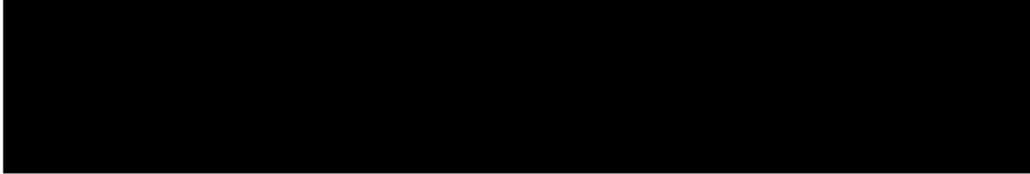




U.S. Citizenship
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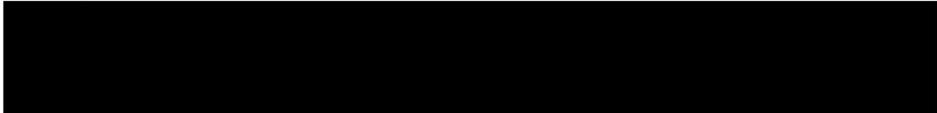


D2

FILE: EAC 06 257 51197 Office: VERMONT SERVICE CENTER

Date: **DEC 20 2007**

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, Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is a national food and drug retailer that seeks to employ the beneficiary as a graduate pharmacist intern. 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). On October 6, 2006, the director denied the petition, determining that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed September 15, 2006 and supporting documentation; (2) the director's September 22, 2006 request for further evidence (RFE); (3) counsel's September 25, 2006 response to the director's RFE; (4) the director's October 6, 2006 denial letter; and (5) the Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner is a large national food and drug retailer. It claimed on the petition that its parent company was established in 1870, that it has over 200,000 employees, and it has a gross annual income of \$44 billion. In the director's October 6, 2006 decision, the director noted that the proposed position consists of the same duties performed by a pharmacy student intern who is an intern that is currently in school and has not yet obtained a bachelor's degree. In the decision, the director cited from the California Code of Regulations, Title 16, Division 17, Board of Pharmacy, Article 3 Pharmacists Candidates, § 1727, which states that an intern pharmacist is a person who holds a valid intern card. The regulations further explain that an intern card will be issued to an individual who fulfills one of four requirements. The two requirements discussed in the decision are: (1) an intern card will be issued to an individual who is "currently enrolled in a school of pharmacy recognized by the board;" or, (2) an intern card will be issued to an individual who graduated from a school of pharmacy. The director stated that the California Code of Regulations "makes no distinction between the duties that may be performed by an undergraduate intern pharmacist, who is currently enrolled in a school of pharmacy, and the duties that may be performed by a graduate intern pharmacist."

On appeal, counsel for the petitioner contends that the position of graduate pharmacy intern is not the same position as that of a student pharmacist intern. Counsel states that a graduate student intern must have earned at least a baccalaureate degree in a course of study devoted to the practice of pharmacy in order to receive a license to practice as a graduate student intern. Counsel also states that the industry norm, and the petitioner's specific needs, require that a graduate pharmacist intern must have obtained a bachelor's degree or its equivalent in a specific specialty in order to fill the position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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). The critical element is not the title of the position nor an employer's self-imposed

standards, but whether 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.

The AAO notes that the petitioner filed the Labor Condition Application (LCA) requesting a graduate pharmacist intern at the annual salary of \$50,960. The petition and supporting documents seek a graduate pharmacist intern.

As noted by the director, the State of California may issue a pharmacist intern license to either a student of pharmacy or a graduate of a pharmacy school. *See California Business & Professions Code, Chapter 9, Division 2, Sections 1727, 4208.* The pharmacist intern must practice under the supervision of a licensed pharmacist and may perform all the duties of a pharmacist. *See California Business & Professions Code, Chapter 9, Division 2, Section 1727.* The director stated that because there is no legal distinction between the duties that may be performed by both graduates and undergraduates of a pharmacy program, the position is not a specialty occupation.

The AAO observes that California law also requires a 1500 hour pharmacy practice internship before the graduate pharmacist intern may apply for full licensure. *See California Business & Professions Code, Chapter 9, Division 2, Sections 4209, 1728.* This internship may be completed either before or after graduation from a pharmacy school. Thus, California does not distinguish between the levels of responsibility to be performed by a student or graduate pharmacist intern.

The AAO finds, however, that in order for a foreign graduate to work as a pharmacist intern, the foreign graduate must have completed his/her education at a foreign pharmacy school and have obtained a satisfactory examination score. *See California and Professions Code, Chapter 9, Division 2, Section 4208.* Thus, the minimum requirement for a foreign pharmacist intern in the State of California is a baccalaureate degree in pharmacy. As the petitioner seeks to hire a foreign pharmacist intern in the position, the position qualifies as a specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(A)(I).

In addition, the petitioner requires its employees who fill the position of graduate student intern to have obtained a bachelor's degree or PharmD degree, as evidenced by its website's advertisement for career opportunities as a Pharmacist and Graduate Intern. The record reflects that that the beneficiary earned the equivalent of a U.S. Bachelor of Pharmacy degree. Thus, the position qualifies as a specialty occupation under 8 C.F.R. 214.2(h)(4)(iii)(A)(3).

However, the petitioner has not established that the beneficiary is eligible to perform the duties of a graduate pharmacist intern, as the record does not contain an intern pharmacist registration from the State of California.

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.

The AAO notes that the record contains a letter from the California State Board of Pharmacy dated July 6, 2005. The letter indicates that if the beneficiary fails to provide the requested social security number within one year from the date of the letter, the application would be considered abandoned. The petition in this matter was filed September 15, 2006, more than one year after the beneficiary applied for his intern pharmacist registration. Although the AAO recognizes that the California State Board of Pharmacy could not process the application due to the lack of a social security number; the record contains no information that the beneficiary continued to pursue registration after July 6, 2005. Thus, as currently constituted the petition may not be approved. As the director did not enter a decision regarding the eligibility of the beneficiary to perform the duties of the specialty occupation, the petition will be remanded. The director should request evidence that the beneficiary is eligible to perform the services of a specialty occupation in the State of California, for the requested period of time, except for the provision of a social security number, giving the petitioner an appropriate period of time to provide a response.

The petitioner has established that the position qualifies for classification as a specialty occupation. The petition may not be approved, however as the record does not establish that the beneficiary is qualified to perform the duties of that specialty occupation upon entrance into the United States. Accordingly, the director's decision will be withdrawn as it regards the specialty occupation issue and the matter will be remanded on the issue of the beneficiary's eligibility to perform the duties of the specialty occupation.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The matter is remanded for the entry of a new decision, which if adverse to the petitioner is to be certified to the AAO for review.