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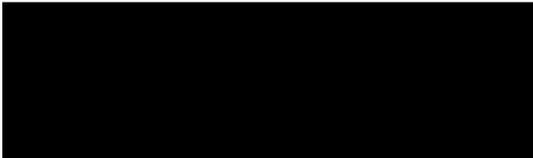
FILE: EAC 05 146 50599 Office: VERMONT SERVICE CENTER Date:

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, 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 The director's decision will be withdrawn. The petition will be remanded.

The petitioner provides healthcare diagnostic testing and support related services to the medical community. It seeks to employ the beneficiary as a medical technologist and endeavors 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 stating that the petitioner failed to submit a certificate from an approved credentialing agency verifying that the beneficiary's foreign education is comparable with that of an American healthcare worker of the same type pursuant to section 212(a)(5)(C) of the Act. On appeal, counsel submits a brief stating that the beneficiary is exempt from the credentialing requirements of the Act for healthcare workers because she will be working in a laboratory and not providing direct or indirect patient care pursuant to 8 C.F.R. § 1212.15(b).

The sole issue considered by the director was whether the beneficiary is subject to the credentialing requirements for healthcare workers under section 212(a)(5)(C) of the Act, 8 C.F.R. § 212.15. While the director properly found that the beneficiary is subject to the foreign health care worker certification requirement, the director improperly denied the petition because the beneficiary was found to be inadmissible to the United States. Before denying the petition, the director failed to consider the underlying eligibility requirements of the petition, that is, whether the position is a specialty occupation and whether the beneficiary is qualified to perform the duties of a specialty occupation.

The issue of the beneficiary's admissibility is determined by the State Department at the time of the visa interview, by the Department of Homeland Security at the time of the beneficiary's admission, and by the director in any extension request. The beneficiary's admissibility to the United States is not properly before the AAO in this case. However, the AAO will briefly address the petitioner's arguments that the beneficiary is not subject to the foreign health care worker certification requirement.

Section 212(a)(5)(C) of the Act provides, in pertinent part:

Uncertified foreign health-care workers. – Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services.

The applicable regulatory requirements at 8 C.F.R. § 212.15 state as follows:

(a) General certification requirements.

- (1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, any alien who seeks admission to the United States as an immigrant or as a nonimmigrant for the primary purpose of performing labor in a health occupation listed in paragraph (c) of this section is inadmissible to the United States unless the alien presents a certificate

from a credentialing organization, listed in paragraph (e) of this section.

....

(b) Inapplicability of the ground of inadmissibility. This section does not apply to:

....

(2) Aliens seeking admission to the United States to perform services in a non-clinical healthcare occupation. A non-clinical health-care occupation is one where the alien is not required to perform direct or indirect patient care. Occupations which are considered to be non-clinical include, but are not limited to, medical teachers, medical researchers, and managers of healthcare facilities;

....

(c) Covered health care occupations. With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she received his or her education or training.

(1) Licensed Practical Nurses, Licensed Vocational Nurses and Registered Nurses;

(2) Occupational Therapists;

(3) Physical Therapists;

(4) Speech – Language Pathologists and Audiologists;

(5) Medical Technologists (Clinical Laboratory Scientists);

(6) Physicians Assistants;

(7) Medical Technicians (Clinical Laboratory Technicians).

....

The petitioner seeks to employ the beneficiary as a medical technologist. That occupation is specifically listed in the regulation above as one that requires a certificate from one of the approved credentialing organizations set forth in 8 C.F.R. § 212.15(e). Counsel asserts that the petitioned occupation is exempt from credentialing under 8 C.F.R. § 212.15(b)(1). That regulation does not support counsel's assertion, however, and is inapplicable as it applies to immigrants (not nonimmigrants) and certain aliens seeking adjustment of status to that of a permanent resident. The present petition is for a nonimmigrant worker. The applicable regulation which provides relief from inadmissibility for non-clinical health care workers (nonimmigrants) is 8 C.F.R. § 212.15(b)(2). That regulation notes that workers performing services in non-clinical health care occupations will not be deemed inadmissible if they do not perform direct or indirect patient care. Examples of applicable workers who may benefit from this exemption are noted in the regulation: medical teachers; medical researchers; and managers of health care facilities. The occupation subject to the present Form I-129 petition is a clinical health care occupation, and is not similar to the listed occupations that are relieved from the admissibility requirement. As

noted above, medical technologists are specifically required by the cited regulation to obtain, as a condition of admission, a certificate from an approved credentialing organization. Thus, the beneficiary does not appear to be admissible to the United States.

As noted above, the alien's admissibility will be determined when she presents a certificate or certified statement to a consular officer at the time of visa issuance and to the Department of Homeland Security at the time of admission. 8 C.F.R. § 212.15(d)(1). While the director correctly found that the beneficiary was subject to the foreign health care worker certification requirement, the petition was improperly denied because the beneficiary was found to be inadmissible. This determination is not properly before the AAO in this case, where the beneficiary has not yet applied for the visa or for admission to the United States.

As the director has not addressed whether the position is a specialty occupation and whether the beneficiary is qualified to perform the duties of a specialty occupation, the petition will be remanded to the director to determine whether the offered position is a specialty occupation, whether the beneficiary is qualified to perform the duties of a specialty occupation, and whether the beneficiary has any license that may be required to work in the proffered position. If the petition is approvable, the question of the beneficiary's admissibility must be determined by the appropriate officers when the beneficiary seeks to obtain a visa and admission to the United States.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director to enter a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner, shall be certified to the AAO for further review.