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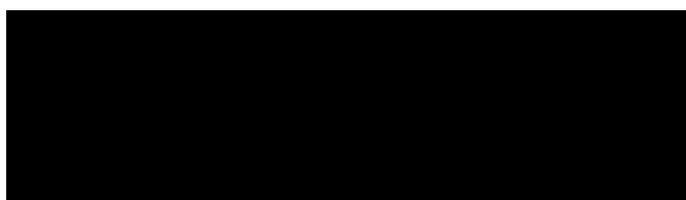


FILE: SRC 05 223 52784 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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)

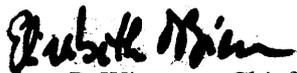
ON BEHALF OF PETITIONER:



PHOTOCOPY

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, 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 develops, manufactures, sells, and distributes medical devices. It claims to employ 15 personnel. It seeks to employ the beneficiary as a clinical specialist. Accordingly, it 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).

On October 19, 2005, the director denied the petition determining that the record did not establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the director did not properly assess the duties and requirements of the proffered position and the beneficiary's qualifications to fill the position. Counsel submits documentation previously submitted and several additional letters in support of the appeal.

The record contains: (1) the Form I-129 filed August 10, 2005 and supporting documentation; (2) the director's August 19, 2005 request for further evidence (RFE); (3) counsel's October 4, 2005 response to the director's RFE; (4) the director's October 19, 2005 denial decision; and (5) the Form I-290B and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before rendering this decision.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her

to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In an August 3, 2005 letter appended to the petition, the petitioner indicated that it wished to hire the beneficiary as a clinical specialist. The petitioner indicated the duties of the position included the following:

[The beneficiary] will provide specialized field clinical support to customers and potential customers in the training and use of the InterX neuro electrical stimulation products. He will also provide clinical support and information to sales representatives and assist in the sale of [the petitioner's] products. [The beneficiary] will assist in the development of specific treatment protocols for the treatment of patients with InterX technology. He will be responsible for the development and management of key clinical sites and support activities in assigned geography. He will provide support for specific clinical trials of [the petitioner's] products as needed. [The beneficiary] will also assist in the development of specialized classroom and [field] training programs on [the petitioner's] products, treatment protocols, and therapies.

The petitioner stated:

The position requires a Bachelor's degree, or its equivalent, and completion of a Certificate or Diploma program in one or more of the following areas, exercise, anatomy and physiology, sports medicine, fitness, kinesiology, and/or sports massage. A minimum of four years of experience providing general rehabilitation therapy to patients and a minimum of two years of experience providing InterX 5000 or Scenar technology therapy to patients is also necessary.

The petitioner also provided a copy of a July 20, 2005 evaluation of the beneficiary's foreign education prepared by Morningside Evaluations and Consulting (Morningside). The evaluator noted the beneficiary's diploma and completion of studies in 1996 at the University of Derby, an accredited institution of higher learning in the United Kingdom. Morningside evaluated the beneficiary's academic education as the equivalent of a bachelor of arts degree in German, with a concentration in Spanish.

In an October 4, 2005 response to the director's RFE on the issue of the beneficiary's eligibility to perform the duties of the proffered position, counsel for the petitioner asserted that the beneficiary had the equivalent of a U.S. baccalaureate degree in kinesiology through his formal training and experience. Counsel asserted further that the beneficiary had recognition of expertise in the specialty area through progressively responsible positions as shown by memberships in recognized foreign associations in the specialty occupation, advanced training and experience in the field, and recognition of expertise by recognized authorities. Counsel submitted:

A certificate dated February 2005 showing the beneficiary had attended training in "interactive neurostimulation" and had been certified an "expert user" by the petitioner.

A diploma dated April 1997 from [REDACTED] certifying the beneficiary had completed a course of professional training and had been awarded a diploma in sports and performance massage with distinction.

An undated diploma from [REDACTED] certifying the beneficiary had completed a course of professional training in Swedish Body massage with anatomy and physiology.

A diploma dated July 1997 from T [REDACTED] certifying the beneficiary had completed a course of professional training and had been awarded a diploma in remedial bodywork with credit.

An undated diploma from [REDACTED] certifying the beneficiary had completed a course of professional training and had been awarded a diploma in gym instruction and fitness testing.

A December 1996 diploma from the International Therapy Examination Council (ITEC) showing that the beneficiary had been awarded a diploma in anatomy physiology and body massage.

