



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **MAY 31 2013** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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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.

On the Form I-129 visa petition, the petitioner stated that it is an outpatient care center with five employees. To employ the beneficiary in what it designates as a "Medical Scientist" position, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue on appeal 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 employment 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] 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 [(2)] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular

position"). Applying this standard, USCIS 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a medical scientist position, and that it corresponds to Standard Occupational Classification (SOC) code and title 19-1042.00 Medical Scientists, Except Epidemiologists.

Evidence submitted with the visa petition indicates that the petitioner is the medical practice of Dr. [REDACTED]. A letter dated April 20, 2011, from Dr. [REDACTED] provides the following description of the duties of the proffered position:

Job Duties / Project Description	% of Time
Collect and analyze patients['] medical data; prepare & analyze data charts	30%
Perform laboratory and Imaging Studies on Patients['] data	30%
Perform research in Preventive Health & Education including research on Smoking, Asthma, High Cholesterol, and High Blood Pressure	30%
Plan and help medical staff with diagnosis and management issues	10%

Detailed Job Description

[The beneficiary] will be involved in doing the research directing the Preventive Health & Education Care Dept. He will be guiding patient's [sic] as well as medial

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staff on the preventive health measures. Moreover, he will meet with doctors and describe to them about medical service in preventive health such as Smoking, Asthma, High Cholesterol, and High Blood Pressure, etc.

Dr. [REDACTED] stated that the proffered position "requires specialized knowledge about Medical Science or Medicine" and that this "type of work can only be performed by one who has at least attained a Bachelor's Degree or higher."

On May 6, 2011, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center outlined the specific evidence to be submitted.

In response, counsel submitted, *inter alia*, a letter, dated June 13, 2011, from a pediatrics and internal medicine practice in [REDACTED] Indiana, and vacancy announcements.

In the June 13, 2011 letter, the president and CEO of the Indiana pediatrics and internal medicine practice stated that his practice employs a medical scientist whose duties include "collection and analysis of patient data to educate [its] staff on preventative health care associated with common conditions stemming from smoking, high cholesterol, high blood pressure and asthma." He did not state the minimum educational requirement of that position in his practice, or state the level of education of the people who have held that position.

The director denied the petition on June 30, 2011, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). In that decision, the director observed:

From the evidence provided, it does not appear that the petitioner has the organizational complexity to certify a position for a medical scientist. The petitioner's business is a private outpatient care practice. There is no evidence in the record showing that the petitioner is involved in any kind of scientific research in the medical or related field. No published material in professional or trade publications or in major media publications about either the petitioner's or the beneficiary's works.

On appeal, counsel reiterated that the proffered position requires a bachelor's degree, but did not indicate that it requires a minimum of a bachelor's degree *in a specific specialty* or its equivalent. Counsel asserted, however, that the descriptions of the duties of the proffered position demonstrate that it is a medical scientist position and that it qualifies as a specialty occupation position.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In the "Medical Scientists" chapter, the *Handbook* provides the following description of the duties of those positions:

What Medical Scientists Do

Medical scientists conduct research aimed at improving overall human health. They often use clinical trials and other investigative methods to reach their findings.

Duties

Medical scientists typically do the following:

- Plan and direct studies to investigate human diseases, preventive methods, and the treatment of disease
- Develop methods, instruments, and procedures for medical applications and data analysis
- Prepare and analyze medical samples to identify toxicity, bacteria, or microorganisms or to study cell structure
- Standardize drug doses and immunization methods for manufacturing drugs and other medicinal compounds
- Work with health departments, industry personnel, and physicians to develop programs that improve health safety standards
- Prepare research grant proposals to get funding from government agencies
- Follow safety procedures to avoid contamination

Many medical scientists, especially in universities, work with little supervision, forming their own hypotheses and developing experiments accordingly. In addition, they often lead teams, technicians, and, sometimes, students who do support tasks. For example, a medical scientist working in a university laboratory may have undergraduate assistants take measurements and observations for the scientist's research.

Medical scientists study biological systems to understand the causes of diseases and other health problems. For example, medical scientists who do cancer research might put together a combination of drugs that could slow the progress

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

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of the disease. They would then study that combination in a clinical trial. Physicians may work with the medical scientists to try the new combination with patients who are willing to participate in the study.

In a clinical trial, patients agree to help find out if a particular drug, or combination of drugs, or other medical intervention works. Without knowing which group they are in, patients in a drug-related clinical trial either receive the trial drug or receive a placebo, a drug that looks like the trial drug but does not have the special ingredients.

Medical scientists analyze the data from all the patients in the clinical trial to see if the trial drug did better than the placebo, for whom it worked better, and to answer other research questions. They then write up and report their findings.

Medical scientists do research both to develop new treatments and to try to prevent health problems. For example, they may study the link between smoking and lung cancer or between alcoholism and liver disease.

Medical scientists who work in private industry usually have less freedom to choose their research topics. Although they may not have the pressure of writing grant proposals to get money for their research, they may have to explain their research plans to nonscientist managers or executives.

Many medical scientists work in the federal government, in research universities, or in private industry.

In the federal government, medical scientists conduct research on human diseases and on exploratory methods of solving medical problems. They spend most of their time carrying out clinical trials or developing experiments on nonhuman subjects. Medical scientists eventually present their findings in medical journals or other publications.

In universities, medical scientists do research and investigate new medicinal methods of improving health. They also write grants, to organizations such as the National Institutes of Health (NIH) and the National Science Foundation (NSF), to secure steady funding for their research.

In addition to doing research, medical scientists in universities and in government who are also medical doctors may see patients, particularly those participating in clinical trials.

In private industry, medical scientists focus on the development of products such as pharmaceutical drugs and medical instruments. Companies place strong

emphasis on the development of products, a process that they hope will culminate with approval from a government agency, often the Food and Drug Administration (FDA). The approval process can take several years and be very costly, so private companies typically emphasize development over research.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Medical Scientists," <http://www.bls.gov/ooh/life-physical-and-social-science/medical-scientists.htm#tab-2> (last visited May 29, 2013).

In addressing whether the proffered position is a specialty occupation, it is noted that the record is devoid of substantial documentary evidence as to the duties to be performed by the beneficiary. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation." The AAO finds that despite the director's specific request for evidence pertaining to the proffered position, the record is devoid of substantial documentary evidence corroborating the duties of the proffered position. The record does not contain evidence that the petitioning organization is involved in research projects. The nature of the medical research that the beneficiary would conduct has never been made clear. The record contains no indication that the beneficiary would perform duties typically performed by medical scientists such as plan and direct studies to investigate disease; develop methods, instruments, and procedures for medical applications and data analysis; prepare and analyze medical samples; standardize drug doses and immunization methods; etc.

There must be sufficient, corroborating evidence in the record that demonstrates not only actual employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will be in a specialty occupation. USCIS 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)(1) and (12). In this instance, not only did the petitioner fail to submit a detailed statement of the proffered position's duties, no such corroborating evidence relevant to the claimed duties of the proffered position was submitted. The petitioner also failed to submit documentary evidence that it is in need of a full-time medical scientist on its staff.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this reason, the appeal will be dismissed and the petition denied.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. §1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

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