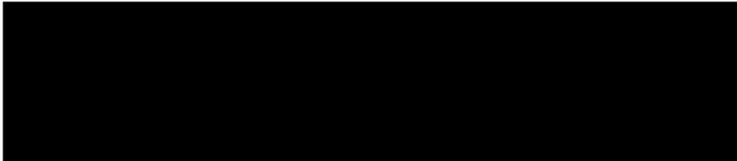


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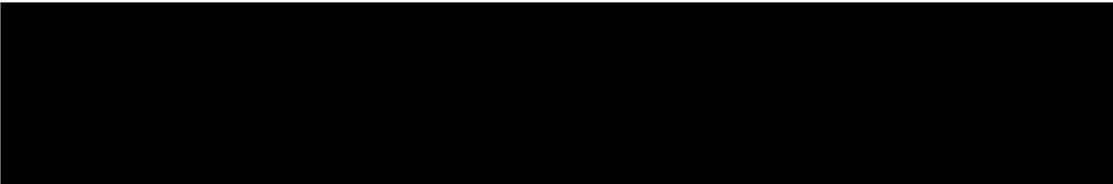
FILE: LIN 05 004 53638 Office: NEBRASKA SERVICE CENTER Date:

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 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 medical practice that seeks to employ the beneficiary as a medical research associate. The petitioner, therefore, 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 the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding 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. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 proposed position.

According to the petitioner’s May 25, 2005 response to the director’s request for additional evidence, the beneficiary would spend fifty percent of his time conducting research, twenty percent of his time analyzing medical data, ten percent of his time designing testing methodologies, ten percent of his time designing research methodologies, and ten percent of his time on technical writing. The petitioner stated that it required an individual with a medical or closely related degree.

As noted previously, the director denied the petition on the basis of his determination that the petitioner had not established that the proposed position qualifies for classification as a specialty occupation. In his denial, the director analyzed the duties of the proposed position under each of the four criteria delineated above. On appeal, counsel does not dispute the director’s findings that the position does not qualify under the first, third, and fourth criteria. He does, however, assert the following:

The Service erred in strictly scrutinizing the petitioner’s advertisements, which constituted sufficient evidence that the degree requirement [sic] is common to the industry [sic] in parallel positions among similar organizations.

Counsel does not submit a brief on appeal,<sup>1</sup> and the sentence quoted above is the sole argument presented on the Form I-290B. Accordingly, this sentence forms the basis of the petitioner’s appeal.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. In its adjudication of this appeal, the AAO consulted the 2006-2007 edition of the *Handbook*.

The AAO finds that the director was correct in finding that a baccalaureate or higher degree or its equivalent is not normally the minimum requirement for entry into this occupation. Although the petitioner has titled its position “medical research associate,” an analysis of its duties reveals that they are not those of a medical researcher.

The *Handbook* indicates that the main focus of a medical researcher is on finding solutions to very specific problems, or answers to very specific questions. The solutions or answers which they seek, however, have a broad application rather than an individual scope. The goals of medical researchers are

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<sup>1</sup> Counsel marked the box in section 2 of the Form I-290B to indicate that a brief would not be submitted. As such, the record is complete.

not necessarily the same as those of medical practitioners, who diagnose individuals and seek solutions for those particular patients.

The *Handbook* places the occupation of a medical researcher within its discussion of the duties performed by medical scientists. According the *Handbook*:

Medical scientists research human diseases in order to improve health. Most medical scientists conduct biomedical research and development to advance knowledge of life processes and living organisms, including viruses, bacteria, and other infectious agents. . . .

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. . . .

While the duties of the proposed position are presented as broad research duties similar to those performed by medical scientists in the *Handbook*, there is no evidence of record that the petitioner is engaged in medical research. The petitioner is a private medical practice with two physicians specializing in neurology, a nurse practitioner, the beneficiary whose duties support the staff physicians, a physical therapy and rehabilitation analyst, and several physical therapy and sleep lab technicians.<sup>2</sup> The record reflects that the petitioner's president has published two medical papers. No evidence indicates that the petitioner is engaged in the type of medical research performed by medical scientists. 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)).

