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U.S. Citizenship and Immigration Services

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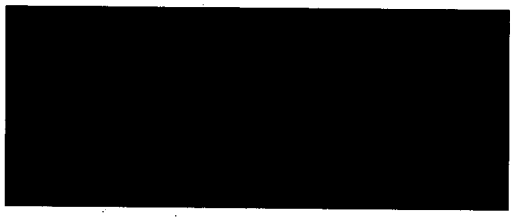


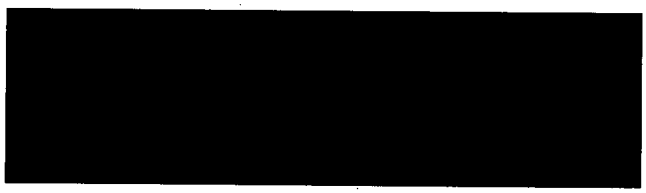
D2

FILE: WAC 03 159 50286 Office: CALIFORNIA SERVICE CENTER Date: AUG 01 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, Director
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 indicates that it is a recruitment and staffing agency and seeks to employ the beneficiary as a medical research assistant. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and evidence.

Section 214(i)(l) of the Immigration and Nationality Act (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.

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 proffered position.

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

The petitioner is seeking the beneficiary's services as a medical research assistant. Evidence of the beneficiary's duties includes: the Form I-129; a statement accompanying the Form I-129 and a job description provided in the October 29, 2003 response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, reviewing and analyzing professional, scientific and medical journals regarding health issues and developments relevant to patient illness and history in order to recommend possible tests or procedures that may be relevant to diagnosis; examining patient and performing comprehensive physical examination and compiling patient medical data including health history and results of physical examination; developing and implementing patient management plans, recording progress notes and monitoring patient's reaction to medication; instructing and counseling patients regarding compliance with prescribed therapeutic regimens, normal growth and development, and health maintenance; assisting the doctor in minor surgical procedures for diagnostic purposes and performing phlebotomy, blood processing, exercise stress test, etc.; researching and analyzing, assessing and investigating the safety and effects of medication to the patient's illness and recommending the necessary dosage and/or treatment; in partnership with the doctor, attending and participating in meetings and conferences held by pharmaceutical and research companies prior to the start of any research project.

Counsel indicated that the position requires a bachelor's degree in the medical field. Additionally, counsel noted that the duties of the proffered position parallel those of a physician assistant.

The director requested additional evidence including a detailed description of the position offered. The director noted that the petitioner indicated that the beneficiary's duties are comparable to those of a physician's assistant. The director requested evidence that the beneficiary has completed and attended a formal physician's assistant program. Additionally, the director requested information about the employer such as a company profile, federal income tax returns, state income tax returns, Form DE-6 quarterly wage reports and the petitioner's organization chart with position descriptions and immigration status.

Counsel for the petitioner responded to the request and stated that the original position description "contained certain irrelevant duties and duties that are not in fact required by the position." The petitioner submitted a different position description. In its response to the director's request for further evidence, the petitioner deleted all duties referencing direct patient care such as "examine patient and perform comprehensive physical examination and compile patient medical data including health history and results of physical examination" and "assisting the doctor in minor surgical procedures for diagnostic purposes and perform phlebotomy, blood processing, exercise stress test, etc." In sum, the initial description appeared to have the beneficiary performing duties similar to that of a physician's assistant which requires a specific degree in a specialty.

The purpose of the 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, its level of authority within the organizational hierarchy, or its associated job responsibilities. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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 information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but materially changed the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

In response to the director's request, the petitioner submitted an education evaluation which indicated that the beneficiary has achieved the equivalent of the U.S. degree of Bachelor of Science in pre-medicine and the equivalent of the U.S. degree of Doctor of Dental Medicine. The petitioner submitted a Form 1120 Federal Income Tax Return which indicated gross receipts or sales of $156,000. This return indicated $45,000 in compensation of officers and $18,000 in salaries. The petitioner noted that it had not filed Form DE-6 and Form 941 "since all of workers are under 1099 and none of them are on the payroll."

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proffered position's duties resembled those of a medical assistant. The director noted that the *Handbook* described the training and other qualifications for medical assistant, in part, as follows:

> Most employers prefer graduates of formal programs in medical assisting. Such programs are offered in vocational-technical high schools, postsecondary vocational schools, and community and junior colleges. Postsecondary programs usually last either 1 year, resulting in a certificate or diploma, or 2 years, resulting in an associate degree. Courses cover anatomy, physiology, and medical terminology, as well as typing, transcription, recordkeeping, accounting, and insurance processing. Students learn laboratory techniques, clinical and diagnostic procedures, pharmaceutical principles, the administration of medications, and first aid. They study office practices, patient relations, medical law, and ethics. Accredited programs include an internship that provides practical experience in physicians' offices, hospitals, or other healthcare facilities.