Counsel also submitted a second evaluation, dated September 23, 2005, from Westwood Evaluations evaluating the beneficiary's academics and experience. The evaluator noted that the beneficiary had received a bachelor's of arts degree in German in 1996 and had seven years of progressively responsible qualifying work experience in kinesiology and related areas. The evaluator noted that the beneficiary: had begun his career working as a self-employed sports therapist and fitness trainer from July 1997 through September 1998; had begun working at a hospital as a physiotherapy assistant in October 1998 through March 2000; had begun working for Profortis Sports Therapy Limited [the beneficiary's company] as a practicing sports therapist and InterX therapist in December 2000 continuing to the current date. The evaluator concluded that the beneficiary's seven years of work experience was indicative of bachelor's-level coursework in the field of kinesiology.

The petitioner also submitted an undated letter from [REDACTED], a podiatrist who indicated: that he had been impressed with the beneficiary's level of understanding of lower limb mechanics and treatment techniques; that the beneficiary had trained him on the use of the InterX 5000 neuro stimulation device in three weekends; and that the beneficiary was regarded as one of the primary InterX treatment consultants/trainers in the United Kingdom.

Counsel for the petitioner noted that the petitioner had international distributor agreements with companies to sell the petitioner's medical products and that the beneficiary's formal education in Spanish and German made him invaluable to the petitioner when dealing with affiliates in Germany, Spain, and Latin America.

On October 19, 2005, the director denied the petition, determining that the petitioner had not demonstrated that the beneficiary had the appropriate degree for the position of a clinical specialist. The director noted the beneficiary's bachelor's of arts degree in German, but determined that the additional five courses the beneficiary had taken were not commensurate with bachelor-level training. The director noted the beneficiary's resume but determined that a resume could not substantiate work experience without supporting documentation. The director determined that on-the-job experience could not be substituted for academic education. The director concluded the petitioner had not demonstrated that the beneficiary qualified to perform a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C) and that the evidence provided did not substantiate the work experience in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

On appeal, counsel for the petitioner asserts the beneficiary must have a baccalaureate degree or the equivalent in a medical rehabilitation field, experience with the petitioner's medical device, and foreign language skills. Counsel contends that the beneficiary will be counted on to be the petitioner's top trainer and distributor in Germany, Spain, and Latin America and that the director failed to see that language fluency is a critical element for the position.

Counsel avers that the beneficiary holds a foreign degree that has been determined to be the equivalent to a U.S. baccalaureate degree required by the specialty occupation and that the beneficiary has education, specialized training, and progressively responsible experience that is equivalent to completion of a U.S. baccalaureate degree in kinesiology which is also related to the specialty occupation.

Counsel submits:

A November 15, 2005 letter confirming the beneficiary's employment as a physiotherapy technician from September 1998 to February 2000 and that the beneficiary's work was conducted under the supervision of degree-qualified physiotherapists.

Two letters from accountants verifying the beneficiary was self-employed as a sports therapist and that the beneficiary's company, [REDACTED] employed the beneficiary as a sports therapist.

A November 8, 2005 letter from [REDACTED] extolling the virtues of the InterX device and noting that the beneficiary was one of only three individuals in the United Kingdom with the knowledge and ability to train others to use the device. [REDACTED] noted that a wide range of specialists including an acupuncturist, a veterinary surgeon, and a doctor attended a clinic course on using the device, taught by the beneficiary.

An October 26, 2005 letter from the petitioner indicating the beneficiary has been certified as an expert user of the InterX 5000, which requires a one-year minimum of working with the device. The petitioner also notes that the beneficiary will be instrumental in marketing the petitioner's product in several countries and that his ability to speak other languages makes him valuable to the company.

An October 27, 2005 letter from [REDACTED] M.D. describing the beneficial nature of the device and noting that the petitioner has only two therapists with significant training in the InterX technology and both were trained in the United Kingdom. [REDACTED] opined: "[t]he opportunity to have UK trained expert is important to this technology."

An undated letter from [REDACTED] M.D. describing the beneficial nature of the InterX 5000 device and observing that it is "obvious that specialized training is required to properly utilize this device" and that the petitioner has only two therapists with significant training in the InterX technology and both were trained in the United Kingdom. [REDACTED] opined: "[t]he opportunity to have UK trained expert is important to this technology."

