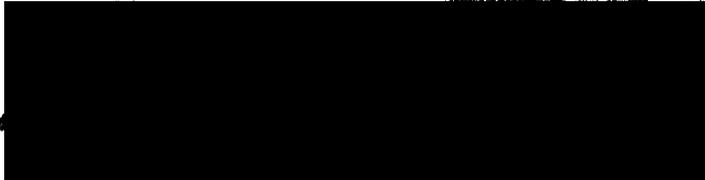




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent disclosure in warrants
invasion of personal privacy

PUBLIC COPY



Handwritten signature

MAR 21 2005

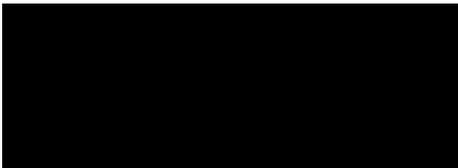
FILE: WAC 03 040 51566 Office: CALIFORNIA SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 medical office that seeks to employ the beneficiary as a medical technologist. The petitioner, therefore, 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, counsel submits a brief.

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.

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.

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) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a medical technologist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail performing supervisory and administrative functions over non-invasive exercise testing for cardiac risk assessment in the non-invasive cardiac laboratory; performing quality control on laboratory tests, reagents, and materials; checking test reports before issuing them to requesting physicians; purchasing reagents and supplies for the laboratory; and preparing a manual for standard operating procedures. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in medical technology and have two years of experience in a similar position.

According to the director, the proffered position involved general managerial/laboratory manager duties. The proposed duties and level of responsibility, the director found, did not indicate a complexity or authority beyond what is normally encountered in the occupational field. Consequently, the director determined that the proffered position is not a specialty occupation. The director found counsel's statement that the proffered position did not require licensure, and the evidence that allegedly supported his statement, unpersuasive.

On appeal, counsel states that the duties of the proffered position parallel those of a clinical laboratory technologist as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reports that a clinical laboratory technologist is required to possess a bachelor's degree in medical technology or the life sciences. Thus, counsel states that the proffered position is a specialty occupation. Counsel asserts that a Nevada statute provides that licensure is not required when a person providing services as a medical technologist is supervised and controlled by a medical doctor. Counsel states that this is a newly created position.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the

position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel states that the proffered position is similar to a clinical laboratory technologist as delineated in the *Handbook*. The AAO disagrees with this. The *Handbook* discloses that a clinical laboratory technologist performs complex chemical, biological, hematological, microscopic, and bacteriological tests. They make cultures of body fluid and tissue samples to determine the presence of bacteria, fungi, parasites, or other organisms. They also evaluate test results, develop and modify procedures, and establish and monitor programs to ensure the accuracy of tests. None of these duties will be performed by the beneficiary; the proffered position is unlike a clinical laboratory technologist.

The *Handbook* reveals that the proffered position resembles an EKG technician, a noninvasive technician. The *Handbook* states that for a treadmill stress test, EKG technicians document the patient's medical history, explain the procedure, connect the patient to an EKG monitor, and obtain a baseline reading and resting blood pressure. In the June 10, 2003 letter, the petitioner stated that the beneficiary will supervise "exercise treadmill testing and pharmacological stress testing." Thus, this duty parallels that of an EKG technician.

The *Handbook* conveys that for basic EKGs, Holter monitoring, and stress testing, 1-year certification programs exist, but most EKG technicians are trained on the job by an EKG supervisor or a cardiologist. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

There is no evidence to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* portrays an EKG technician, an occupation that does not require a bachelor's degree, as similar to the proffered position.

Because the proffered position is newly created, the petitioner cannot satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. None of the beneficiary's responsibilities exceeds the scope of those performed by an EKG technician, an occupation that the *Handbook* shows does not require a bachelor's degree.

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.

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.