The research duties of the proposed position appear to be focused on individual patient diagnosis and care, and the record reflects that the beneficiary would be researching not broad topics, but individual cases being studied by the doctor. Much of the research involved, such as researching issues relating to specific patient cases, is the type of research typically performed by physicians and their staff in order to treat patients.<sup>3</sup> This is not the type of research typically conducted by medical researchers. The medical literature that the beneficiary would read in the performance of his duties, in fact, publishes the work of medical researchers and scientists conducting studies in laboratories and clinical facilities. There is no information in the record to indicate that this is the type of work that would be performed by the beneficiary in the performance of his duties.

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<sup>2</sup> See the employer roster of record.

<sup>3</sup> As indicated on the employee roster, the petitioner employs the beneficiary in support of the physicians' medical practice and not in the general study of human diseases. In the context of the petitioner's medical practice, the AAO finds that the beneficiary will be performing research duties focused on finding individual solutions to medical problems. The duties of the position to be performed in relation to the petitioner's business, and not the title of the position, determine whether a position is a specialty occupation.

Upon review, the AAO finds that the petitioner has not presented a persuasive case for classifying the proposed petition as a specialty occupation. The proposed position is not that of a medical researcher as described in the *Handbook*. The petitioner has not established that the duties of the proposed position exceed those of an experienced medical assistant with research duties. To the extent that the *Handbook* does not indicate that such positions require a bachelor's degree, it does not appear that such a degree is the minimum requirement for entry into this position. Thus, the AAO concludes that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). As noted previously, counsel does not dispute this point.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by the petitioner in response to the director's request for additional evidence. The petitioner, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, the petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. Thus, for a job posting to be of probative value, the petitioner must demonstrate both that the advertised position is "parallel" to the proposed position and that the entity placing the advertisement is "similar" to the petitioner. In his denial, the director stated the following:

The Service has reviewed the advertisements and is not persuaded that they can be considered comparable. All of the advertisements relate to research positions at large academic institutions or their affiliated hospitals. Clearly, the petitioner's business bears little resemblance to the size and nature of the organizations associated with the advertisements.

The AAO agrees. The record does not establish that any of the organizations from whom the petitioner submits job postings – Wayne State University, the University of Michigan, the University of Michigan Health System, the University of Pennsylvania, Boston University, and the City College of New York – are similar to the petitioner, a 20-employee medical practice with two physicians, in size, scale, or scope of operations.

Accordingly, the petitioner has not established eligibility under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of the second criterion requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, there has been no demonstration that the proposed position is more complex or unique than the general range of

medical assistant positions involving research duties in other, similar organizations, which would not require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions. Counsel does not dispute this prong of the second criterion.

Therefore, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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. This is the first time that the petitioner has filled this position. As such, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Counsel does not dispute this point.

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(4) – that 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. To the extent that they are depicted in the record, the duties do not appear more specialized or complex than those associated with experienced medical assistant positions, for which the *Handbook* indicates neither a requirement for or usual association with at least a baccalaureate degree in a specific specialty. The evidence does not establish that this particular position requires the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Although the petitioner describes the proposed position as that of a medical research associate, no documentation contained in the record places the position within the *Handbook's* description of a medical researcher. No documentation of any specialized or complex duties within the description of the duties this position has been placed in the record. Accordingly, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As noted previously, counsel does not dispute this point.

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

Counsel notes on appeal that the beneficiary is currently in H-1B status. However, 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). Although the AAO may attempt to hypothesize as to whether the prior petition was similar to the position proposed here or was approved in error, no such determination may be made without review of the original record, in its entirety. If the prior petition was approved based on evidence substantially similar to the evidence contained in this record of proceeding, however, that approval would constitute error on the part of the director. CIS is not required to approve 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). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.