



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

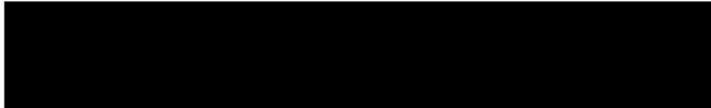
## PUBLIC COPY



*D2*

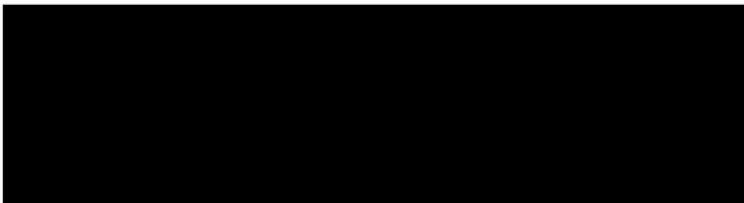
FILE: WAC 03 040 51566 Office: CALIFORNIA SERVICE CENTER Date: **SEP 28 2006**

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner, a medical office, 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 finding that the proposed position fails to qualify as a specialty occupation. The AAO dismissed a subsequent appeal, finding that the proposed position is not a specialty occupation. Counsel submits a timely motion.

The AAO grants counsel's motion.

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 regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(I) states that an H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation.

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; (6) the AAO's decision; and (7) the motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a medical technologist. The AAO's March 21, 2005 decision, which is contained in the record of proceeding, described the beneficiary's proposed duties; consequently, they will not be repeated here.

The AAO finds that the offered position does not qualify as a specialty occupation as the petitioner does not operate a registered laboratory. The petitioner states that a licensed physician will operate its medical laboratory solely in connection with the diagnosis or treatment of the petitioner's own patients. In the memorandum of law, dated December 30, 2003, counsel states that as soon as the H-1B petition is approved, the petitioner will register its medical clinic with the Nevada Department of Health, a simple administrative process with the requirement of licensure in the Country of Clark, State of Nevada. Counsel submits into the record a copy of the petitioner's Clark County business license.

The Nevada Revised Statutes (NRS) at 652.235, 652.130, and 652.140 and the Nevada Administrative Code (NAC) at 652.180 regulate medical laboratories in Nevada. The petitioner states that a licensed physician will operate its medical laboratory solely in connection with the diagnosis or treatment of the petitioner's own patients. The NRS at 652.235, which concerns the requirements for a medical laboratory operated by a licensed physician solely in connection with diagnosis or treatment of own patients, states:

1. A licensed physician may operate a medical laboratory solely in connection with the diagnosis or treatment of his own patients if the medical laboratory complies with the provisions of this section.
  2. Each such medical laboratory shall:
    - (a) Register with the Health Division.
    - (b) Comply with the rules and regulations adopted by the Board pursuant to NRS 652.130.
    - (c) Submit to the inspections and tests provided for in subsections 1 and 2 of NRS 652.140.
- (Added to NRS by 1973, 661, 1406; A 1989, 1115; 1993, 2598; 1995, 1592)

The NRS at 652.130, cited in the NRS at 652.235, states the following about the educational and experience requirements of laboratory directors and technical personal, and the requirements of a laboratory:

[E]xcept as otherwise provided in NRS 652.127, the Board, with the advice of the Medical Laboratory Advisory Committee, may prescribe and publish rules and regulations relating to:

1. The education, training and experience qualifications of laboratory directors and technical personnel.
2. The location and construction of laboratories, including plumbing, heating, lighting, ventilation, electrical services and similar conditions, to ensure the conduct and operation of the laboratory in a manner which will protect the public health.
3. Sanitary conditions within the laboratory and its surroundings, including the water supply, sewage, the handling of specimens and matters of general hygiene, to ensure the protection of the public health.
4. The equipment essential to the proper conduct and operation of a laboratory.
5. The determination of the accuracy of test results produced by a laboratory and the establishment of minimum qualifications therefor.

The NRS at 652.140, cited in the NRS at 652.235, deals with inspections, proficiency tests, and reports. The NRS at 652.140 states:

The Health Division may:

1. Inspect the premises and operations of laboratories;
2. Conduct proficiency tests to determine the accuracy of the test results of laboratories;
3. Require laboratories to submit reports to determine compliance with the provisions of this chapter; and
4. Require that the reports submitted by a laboratory be:
  - (a) Made under oath;
  - (b) Signed by the laboratory director; or
  - (c) Made under oath and signed by the laboratory director.

