illness or injury." This vague information raises the question of whether beneficiary would be involved in medical diagnosis or medical advice that requires licensure. As the evidence of record raises but fails to resolve the issue of whether licensure is required, the petition must be denied for this reason also.

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. Accordingly, the appeal will be dismissed.

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