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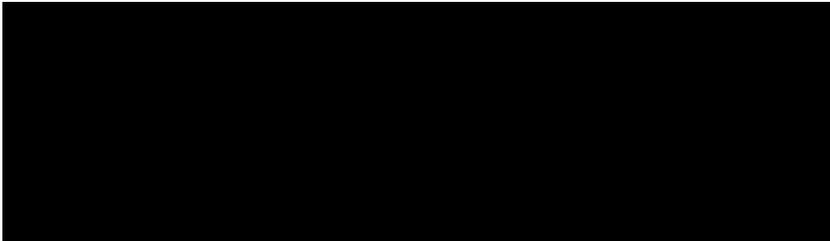
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FILE: WAC 04 125 50383 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2005

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

**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 operates a laboratory, blood banks, and plasma centers and seeks to extend the employment of the beneficiary as a high complexity testing personnel. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 term "specialty occupation" is further 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner states that it is seeking the beneficiary's services as a high complexity testing personnel. Evidence of the beneficiary's duties includes: the Form I-129 and a March 17, 2004 letter of support from the petitioner.

At the time of filing, the petitioner stated that the duties of the proffered position entail performing specimen processing, testing performance and reporting test results; presenting all completed test paperwork, forms testing alerts, and quality control documents to the laboratory manager for release of the test results in a timely manner; monitoring the inventory of FDA required test kits and accessories to provide continuous scheduled testing; identifying problems that may adversely affect test performance and test results and either correct the problem or immediately notify the laboratory manager; documenting all corrective actions taken when test systems deviate from the laboratory's quality control policies including quality control documentation, instrument, and procedure calibration maintenance. The petitioner stated it believed that the position required a bachelor's degree or its equivalent. The petitioner refers to 42 C.F.R. § 493.14(b)(1) as stating that testing personnel must have a bachelor's degree to perform high complexity FDA required tests.

The director determined that the position described by the petitioner reflect the duties of testing personnel as listed under the title laboratory technician in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). The director referred to the *Handbook* and noted that the usual requirement for an entry-level position as a medical or clinical laboratory technician is an associate's degree or a certificate from a hospital, a vocational or technical school, or one of the U.S. Armed Forces. The director found that the information does not indicate that a baccalaureate level of training is a normal industry-wide minimum requirement for entry into the occupation. The director found that the petitioner submitted no evidence to demonstrate that a degree in a specific field of study is common to the industry in parallel positions among similar organizations or, in the alternative, may show that its particular position is so complex or unique that it can be performed only by an individual with a degree. The director noted that the evidence failed to distinguish the difference between the duties to be performed by the beneficiary and those normally performed by laboratory technicians. The director concluded that the proffered position does not meet any of the preceding criteria for classification as a specialty occupation.

On appeal counsel contends that the director erred in concluding that the duties of the proffered position are not those of a specialty occupation. Counsel asserts that the duties of the proffered position, a high complexity testing personnel, requires a bachelor's degree and the petitioner states that its business nature is very unique and plasma blood banks are not covered by the *Handbook*. Counsel asserts that the director needs to give deference to the employer's view and not rely on the *Handbook*. The petitioner submits a more

detailed job description on appeal. The petitioner refers to 42 C.F.R. § 493.1489.b.5ii [sic] as stating that “all staff must meet the more stringent requirements.” The petitioner asserts that “there are no associate’s degree in medical technology programs anymore.” The petitioner has not provided evidence to support its assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).<sup>1</sup>

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 duties of the proffered position are similar to the occupation of a medical and clinical laboratory technologist as described in the *Handbook*. The AAO notes that the record does not reflect that the beneficiary is a licensed clinical laboratory technologist and that the petitioner does not require a California license in the position. California law requires that medical and clinical technologists be licensed to perform tests classified as high complexity. California Business and Professions Code Section 1206.5(c). The *Handbook* discloses that many of duties of the proffered position are performed by clinical and medical laboratory technicians. Like the beneficiary, who will be responsible for specimen processing, testing performance and reporting testing results, the *Handbook* reports:

*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. Like technologists, they may work in several areas of the clinical laboratory or specialize in just one. Histotechnicians cut and stain tissue specimens for microscopic examination by pathologists, and phlebotomists collect blood samples. They usually work under the supervision of medical and clinical laboratory technologists or laboratory managers.

