



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: SRC 98 154 51455 Office: Texas Service Center Date:

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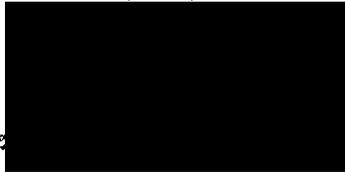
IN RE: Petitioner:
Beneficiary:



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)

Public Copy

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to employ the beneficiary as a pharmacist intern for a one-year period. The director determined the petitioner had not established that the offered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, counsel states that the job duties of the offered position are the same job duties as those of a pharmacist and that the beneficiary would be assigned full responsibility for executing these job duties. Counsel argues that the Service recognizes that there are occupations which generally require licensure, but, according to the laws of the various states, allows individuals, in certain circumstances, to practice the occupation under the supervision of a licensed professional. Counsel states that the facts of this case fit squarely within the statutory language which allows the Service to award H-1B classification, to those individuals who will still practice the job duties of a specialty occupation, in the absence of a license or other type of registration. Counsel requests that the petition be approved.

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), provides, in part, for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and 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)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

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.

The beneficiary graduated from the School of Pharmacy of the University of London, England, in 1994, earning a Bachelor of Pharmacy degree. She passed the Foreign Pharmacy Graduate Equivalency Examination and the Test of English as a Foreign Language examination administered by the National Association of Boards of Pharmacy located in Park Ridge, Illinois, in 1997.

The term "specialty occupation" is 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.

The petitioner outlines the duties of the offered position as follows:

██████████ will work under the direction of our registered pharmacist in our Fort Mill location, where she will undertake all aspects of pharmacy operations. To execute her duties, ██████████ will be required to solicit patient information in order to fill prescriptions and check for possible drug interactions. This work will include making recommendations on product selection, such as generic and brand name drugs, preparation of compound medications, selection and measuring of medications to ensure that expired, damaged and recalled merchandise is properly returned and not circulated to the clients. She will be required to communicate with physicians, dentists and other health care professionals to ascertain that the proper medications are dispensed and that our pharmacy has an accurate and timely record of the patient's current and prospective medications. ██████████ will also

be required to ensure that our company is in compliance with all internal, federal and state regulations attendant to the dispensing of prescription medications.

The duties of a pharmacist are described in the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 Edition at pages 160 and 161. The Handbook indicates that:

Pharmacists dispense drugs prescribed by physicians and other health practitioners and provide information to patients about medications and their use. They advise physicians and other health practitioners on the selection, dosage, interactions, and side effects of medications. Pharmacists must understand the use, composition, and clinical effects of drugs. Compounding—the actual mixing of ingredients to form powders, tablets, capsules, ointments, and solutions—is only a small part of a pharmacist's practice, because most medicines are produced by pharmaceutical companies in a standard dosage and drug delivery form.

Pharmacists in community or retail pharmacies counsel patients, as well as answer questions about prescription drugs, such as possible adverse reactions or interactions. They provide information about over-the-counter drugs and make recommendations after asking a series of health questions, such as whether the customer is taking any other medication. They also give advice about durable medical equipment and home health care supplies. Those who own or manage community pharmacies may sell nonhealth-related merchandise, hire and supervise personnel, and oversee the general operation of the pharmacy. Some community pharmacists provide specialized services to help patients manage conditions such as diabetes, asthma, smoking cessation, or high blood pressure.

In cases such as this, the duties of the position determine the outcome and not just the job title. The petitioner indicated that the position was that of an intern pharmacist upon initial submission. However, the offered position contains most of the duties listed above. The record shows that these include completing all aspects of pharmacy operation.

This position is more complex than that of an intern pharmacist. The primary duties described are those of a pharmacist. Therefore, this petition may not be approved because the petitioner has not established that the beneficiary has a license or other authorization required by the State of intended employment (South Carolina) to practice as a pharmacist, or is exempt from this requirement by law.

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.