An October 27, 2005 letter from the [REDACTED] Member of Congress, noting CIS concern that the beneficiary's degree was not directly related to the specialty occupation of clinical specialist. Representative [REDACTED] stated that with the beneficiary's language skills, as a clinical specialist, the beneficiary would be able to market the petitioner's technology in Germany, Spain, and Latin American countries.

An excerpt from the petitioner's website.

Counsel concludes the following: that sufficient information has been submitted to show that a degree in Spanish and German is related to the position; that the beneficiary has the equivalent of a U.S. degree in kinesiology; that the beneficiary's work experience was gained while working with degreed professionals in the specialty occupation as evidenced by the letters submitted by the beneficiary's colleagues; that evidence has been submitted to show that the beneficiary is recognized as an expert by at least three recognized authorities in the specialty occupation, the petitioner's president, [REDACTED] and [REDACTED] that two other recognized authorities have testified of the shortage of trained experts in this technology; and that the beneficiary is recognized as an expert in the specialty area and is deserving of an H-1B status pursuant to the applicable law and regulations.

Counsel's assertions and conclusions are not persuasive. The record does not establish that the beneficiary holds a United States baccalaureate or higher degree in kinesiology or any other field, as required to establish that the beneficiary is qualified pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). Neither does the record provide evidence establishing that the beneficiary's four-year foreign diploma from the University of Derby resulting in a bachelor's of arts degree in German with a concentration in Spanish is equivalent to a United States baccalaureate or higher degree in a specific discipline relevant to the proffered position as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The petitioner has not provided evidence that the beneficiary has other State licenses, registration, or certification which authorizes him to fully practice a specialty occupation; thus the petitioner may not establish the beneficiary's qualifications under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(3). Rather, the petitioner claims that the beneficiary's foreign language degree coupled with his work experience is equivalent to the completion of a United States baccalaureate or higher degree in kinesiology and that the beneficiary has the recognition of expertise based on his work experience in a specialty by two recognized authorities pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon

the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for a H-1B nonimmigrant visa based upon:

- (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.

The record does not contain evidence that the beneficiary is qualified for an H-1B nonimmigrant visa based on the requirements at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2), (3), or (4). Instead, counsel asserts that the evidence in the record is sufficient to establish that the beneficiary is qualified to perform the services of a specialty occupation based on: (1) an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1); and (2) his education and work experience have been determined to be equivalent to a baccalaureate degree in education by at least two recognized authorities in the field pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to determine whether the record before the director contained an evaluation from an official with 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. The July 20, 2005 Morningside evaluation does not purport to quantify the beneficiary's work experience but evaluates the beneficiary's foreign academic studies as equivalent to the equivalent of a U.S. bachelor of arts degree in German, with a concentration in Spanish. The AAO accepts this evaluation, but determines that the beneficiary's academic degree is not directly related to the proffered position. The AAO finds that the beneficiary's language degree may be helpful to the petitioner when the beneficiary sells, demonstrates, or otherwise trains individuals to use the petitioner's medical device, but that such language prowess is not central to a position in a specialty occupation in the

medical field. The AAO notes further that the beneficiary's temporary employment in the United States would suggest that the beneficiary would be working in the United States, where English is generally spoken.

The September 23, 2005 Westwood Evaluation attempts to evaluate both the beneficiary's academic education and his work experience. The evaluator notes the beneficiary's work experience from July 1997 to September 23, 2005 and assesses the work experience to be indicative of bachelor's-level coursework in the field of kinesiology. When attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The AAO may not accept this evaluation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the record does not contain evidence that the Westwood evaluator has the authority to grant college-level credit in the kinesiology field¹ or that the evaluator is associated with a college or university that has a program for granting college-level credit for work experience in the field of kinesiology.

The AAO also finds counsel's assertion that the beneficiary's education and work experience have been determined to be equivalent to a baccalaureate degree in education by at least two recognized authorities in the field unpersuasive. First, in order to establish eligibility under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), Citizenship and Immigration Services (CIS) must make the determination as to whether the beneficiary has acquired the equivalent of a degree through a combination of education, specialized training, and/or work experience in areas related to the specialty. To qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), CIS must consider whether the beneficiary's work experience coupled with his foreign formal education in the German and Spanish languages is sufficient to establish that he is qualified to perform the duties of a specialty occupation. In this matter it is not.

