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U.S. Citizenship
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Services

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FILE: WAC 04 213 50845 Office: CALIFORNIA SERVICE CENTER Date:

JAN 27 2006

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 provides acupuncture and medical herbs. It seeks to employ the beneficiary as a chemist. 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 additional evidence.

Section 214(i)(1) of 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.

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 chemist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary will perform complex chemical, biological, hematological, immunologic, microscopic, or bacteriological tests; analyze samples for chemical content or a chemical reaction and determine blood glucose and cholesterol levels; evaluate test results, develop and modify procedures, and establish and monitor programs to ensure the accuracy of tests; prepare specimens and analyze the chemical and hormonal contents of body fluids; conduct company-wide product training, competitive analysis, and research and development of new products and product direction; provide scientific knowledge to clients and prospects concerning issues related to chemicals; and address questions and research technical issues arising from clients. For the proposed position, the petitioner requires a baccalaureate degree in chemistry or science.

The director determined that the proffered position resembles a clinical laboratory technologist as that occupation is depicted in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that that occupation does not require a bachelor's degree in a specialty occupation. According to the director, the submitted job postings did not show that a baccalaureate degree in a specific specialty is common to the industry in parallel positions among organizations that are similar to the petitioner. The director stated that the proposed duties are generic in nature, and that the petitioner failed to explain how they are unique, specialized, or complex; or how the duties differ from other similar positions in the petitioner's industry. The director discussed *Defensor v. Meissner*, 201 F. 3d 384, 387 (5th Cir. 2000) and *Matter of Michael Hertz Assocs.* 19 I&N Dec. 558 (Comm. 1988).

On appeal, counsel submits a letter from the petitioner into the record, which states that the petitioner's annual income and number of employees is not relevant in determining whether the proposed position qualifies as a specialty occupation. The letter further states that the *Handbook* reports that a laboratory technologist, which is similar to the proposed position, usually requires a baccalaureate degree; thus qualifying it as a specialty occupation.

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 first 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)).

In determining whether a 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 evidence in the record does not support the description of the proposed duties. The petitioner's September 2, 2004 letter states that the beneficiary will be "supervising the clerk technician's works [sic]" and will "supervise how the clerk technicians perform their works [sic]." However, the submitted organizational chart depicts the beneficiary as occupying two different positions, a chemist and a staff/clerk. The Form I-129 petition, the July 23, 2004 and September 2, 2004 letters, and the document entitled "Job Announcement," indicate that the beneficiary will provide services as a chemist; the petitioner never indicated in the documents that the beneficiary will hold two positions. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record explains or reconciles the inconsistency of having the beneficiary hold two different positions, chemist and staff/clerk.

The proposed duties are described generically (many are taken verbatim from the *Handbook*) and are not depicted in a manner that would show that they relate specifically to the petitioner's business operation. For instance, the beneficiary is portrayed as conducting "company-wide product training, competitive analysis, research and development of new products and product direction." Yet, the Form I-129 petition indicates that the petitioner has only two employees; there would thus be no need to provide "company-wide product training." Moreover, the petitioner is a small clinic providing acupuncture and medical herbs; the evidence does not suggest that it engages in "research and development of new products and product direction." The petitioner does not describe what "competitive analysis" would entail. 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)).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(I) require that the beneficiary come temporarily to the United States to perform services in a specialty occupation. The organizational chart reflects that the beneficiary will hold two different positions while employed with the petitioner and the proposed job duties are not depicted so as to show their relationship to the petitioner's business operation. In light of this evidence, the AAO finds that the record fails to demonstrate that the beneficiary will come temporarily to the United States to perform services in a specialty occupation. Consequently, the petitioner establishes none of the four criteria outlined at 8 C.F.R.

§ 214.2(h)(4)(iii)(A): a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, a particular position is so complex or unique that it can be performed only by an individual with a degree¹; the employer normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall 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.

¹ It is worth noting that the submitted job postings represent employers that are different in nature (size and scope) from the petitioner and nearly all of the jobs in the postings require state licensure.