The director noted that a baccalaureate degree is not required for entry into this occupation. The director noted that counsel also asserted that the proffered position is similar to a medical and health services manager or physician's assistant. The director found that the petitioner had not submitted evidence that the beneficiary had passed a licensing examination, completed a State-approved training program and pursued continuing education or that California does not require training and licensing. The director found that the beneficiary has not met these requirements.

On appeal, counsel restates the duties that were submitted in response to the director's request for evidence and contends that the proffered position is that of a medical research assistant and is similar to a medical and health services manager. However, as noted above, the AAO will review the position description that was initially submitted.

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. CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation. The AAO considers 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; 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 often considered by CIS when determining these criteria include: whether the *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)).

First, the AAO does not agree with the director's conclusion that the proffered position is a medical assistant. Based on the petitioner's initial position description the offered position is similar to that of a physician's assistant. In its *Handbook*, 2004-2005 edition, the DOL states the following about the duties of physician assistants:

> Physician assistants (PAs) provide healthcare services under the supervision of physicians. They should not be confused with medical assistants, who perform routine clinical and clerical tasks. PAs are formally trained to provide diagnostic, therapeutic, and preventive healthcare services, as delegated by a physician. Working as members of the healthcare team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x-rays, make diagnoses, and prescribe medications. They also treat minor injuries, by suturing, splinting, and casting. PAs record progress notes, instruct and counsel patients, and order or carry out therapy. In 47 States and the District of Columbia, physician assistants may prescribe medications. PAs also may have managerial duties. Some order medical and laboratory supplies and equipment and may supervise technicians and assistants.

The proffered position appears to resemble that of a physician's assistant. The petitioner indicated that the beneficiary would "examine patient and perform comprehensive physical examination and compile patient medical including health history and results of physical examination" and "assisting the doctor in minor surgical procedures for diagnostic purposes and perform phlebotomy, blood processing, exercise stress test, etc."

The *Handbook* states the following about the training and education of physician's assistants:

> All States require that new PAs complete an accredited, formal education program. In 2002 there were about 133 accredited or provisionally accredited education programs for physician assistants. Sixty-eight of these programs offered a master's degree, and the rest offered either

a bachelor's degree or an associate degree. Most PA graduates have at least a bachelor's degree.

If the position is that of a physician's assistant, the position would qualify as a specialty occupation under the first criterion. However, the record does not establish that the beneficiary will be performing the duties of a physician's assistant.

It is noted that the petitioner indicates that it provides recruitment and placement services. The petitioner states that it has a number of contracts with hospitals and registries to provide them with a substantial number of nurses, physical therapists and medical technologists, and other related positions. The petitioner listed a number of clients. The petitioner also indicated that it has opened a subsidiary [redacted] The petitioner did not indicate if the beneficiary would be placed at another facility or performing his duties at the petitioner, a placement agency.

The record does not clearly state where the beneficiary will be working and how the proffered position will function in relation to the type of business of the petitioner, a staffing agency. Without such a description, the petitioner cannot demonstrate that the work that the beneficiary will perform at the facility will qualify as a specialty occupation.

In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

The record does not contain an agency service agreement between the petitioner and the client where the beneficiary will work and the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at the client's location will qualify as a specialty occupation.

The director had requested evidence that the beneficiary was qualified for the position. The *Handbook* requires that physician assistants complete an accredited education program. Additionally, the State of California requires that physician's assistants be licensed pursuant to Cal. Code Regs. Business and Professions Code Chapter 7.7. Article 1 § 3500.5 (2005.) Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a completion of an accredited program for physician's assistants and a license. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for

granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As discussed above, the petitioner submitted an education evaluation that indicated that the beneficiary has achieved the equivalent of the U.S. degree of Bachelor of Science in pre-medicine and the equivalent of the U.S. degree of Doctor of Dental Medicine. The petitioner has not established that the beneficiary's baccalaureate degree is equivalent to a United States degree in the specialty. The record does not establish that the beneficiary is licensed to perform the specialty occupation in the state of intended employment as required by the regulations.

Beyond the decision of the director, the AAO notes that the petitioner, [redacted] is located in West Covina, California and states that it provides healthcare staffing solutions. The Form I-129 indicated that the location of employment is at the petitioner's location in West Covina. The petitioner has not described if the beneficiary would be performing the above listed duties at the staffing agency, the subsidiary, [redacted], or for a facility that has engaged the services of the petitioner. Based on the record, there is insufficient information in the record to determine essential characteristics of the employment relationship with respect to the petitioner as a U.S. employer as required by 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that the petitioner will employ the beneficiary in a specialty occupation, or that the beneficiary's baccalaureate degree is equivalent to a United States degree in the specific specialty related to the specialty occupation or that the beneficiary is licensed as required.

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.