The NAC at 652.180 concerns the issuance and renewal of the certificate of registration of a laboratory operated by a licensed physician; this code states:

1. Except as otherwise provided in subsection 2, the Bureau shall issue a certificate of registration to each laboratory which registers with the Health Division pursuant to NRS 652.235. A certificate of registration issued pursuant to this section is effective for 2 years after the date of issuance.
2. The Bureau may issue one certificate of registration for any number of laboratories which test specimens to protect the public health if each laboratory:
  - (a) Is supervised by the Health Division or a health district; and
  - (b) Performs at least 1 but not more than 15 tests which are classified pursuant to 42 C.F.R. Part 493, Subpart A, as moderate complexity tests or waived tests.
3. An application for renewal of a certificate must be on a form provided by the Bureau.
4. The failure to apply for renewal within 30 days after a certificate expires will result in termination of the laboratory's authority to operate in this State.
4. Upon acceptance of an application for renewal, the Bureau shall provide the laboratory with a new certificate of registration.

Counsel asserts that registration of the medical clinic with the Nevada Department of Health requires only that the petitioner have a Country of Clark business license. The AAO disagrees. According to the statutory and administrative code provisions set forth above, the certificate of registration of a laboratory operated by a licensed physician requires more than having a Country of Clark business license. The NRS at 652.235 states that a licensed physician may operate a medical laboratory solely in connection with the diagnosis or treatment of his own patients if the medical laboratory: (1) is registered with the Health Division; (2) complies with the rules and regulations adopted by the Board pursuant to NRS 652.130; and (3) submits to the inspections and tests provided for in subsections 1 and 2 of NRS 652.140. The NRS at 652.130 requires compliance with credentialing standards of laboratory directors and technical personnel and with rules and regulations relating to the location, construction, and sanitary conditions of laboratories; the equipment used in the laboratory; and the accuracy of tests produced by a laboratory. Counsel states that the petitioner does not operate a licensed medical laboratory. Because the petitioner does not operate a registered medical laboratory in accordance with Nevada's laws, the petitioner has not established that it will employ the beneficiary in a specialty occupation or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(ii)(B)(I).

Beyond the decision of the director, the evidence of record reveals that the beneficiary is not qualified to perform the duties of a specialty occupation. The beneficiary's proposed duties are those of a medical technologist, which qualifies as a specialty occupation in the State of Nevada. The NRS at 652.420, which sets forth the activities and qualifications required of a clinical laboratory technologist, states:

1. A clinical laboratory technologist may:

- (a) Perform tests which require the exercise of independent judgment, under minimum supervision or review by the director or general supervisor, in those specialties for which he has had adequate education, training and experience and in which he has demonstrated a proficiency; and
- (b) Supervise, if necessary, the work of the medical technicians and laboratory assistants.

2. To qualify for a certificate as a clinical laboratory technologist, a person must:

- (a) Successfully complete a full course of study which meets all academic requirements for a bachelor's degree in medical technology from an accredited college or university, and pass a national examination for certification approved by the Board;
- (b) Successfully complete 3 years of academic study, with a minimum of 90 semester hours or the equivalent, at an accredited college or university in a curriculum involving biological or physical science and at least 12 months of training at a school of medical technology approved by a national accrediting agency, and pass a national examination for certification approved by the Board;
- (c) Successfully complete a course of study for a bachelor's degree in one of the chemical, physical or biological sciences at an accredited college or university, have at least 1 year of additional full-time experience or training in the specialty or subspecialty in which he performs tests, and pass a national examination for certification approved by the Board; or

(d) Pass the examination for clinical laboratory technologists given by the United States Department of Health and Human Services.

The record contains a document that shows that the beneficiary is approved to sit for an American Medical Technologist certification examination for a medical technologist position; this signifies that the beneficiary does not hold certification as a medical technologist and is thereby not qualified to perform the duties of a medical technologist. For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the services of 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 decision of the AAO is affirmed. The petition is denied.