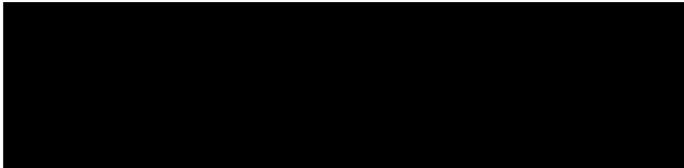




U.S. Citizenship
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FEB 20 2007

FILE: WAC 02 174 52333 Office: CALIFORNIA 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 service center 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 engaged in the business of providing clinic service, research, and educational programs in traditional Chinese medicine, and seeks to employ the beneficiary as a research associate. The petitioner 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 does not qualify as a specialty occupation. On appeal, the petitioner submits a brief stating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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:

[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 are 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) 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; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a research associate. Evidence of the beneficiary's duties includes the Form I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Review patients' charts and research medical literature to consider possible diagnoses for unusual cases, and suggest possible tests or procedures that may be relevant to diagnosis;
- Conduct tutorial programs in traditional Chinese medicine, Chinese acupuncture, acupressure, and massage;
- Observe and record the patient's ocular condition including the appearance of retinal cortex, the lens and pupil, and the internal pressure of the vitreous body;
- Research and study the impact of the selection and insertion of acupuncture needles, the points of insertion of the needles, and the depth and duration of the insertion of needles;
- Categorize and analyze patient symptoms, case history, and physical status after using various herbal formulas and acupuncturist techniques;
- Develop specialized TCM herbal formulas adapted specially to the needs, lifestyles and habits of Western patients;
- Undertake research into the safety of various traditional Chinese herbs and herbal formulae to address concerns expressed by the FDA as to the safety of TCM remedies; and
- Chart the data and analyze the correlation between ocular conditions and the diagnosed neurological disorders.

The petitioner requires a minimum of a bachelor's degree in Chinese medicine/acupuncture for entry into the proffered position.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. This particular occupation, however, is not discussed in detail in the *Handbook*. The duties of the position were discussed in the petitioner's letter of April 18, 2002 and in the petitioner's response to the director's request for evidence. The petitioner listed additional duties in its brief filed in support of the present appeal. The petitioner now states that the beneficiary would assist in conducting long-term clinical studies in the United States on herbal supporting therapy of breast cancer patients undergoing chemotherapy. The petitioner also states that the beneficiary would assist in the implementation of a new 3000 - hour curriculum that complies with California guidelines for oriental medicine education and organize educational seminars on the latest breakthroughs in traditional Chinese medicine. These duties represent a substantial departure from the duties listed by the petitioner prior to the director's decision to deny the petition, and will not be considered by the AAO. The petitioner must establish that the position that was offered to the beneficiary at the time the Form I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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 duties of the proffered position, as initially described by the petitioner, fall within those performed by practitioners of traditional Chinese medicine and is regulated by the California Acupuncture Board. The California Business and Professions Code provides for the licensing of persons practicing acupuncture. In order to obtain a license an applicant must comply with the following:

- Be at least 18 years of age;
- Complete an educational training program approved by the Board, or

Satisfactorily complete a tutorial program in the practice of an acupuncturist approved by the board;
or

Complete educational training and clinical experience that meets the standards established pursuant to sections 4939 and 4941 of the California Business and Professions Code.

The standard for approval of training programs shall include a minimum of 3000 hours of study in a curriculum pertaining to the practice of an acupuncturist. A bachelor's degree in a specific specialty is not required to practice acupuncture/traditional Chinese medicine/oriental medicine in California, and the duties listed by the petitioner relative to this practice do not require the theoretical and practical application of a body of highly specialized knowledge.

In addition to the practice of traditional Chinese medicine, the petitioner states that the beneficiary would conduct tutorial programs in acupuncture, acupressure, and massage, all of which are permitted by practitioners who obtain a state license. Again, there is no requirement of a bachelor's degree in obtaining this license, nor is there any requirement that individuals who provide training tutorials or present seminars in

the field hold a baccalaureate level education. The petitioner also states that the beneficiary would undertake research into the safety of various traditional Chinese herbs and herbal formulae to address concerns expressed by the FDA as to the safety of traditional Chinese medicine remedies. The description of this duty is vague and nonspecific and it does not establish that the position qualifies as a specialty occupation requiring a minimum of a baccalaureate level education. The record does not contain any evidence of what type of research would be performed, how the research would be conducted, what concerns have been expressed by the FDA, or to whom the results of the research would be presented. The petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that a degree requirement, in a specific specialty, is common to the industry in parallel positions among similar organizations, or that it normally requires a degree in a specific specialty for entry into the offered position, and offers no evidence in this regard. The petitioner has failed to establish the referenced regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (3).

Finally, the record does not establish that the duties to be performed by the beneficiary are so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties to be performed by the beneficiary are routinely performed in the industry by individuals holding less than a baccalaureate level education. The petitioner has failed to establish the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4).

The petitioner also attempts to qualify the position as a specialty occupation by referring to it as a “research associate” position and referencing prior CIS approvals of unrelated cases. This reference will not sustain the petitioner’s burden of establishing H-1B qualification in the petition now before the AAO. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by the petitioner. Accordingly, no comparison of the positions can be made. 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, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a research associate. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h).

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.

Beyond the decision of the director, the beneficiary is not qualified to perform the services of an acupuncturist in the State of California, which requires licensure. No evidence of record establishes that the beneficiary is a licensed acupuncturist. For this additional reason, the petition may not be approved.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

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