



U.S. Citizenship
and Immigration
Services

92



FILE: SRC-03-134-53328 Office: TEXAS SERVICE CENTER Date: OCT 08 2004

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:

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, Director
Administrative Appeals Office

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The director has 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 a private laboratory that analyzes human body fluids medical offices submit for testing. The petitioner seeks to employ the beneficiary, who has a foreign medical degree, as a medical lab technician. The laboratory 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 is not a specialty occupation. On appeal, the petitioner and its counsel have submitted written arguments.

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 record of the proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence; (3) the petitioner’s response to the director’s request and supporting documentation; (4) the Department of Labor certification that the petitioner has filed a labor condition application (LCA); (5) the director’s denial letter; and (6) Form I-290B and supporting letters. The AAO reviewed the record in its entirety before issuing its decision.

The director determined that the proffered position does not meet any of the criteria for a specialty occupation, and in particular, that it does not require a baccalaureate degree.

On appeal, counsel asserts that the petitioner “normally requires a degree or its equivalent for the position,” and advertises that it “hires MDs to perform its lab services.”

At the outset the AAO notes that the director, at counsel’s request, treated the petition as seeking either a medical or clinical laboratory technician or a chemical technician. Through “an oversight on [the beneficiary’s] part,” the certified LCA was for a chemical technician, which counsel asserted was “practically on point” – i.e., interchangeable -- with one for a medical lab technician, because either “would require an individual to possess a bachelor’s degree and/or medical background.”¹ Counsel then submitted a new certified LCA for a medical lab technician, with a certified date of July 29, 2003, well after the petition’s filing date, and requested that the new LCA relate back. Regardless, the proffered position is not for a

¹ Because medical lab technology focuses upon human health rather than upon product quality, it arguably requires a higher degree of skill than for work in chemical technology if only from a greater concern for human life than for product quality. In this regard, had the petitioner sought to classify the beneficiary as medical technologist instead of merely a medical lab technician, it might have come closer to meeting the standard of education required of a “specialty occupation,” given the entry-level job requirements for a medical technologist. See, the American Medical Technologists at www.amtl.com.

chemical technician but for a medical laboratory technician. The two jobs are dissimilar in duties and require different educational backgrounds.

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.

In response to the director's request for evidence counsel asserted the proffered position meets at least two of the four criteria for specialty occupation. Reviewing the evidence, however, the AAO has determined that the petitioner satisfies none of the criteria.

Neither the classification for chemical technician nor medical lab technician requires a bachelor's degree or its equivalent for entry-level qualifications. Instead the Department of Labor's *Occupational Outlook Handbook* (ed. March 2004) (*Handbook*) specifies that some employers prefer applicants with two-year or associates degrees for either technician category. By contrast, the *Handbook* states that a bachelor's degree in medical technology would be the "usual" requirement for medical technologist. The petitioner, however, is not seeking to classify the beneficiary as a medical technologist. Accordingly, the petitioner's proof falls short of satisfying the first criterion.

Counsel asserts that the proffered position is a specialty occupation based on information in the *O*Net*. The DOL has replaced the *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991) with the *O*Net*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *O*Net*.

An examination of the duties set forth by the petitioner's evidence is illustrative that the position resembles, in job duties, the requirements for the standard medical lab technician job, which ordinarily requires a two-year associate's degree, according to the *Handbook*. Thus, it is a standard requirement for a medical or clinical lab technician to be able to examine and analyze body fluids, tissues and cells for bacteria, parasites and other microorganisms; to analyze the chemical content of fluids, matching blood for transfusions and to test drug levels in the blood to show a patient's treatment response; to use sophisticated equipment such as microscopes and cell counters; to maintain the glassware, instruments, logs and record books; and, to perform troubleshooting tasks and assist on special projects. See, the *Handbook*; www.jobprofiles.monster.com.

Nor has the petitioner satisfied the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) by showing a bachelor's degree is an industry-wide requirement. Counsel asserts a working knowledge of human organisms is "one of the main reasons" the petitioner typically hires medical doctors to perform lab services. Petitioner's ad states, "Our lab is unique since it hires MD's that work in various parts of the lab such as phlebotomy, medical editing and client services." However, by making a case for uniqueness in hiring medical doctors, the petition also implicitly acknowledges hiring practices going beyond those "common to the industry."

Nor does petitioner satisfy the second criterion's requirement that "the particular position is so complex or unique that it can only be performed by an individual with a degree." Rather, the petitioner describes the reason for such high standards for job applicants is the need to stay competitive with other similar laboratories rather than any complexity or uniqueness inherent in the proffered position itself. The petitioner's only point in hiring job candidates with a bachelor's in chemistry and biology with a "good medical knowledge" is to attract business. Petitioner in fact advertises that many of its workers possess better than the usual training by placing ads in "in medical journals and newsletters that generate business from the medical community." Again, according to counsel, this helps to "generate regular business from the physicians within the community."

The petitioner also fails to demonstrate that the position satisfies the third criterion, which requires a showing that the employer "normally requires a degree or its equivalent for the position." 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The petitioner claims that five of its employees in the division where the beneficiary would work "all ... have a minimum of [a] bachelor's degree." To assert this without documentation does not amount to proof of the assertion. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, creation of a position with a perfunctory bachelor's degree requirement cannot mask the fact that the position is not a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3rd 384 (5th Cir. 2000). Citizenship and Immigration Services (CIS) must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. The critical element is not the title of the position or 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. Interpreting the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Accordingly, the petitioner fails to satisfy the third criterion for a specialty occupation.

Finally, the petitioner does not demonstrate the fourth criterion of how the specific duties of the position are "so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree." Counsel has listed the job duties required for the proffered position to include drawing and analyzing patients' blood for diseases and reporting abnormality for further study; analyzing biological material for chemical content and reaction; and, interpreting and reviewing the results for "quality control and performance." Comparing the petitioner's requirements with those in the *Handbook* reveals little to differentiate them from each other, much less to demonstrate a higher degree of complexity or uniqueness beyond the routine responsibilities of a medical lab technician.

Beyond the decision of the director, the petition may not be approved because the petition seeks to classify the proffered position of medical lab technician as a "specialty occupation" while the timely filed certified LCA of record is for a chemical technician, which, as discussed above, differs in the job duties and educational requirements of a medical lab technician. The AAO will not consider the certified LCA for the chemical lab technician to be applicable in this case.

Prior to filing the petition under this section, a petitioner must obtain a Labor Condition Application for H-1B Nonimmigrants (LCA), Form ETA 9035, that has been certified by the United States Department of Labor. 8 C.F.R. 214.2(h)(4)(i)(B) lists the requirement of a certified LCA in the specialty occupation obtained prior to the filing of a petition, as follows:

(1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certificate from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The second LCA was certified on July 29, 2003, well after the petition was filed, on April 20, 2003. As stated, the regulation requires the petitioner to provide evidence that it has obtained a certified LCA in the specialty occupation prior to filing the petition. The petitioner failed to comply with this requirement. For this additional reason, the petition is denied, pursuant to 8 C.F.R. § 103.2(b)(12).

The petitioner, if it chooses, may file another petition, this time with a certified LCA for the proffered position.

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. The petition is denied.