When evaluating a beneficiary's qualifications under the fifth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of the necessary number of years in a specific discipline, the petitioner must also establish that the beneficiary's training and/or work experience included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation, and that the beneficiary has achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5).

The record contains several diplomas showing that the beneficiary has attended courses and seminars on

¹ Moreover, the AAO notes that the evaluator is a professor in the department of computer and information science at Brooklyn College of the City University of New York. Therefore, his credentials to evaluate work experience in the field of kinesiology have not been established.

subjects relating to sports and Swedish massage, bodywork, gym instruction and fitness testing, as well as a certificate to operate the petitioner's medical device as an "expert user." However, the record does not contain evidence regarding the length of each course, nor does the record contain evidence that the courses involved college-level study. The certificates of training do not establish that the training involved the theoretical and practical application of specialized knowledge required by a specialty occupation.

The letters submitted by petitioner from [REDACTED] and the petitioner's owner, speak to the beneficiary's expertise with the petitioner's medical device, but do not detail how the expertise was obtained nor explain how the beneficiary's expertise corresponds to any college-level course.² These letters do not provide evidence that the beneficiary's training or work experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The three letters³ relating to the beneficiary's past employment likewise do not include substantiating evidence that the beneficiary's work included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. 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)). Nor do these letters satisfy any of the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) requires that the petitioner document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Counsel asserts that the beneficiary is recognized as an expert by at least three recognized authorities in the specialty occupation, the petitioner's president, [REDACTED] and [REDACTED] and that two other recognized authorities have testified of the shortage of trained experts in this technology.

² The AAO acknowledges that the petitioner's owner indicates that to become an "expert user" of its InterX medical device, the user must have one-year of working with the device; however, the petitioner's owner does not explain how this experience correlates to particular college-level courses.

³ The AAO acknowledges that the beneficiary's prior employer indicates that the beneficiary worked as a physiotherapy technician from September 1998 to February 2000 under the supervision of degree-qualified physiotherapists. However, the record does not contain a detailed description of the beneficiary's daily tasks while working as a physiotherapy technician, nor does the record contain evidence of the degrees held by his supervisors. Likewise, the letters from accounting firms certifying that the beneficiary was self-employed as a sports therapist do not establish the caliber of the beneficiary's work experience, as an accounting firm would not have direct knowledge of the beneficiary's daily tasks or whether the tasks were conducted while working with peers, supervisors, or subordinates who have degrees or the equivalent in the field of kinesiology.

Recognized authority means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinion, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(i)(C)(ii).

The letters submitted by the petitioner's president, [REDACTED] and [REDACTED] do not comply with the requirements necessary to establish these individuals as recognized authorities. In addition, the writers do not provide an analysis of the beneficiary's experience and how the briefly described experience equates to particular courses at the university level. The writers do not provide examples of how the beneficiary's length of time in a particular position contributed or is otherwise equal to college-level courses. Further, testimony relating to the shortage of trained experts in this technology, even if submitted by experts in the field, a fact not established in this record, is not relevant to establishing a beneficiary's qualifications to perform the duties of a specialty occupation. The petitioner has not provided opinions from recognized authorities that contain evidence substantiating any conclusions regarding the beneficiary's expertise in the specialty occupation. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), and has not established that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the petition will be denied.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation. The only description of the duties of the position indicates that the beneficiary: "will provide specialized field clinical support to customers and potential customers in the training and use of the InterX neuro electrical stimulation products;" "will be responsible for the development and management of key clinical sites and support activities in assigned geography;" "will also assist in the development of specialized classroom and [field] training programs on [the petitioner's] products, treatment protocols, and therapies;" and "will also provide clinical support and information to sales representatives and assist in the sale of [the petitioner's] products." From this brief description of duties, the proffered position appears to be a position that requires the skill of an individual who has experience operating, demonstrating, and selling the petitioner's medical devices. The record does not contain sufficient information regarding the proffered position to enable the AAO to assess whether operating, demonstrating, and selling a medical device or devices requires the theoretical and practical application of a body of highly specialized knowledge attained by a bachelor's or higher degree in a specific specialty as a minimum for entry into the occupation in the United States. *See* Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1).

The AAO requires detailed information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent in a directly related academic specialty. The AAO cannot conclude that the training to operate, demonstrate, and sell the petitioner's medical device, is equivalent to a four-year course of study at the university level; thus, the petitioner has not established that the proffered position is a specialty occupation. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 director's decision will be affirmed.

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