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U.S. Citizenship
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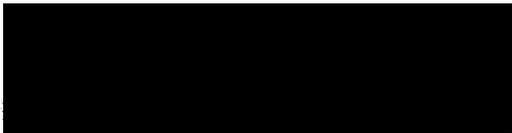
FILE: WAC 03 084 55203 Office: CALIFORNIA SERVICE CENTER Date: OCT 04 2006

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 materials 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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a home health services business. It seeks to employ the beneficiary as a medical technologist and to classify her 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 on the ground that the proffered position does not qualify as a specialty occupation.

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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and copies of previously submitted materials. The AAO reviewed the record in its entirety before issuing its decision.

On Form I-129 and an accompanying letter the petitioner described itself as a home health services business that provides medical and non-medical care to individuals of varying ages and health conditions in private homes as well as convalescent and retirement homes. The petitioner states that it was established in 1997, had gross revenues of approximately \$265,000 in 2001, and had 30 employees at the time the petition was filed in early 2003. The petitioner proposes to hire the beneficiary as medical technologist to “perform supervisory and administrative functions over the operations of one of two laboratories that will be established by the company.” The duties of the position were described in the petitioner’s initial letter as follows:

perform quality control on the tests conducted at the laboratory, reagents, materials, control organisms, and equipment; check the test report before issuing the same to the requesting physicians; purchase reagents and supplies for the laboratory; prepare manual for standard operating procedures to be followed in the laboratory.

In response to the RFE the petitioner provided a more detailed description of the proffered position. In addition to the duties previously described, the petitioner indicated that the beneficiary would perform the following tasks:

Examine by using the microscope blood, tissue, and other body substances; make cultures of body fluid and tissue samples to determine the presence of bacteria, fungi, parasites, or other microorganisms; analyze samples for chemical content or reaction and determine blood glucose and cholesterol levels; type and cross match blood samples for transfusions; evaluate test results, develop and modify procedures, and establish and monitor programs to ensure their accuracy; perform quality control on the tests conducted at the laboratory, reagents, materials, control organisms, and equipment; check the test report before issuing the same to the requesting physicians; purchase reagents and supplies for the laboratory; prepare manual for standard operating procedures to be followed in the laboratory.

The petitioner states that the beneficiary would be functioning under the direct supervision of a licensed medical technologist. According to the petitioner the position requires a bachelor’s degree in medical technology. The beneficiary has a bachelor of science in medical technology from Saint Louis University in Baguio, the Philippines, granted in June 1984.

The director determined that the duties of the proffered position reflected those of a medical or clinical laboratory technician, as described in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*. The director concluded that a baccalaureate level of training is not a normal, industry-wide minimum requirement for entry into the occupation based on information in the *Handbook* stating that even though a bachelor’s degree with a major in medical technology or a life science was usually required for an entry-level position as a medical or clinical laboratory technologist, it was also possible to qualify for such a position with a combination of education, on-the-job, and specialized training. The evidence of record did not establish that the petitioner normally requires applicants for the position to have a baccalaureate or higher degree in the field, the director continued, or that the duties of the position could not be performed by an experienced individual with a sub-baccalaureate level of education. The director determined that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that the director mixed up the separate occupational categories of medical technologists and medical technicians, as described in the *Handbook*, mistakenly identified the proffered position as that of a medical technician, and misinterpreted the information in the *Handbook* about the educational requirements for medical technologists. Counsel reiterates the petitioner's contention that the proffered position is that of a medical technologist and asserts that the information in the *Handbook* confirms that a bachelor's degree in the field is the minimum requirement for entry into such a position. Furthermore, counsel maintains that the evidence of record demonstrates that the petitioner normally requires applicants for the position to have a baccalaureate degree in the field, and that the duties and responsibilities of the position are so specialized and complex that the knowledge required to perform them is usually associated with a bachelor's degree in medical technology. Counsel cites a decision of the Board of Immigration Appeals ruling that a medical technologist is a professional position.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

Medical technologists and medical technicians (also called clinical laboratory technologists and technicians) are two sub-categories of the *Handbook's* occupational category entitled clinical laboratory technologists and technicians. As described in the *Handbook*, 2004-05 edition, at 313:

