U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: LIN 00 155 53520 Office: Nebraska Service Center Date: JAN 14 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a medical business employing two persons which seeks to employ the beneficiary as a urology research assistant for a period of two years and six months. The director determined that the beneficiary would be coming to the United States to perform duties in the medical profession. The director then found that the petitioner had not established that the beneficiary, as a foreign medical graduate, had passed the examinations determined to be appropriate by the Secretary of Health and Human Services.

On appeal, counsel states the beneficiary does not intend to come to the United States as a member of the medical profession. Rather, he intends to work as a research assistant. Counsel further states that this position does not require a medical degree, but a degree in a medically related field is preferred due to the highly specialized character of the research.

Counsel argues that the Service should follow the guidance of Matter of Sheikh 17 I&N Dec. 634 (BIA 1980) in this case based on the general proposition that where the position does not require the performance of medical services, the special visa requirements applicable to foreign medical graduates do not apply.

Counsel is correct that Matter of Sheikh should be followed in this case. In Sheikh, the Board of Immigration Appeals found that the position of professor of environmental epidemiology was a position not involved in the performance of services in the medical profession. Should it be determined that the duties of the offered position in this case would not require the services of a member of the medical profession, a similar finding as the one in Sheikh would be warranted.

The beneficiary graduated from Shiraz University of Medical Sciences in Iran in 1994, earning a doctorate degree in the field of medicine.

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:

> The temporary position of Research Assistant in Urology involves researching aspects of prostate cancer, such as the isolation, evaluation, chromosomal analysis, and study of biopsies of involved individual and primary laboratory research for the development of medical treatment for those men who suffer from prostate cancer.

In cases such as this, the duties of the position determine the outcome and not the job title. The offered position reflects the duties of a medical scientist, a position clearly in the medical profession. In its Occupational Outlook Handbook, 2000-2001 edition, at page 125, the Department of Labor (DOL) describes the jobs of medical scientists as follows:

> Medical scientists work on basic research into normal biological systems to understand the causes of and to discover treatment for disease and other health problems. Medical scientists try to identify changes in a cell, chromosome, or even genes that signal the development of medical problems, such as different types of cancer. After identifying structures of or changes in organisms that provide clues to health problems, medical scientists work on the treatment of problems. For example, medical scientists involved in cancer research may formulate a combination of drugs that will lessen the effects of the disease. Medical scientists with a medical degree can administer these drugs to patients in clinical trials, monitor their reactions, and observe the results. (Medical scientists without a medical degree normally collaborate with a medical doctor who deals directly with patients.) The medical scientist will return to the laboratory to examine the results and, if necessary, adjust the dosage levels to reduce negative side effects or to try to induce even better results. In addition to using basic research to develop treatments for health problems, medical scientists attempt to discover ways to prevent health problems from developing, such as

> affirming the link between smoking and increased risk of lung cancer, or between alcoholism and liver disease.

Although counsel states the beneficiary does not intend to come to the United States as a member of the medical professions, the offered position contains most of the duties listed above. The record shows that these include researching aspects of prostate cancer and working on the treatment of medical problems. Also, after identifying structures of or changes in organisms that provide clues to curing prostate cancer, the beneficiary would be working on the treatment of that specific problem.

This position is more complex than that of a medical assistant. The primary duties described are those of a medical scientist in the field of cancer research.

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.

Section 212(j)(2) of the Act provides in part that a graduate of a foreign medical school who is coming to perform services as a member of the medical profession may not be admitted as a member of the medical profession pursuant to section 101(a)(15)(H)(i)(b) unless he or she has passed the Federation Licensing Examination (FLEX) or an equivalent examination as determined by the Secretary of Health and Human Services. Furthermore, 8 C.F.R. 214.2(h)(4)(viii)(B)(2) provides that a petitioner seeking to employ a physician who graduated from a medical school in a foreign state under section 101(a)(15)(H)(i) must establish that the beneficiary has passed the FLEX or an equivalent examination as determined by the Secretary of Health and Human Services.

On September 16, 1992, the Department of Health and Human Services published a notice in the Federal Register, Vol. 57, No. 180, which indicated that Parts I, II, and III of the National Board of Medical Examiners (NBME) certifying examinations and Steps 1, 2, and 3 of the United States Medical Licensing Examination (USMLE) were recognized as equivalent to the FLEX. The notice did not provide that combinations of these examinations are equivalent to the FLEX. Hence, combinations of these examinations may not be used to meet the statutory requirement that the alien has passed the FLEX.

On appeal, counsel states that the beneficiary passed the English language proficiency test and submits documentation showing the beneficiary scored 533 on his Test of English as a Foreign Language examination that he took in May 1998. The record now reflects that the beneficiary has passed Step 1 and Step 2 of the USMLE. However, no evidence has been provided to show that the beneficiary passed Step 3 of the USMLE. The petitioner has not demonstrated that the Department of Health and Human Services will accept this attainment as equivalent to passage of the FLEX. Accordingly, 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 not sustained that burden.

ORDER: The appeal is dismissed.