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<sup>1</sup> The AAO notes that many community colleges offer an associate’s degree in medical technology. See, for example, Gogebic Community College located in Ironwood, MI, [www.gogebic.edu](http://www.gogebic.edu), accessed October 19, 2005.

The *Handbook* differentiates between a clinical laboratory technologist and a clinical laboratory technician. The *Handbook* indicates that the usual requirement for an entry-level position as a clinical laboratory technician generally is 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. The *Handbook* reveals that some states require laboratory personnel to be licensed or registered.<sup>2</sup>

The petitioner fails to establish the first criterion because the *Handbook* indicates that the usual requirement for an entry-level position as a clinical laboratory technician generally is either an associate degree from a community or junior college. The *Handbook* reveals that a bachelor's degree is not required for a clinical technician position. 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 proffered position.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner submitted a letter from National Genetics Institute authored by its director of regulatory affairs/quality assurance. The author stated "to maintain compliance with regulations and meet the level of understanding needed to perform the technical aspects in the laboratory, all employee require a minimum of a baccalaureate degree in a related science field as well as extensive in-house training." The petitioner has not established that the proffered position is parallel with the personnel mentioned in the letter. The letter is insufficient to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner alleges that it is following the educational requirements of the state and FDA regulations in that testing personnel in the position require a four-year degree. The petitioner has submitted some federal regulations. The AAO has been unable to find the location in the regulations where it is stated that a four-year degree is the minimum requirement for entry into the occupation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The AAO notes that the petitioner cited two inconsistent federal regulations indicating that a bachelor's degree is required in the position, neither of which is accurate, and do not establish a degree requirement for the position. The AAO further notes that the petitioner is not following the licensing requirements of the state of California, as counsel indicates, as the petitioner does not require licensure for high complexity testing personnel, as noted above, under California law.

Nor is there evidence in the record to establish the third criterion 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 petitioner indicated that it employed 230 personnel. The petitioner submitted four attestations from four employees as well as copies of their foreign degrees without educational evaluations. The petitioner has not documented the number of its testing personnel that have bachelor's degrees in a specific specialty. Therefore, the petitioner has not provided sufficient evidence to document that it normally requires a degree for the proffered position.

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<sup>2</sup> The State of California Business and Professional Code at Sections 120-1214, 1240-1246.5 and 1280-1291 indicates that the State regulates clinical labs and clinical laboratory personnel. As defined in the code "clinical laboratory" means any place used, or any establishment or institution organized or operated, for the performance of clinical laboratory tests or examinations or examinations or the practical application of clinical laboratory sciences. California Business and Professional Code, Section 1206(7).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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. The duties of the proffered position are those of a clinical technician. It cannot be concluded 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. The AAO notes that the Labor Condition Application indicates that the job title is testing personnel and that the prevailing wage is \$11.20 per hour. The *Handbook* indicates median annual earnings of medical and clinical laboratory technicians were \$29,040 in 2002 and that median annual earnings of medical and clinical laboratory technologists were \$42,910 in 2002. Once again, the *Handbook* reveals that the duties of the proffered position are performed by clinical technicians, an occupation not requiring a bachelor's degree.

The AAO notes that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Therefore, for the reasons related in the preceding discussion, 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.

Beyond the decision of the director, the record does not reflect that the beneficiary is licensed to perform the duties of a laboratory technologist or a laboratory technician as required under California law and is thus ineligible for H-1B classification. For this additional reason, 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. The petition is denied.