Clinical laboratory personnel examine and analyze body fluids, tissues, and cells. They look for bacteria, parasites, and other microorganisms; analyze the chemical content of fluids; match blood for transfusions; and test for drug levels in the blood to show how a patient is responding to treatment. These technologies also prepare specimens for examination, count cells, and look for abnormal cells. They use automated equipment and instruments capable of performing a number of tests simultaneously, as well as microscopes, cell counters, and other sophisticated laboratory equipment. Then they analyze the results and relay them to physicians

Clinical laboratory technologists . . . perform complex chemical, biological, hematological, immunologic, microscopic, and bacteriological tests. Technologists microscopically examine blood, tissue, and other body substances. They make cultures of body fluid and tissue samples, to determine the presence of bacteria, fungi, parasites, or other microorganisms. Clinical laboratory technologists analyze samples for chemical content or a chemical reaction and determine blood glucose and cholesterol levels. They also type and cross match blood samples for transfusions.

Clinical laboratory technologists evaluate test results, develop and modify procedures, and establish and monitor programs, to ensure the accuracy of tests. Some clinical laboratory technologists supervise clinical laboratory technicians

Clinical laboratory technicians perform less complex tests and laboratory procedures than technologists perform. Technicians may prepare specimens and operate automated analyzers, for example, or they may perform manual tests in accordance with detailed instructions They usually work under the supervision of medical and clinical laboratory technologists or laboratory managers.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the duties of the position require a specialty degree. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The evidence of record does not establish that the duties of the proffered position are those of a medical technologist. Though the petitioner asserted at the time of filing that it intended to establish two laboratories, and that the beneficiary would be in charge of one of them, there is no documentation in the record showing that any laboratory has in fact been established. Thus, there is no evidence that the requisite workplace is in existence for the beneficiary to perform the complex tasks of a medical technologist. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, counsel stated in response to the RFE that the beneficiary would be directly supervised by a licensed medical technologist. Thus, it would appear that the petitioner already employs a medical technologist. The DOL *Handbook* indicates that medical technologists typically supervise medical technicians. Based on the evidence of record, the AAO determines that the proffered position is that of a medical technician.

With respect to the educational requirements for medical technologists and technicians, the *Handbook* states the following:

Medical and clinical laboratory technicians generally have either an associate degree from a community or junior college or a certificate from a hospital, a vocational or technical school, or one of the U.S. Armed Forces. A few technicians learn their skills on the job.

Based on the foregoing information, the AAO determines that a baccalaureate degree in medical technology or a related field is not the normal minimum requirement for entry into a position as a medical technician. The *Handbook* indicates that most medical technicians have sub-baccalaureate academic credentials such as associate degrees or certificates from a variety of institutions, while some qualify based solely on work experience. Accordingly, medical technicians do not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(I).

As for the second alternative criterion of a specialty occupation, there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the record does not show that the petitioner normally requires a degree or its equivalent in a specific specialty for the proffered position. Though counsel points to various statements by the petitioner that a bachelor's degree in medical technology is required for the position, there is no documentation in the record demonstrating that the petitioner has previously hired a medical technologist and that such a degree was in fact required. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See Matter of Soffici*. Thus, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that they require a depth of knowledge usually associated with the attainment of a baccalaureate degree in a specific specialty.

Counsel cites a Board of Immigration Appeals decision, *Matter of Panganiban*, 13 I&N Dec. 581 (BIA 1970), as establishing that a medical technologist is a professional position requiring a baccalaureate degree in medical technology or three years of academic study in that field plus one year of specialized training at a school of medical technology. The ruling in *Matter of Panganiban* was that a medical technologist with the requisite education qualifies as a professional under section 101(a)(32) of the Act. It did not involve the issue of whether medical technologists meet the requirements of a specialty occupation under section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Moreover, the record in the instant petition does not establish that the proffered position is that of a medical technologist. Thus, the BIA decision from 1970 has no legal bearing on the AAO's disposition of the instant petition.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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