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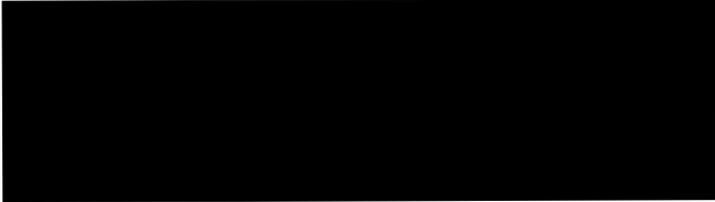
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 204 51498 Office: VERMONT SERVICE CENTER Date: SEP 12 2006

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, Chief
Administrative Appeals Office

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

The petitioner is a medical center that seeks to employ the beneficiary as a medical technologist. The petitioner 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 on the grounds that (a) the beneficiary did not possess certification from the Commission on Graduates of Foreign Nursing Schools (CGFNS) and was thus inadmissible under section 212(a)(5)(C) of the Act, and (b) the petitioner did not demonstrate that the beneficiary is qualified to perform services in a specialty occupation because the petitioner submitted no evidence showing that the beneficiary has a license to perform the duties of a medical technologist in the State of Pennsylvania.

On appeal, counsel submits two briefs and additional evidence. In the first brief, counsel contends that because the petitioner submitted the Form I-129 petition prior to July 26, 2004, and was maintaining valid H-1B status prior thereto, the service center should have granted the beneficiary a temporary extension of status for a period of one year pursuant to 8 C.F.R. § 212.15(n) to allow the beneficiary to obtain certification from the CGFNS. Counsel also asserts that the director improperly denied the petition on the ground that the petitioner failed to submit evidence that the beneficiary was licensed to perform the duties of a medical technologist in the State of Pennsylvania because the director's request for evidence did not give the petitioner adequate notice of the director's intent to deny the petition on this ground. Counsel asserts that the director also erred in denying the petition on this ground because the State of Pennsylvania does not require medical technologists to obtain a license. On appeal, the petitioner submits additional evidence in support of this assertion. In the second brief, counsel observes that the beneficiary has now obtained certification from the CGFNS and submits a copy of the certificate dated October 27, 2005.

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

The AAO first addresses the issue of inadmissibility under section 212(a)(5)(C) of the Act. Under this section, aliens in certain health care occupations (nurse, physical therapist, occupational therapist, speech language pathologist, medical technologist, medical technician, and physician's assistant) are inadmissible unless they present a certification from an independent credentialing organization approved by the Attorney General. GFNS is the approved credentialing organization for medical technologists.

Counsel contends, however, that 8 C.F.R. § 212.15(n)(1) provides for a transition period during which health care workers covered by section 212(a)(5)(C) may be granted a waiver of inadmissibility for one year in order to obtain the appropriate certification. The regulation states in relevant part:

- (i) Pursuant to section 212(d)(3) of the Act . . . the Secretary has determined that until July 26, 2004 . . . DHS, subject to the conditions in paragraph (n)(2) of this section, may in its

discretion admit, extend the period of authorized stay, or change the nonimmigrant status of an alien described in paragraph (d)(1) or paragraph (d)(2) of this section, despite the alien's inadmissibility under section 212(a)(5)(c) of the Act, provided the alien is not otherwise inadmissible.

(ii) After July 26, 2004 . . . such discretion shall be applied on a case-by-case basis.

The director did not address the issue of waiver under 8 C.F.R. § 212.15(n)(1) in his decision or his request for further evidence, and the petitioner did not raise the issue prior to this appeal. The AAO finds that it was appropriate for the director to request evidence of certification. Also, the director's decision is dated January 3, 2005, at which time it was within the discretion of the director to apply the waiver on a case-by-case basis should the petitioner have requested it.

However, as the deficiency in the petition occurred during the aforementioned transition period, and as the petitioner has now submitted satisfactory evidence that the beneficiary has obtained certification from CGFNS, the AAO finds that the beneficiary is no longer inadmissible under section 212(a)(5)(C) and withdraws the director's denial of the petition on this ground.

The AAO turns now to the question of whether the beneficiary is qualified to perform services in a specialty occupation. As stated above, the director found that the beneficiary was not qualified to perform services in a specialty occupation because there was no evidence in the record showing that the beneficiary has a license to perform services as a medical technologist in the State of Pennsylvania. On appeal, counsel contends that the State of Pennsylvania does not require medical technologists to be licensed. In support of this assertion, the petitioner submits a letter from the technical director of its laboratory stating the same, and includes a list of "licensed occupations" purportedly for the State of Pennsylvania on which the occupation medical technologist (or clinical laboratory technologist) does not appear.

To prove that a beneficiary is qualified to perform the duties of a specialty occupation, a petitioner must establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or 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.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The AAO takes notice that the State of Pennsylvania does not have a license requirement for medical technologists. The record shows that the beneficiary holds a foreign degree determined to be equivalent to a United States bachelor's of science degree in medical technology and has in addition been certified as a medical technologist by the American Medical Technologists. Thus, the petitioner has demonstrated that the beneficiary is qualified to perform services in a specialty occupation.

The petitioner has established that the beneficiary is qualified to perform the services of a specialty occupation and is admissible as a foreign health care worker. Thus, the petitioner has overcome the decision of the director.

The AAO now turns to the question of whether the proffered position is a specialty occupation.

The petitioner is seeking the beneficiary's services as a medical technologist (also known as a clinical laboratory technologist). Evidence of the beneficiary's duties includes the I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail the following:

- Perform medical laboratory tests, procedures, experiments, and analysis to provide data for diagnosis, treatment and prevention of disease
- Conduct chemical analysis of body fluids, such as blood, urine, and spinal fluid, to determine presence of normal and abnormal components
- Study blood cells, their numbers, and morphology, using microscopic technique
- Perform blood group, type, and compatibility tests for transfusion purposes
- Analyze test results and enter findings into computer
- Coordinate activities of workers engaged in performing chemical, microscopic, and bacteriologic tests to obtain data for use in diagnosis and treatment of diseases
- Review test results to ensure quality control
- Conduct education and training programs for medical technology personnel
- Purchase laboratory equipment and supplies

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 director did not make an explicit determination as to whether the proffered position is a specialty occupation. The record is sufficient, however, for the AAO to make this determination.

Upon review of the record, the petitioner has established the criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors often considered by CIS when determining this criterion include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, 2006-2007 edition, 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)). The *Handbook* states that the “usual requirement for an entry-level position as a clinical laboratory technologist is a bachelor’s degree with a major in medical technology or in one of the life sciences.” Therefore, the proffered position is a specialty occupation.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.