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U.S. Citizenship
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Services

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EB 08 2005

FILE: WAC 03 052 54980 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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:

[REDACTED]

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.

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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 is a medical testing facility that seeks to employ the beneficiary as a quality assurance specialist. The petitioner, therefore, 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 because: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

The AAO will first discuss whether the proffered position is 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a quality assurance specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail reviewing and auditing practices and procedures to identify quality problems; implementing and maintaining effective quality systems; setting and ensuring quality improvement and performance goals; overseeing and assisting laboratory technicians and providing training; and compiling relevant data and information and presenting findings, suggestions, and work activities for executive-level review. The petitioner's August 12, 2003 letter expounded on the duties of the proffered position such as the procedures involved including microscopic examinations, hemoglobin tests, fluid examinations, and white, red, and differential blood counts. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in a related medical field.

The director determined that the proffered position was not a specialty occupation. Referring to the *Occupational Outlook Handbook* (the *Handbook*), the director stated that the beneficiary's duties are performed by a clinical laboratory technologist and technician, occupations that do not require a bachelor's degree for entry into the field. The director found that the evidence failed to show that the job offered could not be performed by an experienced person whose educational training fell short of a baccalaureate degree. The director stated that the beneficiary, who holds a bachelor's degree in nursing, was not qualified to perform the duties of the proffered position had it been determined to be a specialty occupation. According to the director, the position requires a bachelor's or master's degree in biological science or a discipline described by the Employment Development Department (EDD) in the submitted evidence.

On appeal, counsel states that the director improperly ignored the submitted evidence which established that the proffered position is a specialty occupation. Counsel refers to the evidence from the EDD and the job announcements to show that the petitioner's degree requirement is common to the industry. Counsel contends that the proposed duties have a highly specialized and complex nature, and stresses that the beneficiary will review and audit practices and procedures, devise quality control mechanisms, engage in analysis of processes, and oversee laboratory technicians. Counsel asserts that the beneficiary's duties are more complex and specialized than those of a clinical laboratory technologist and technician, and states that the *Handbook* actually describes clinical laboratory technologists and technicians as normally requiring a bachelor's degree. According to counsel, the beneficiary, a holder of a bachelor's degree in nursing, is qualified for the proffered position because nursing is a health related scientific discipline, and the *Handbook* and EDD state that a bachelor's degree in biosciences and scientific disciplines is a prerequisite for entry into a clinical laboratory technologist and technician job. Counsel contends that the *Handbook* reveals that it is not uncommon for a nurse to be employed as a quality assurance specialist.

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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

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.

A review of the *Handbook* discloses that the director correctly determined that the duties of the proffered position are performed by a clinical laboratory technologist and technician. The *Handbook* states:

Clinical laboratory technologists generally have a bachelor's degree in medical technology or in one of the life sciences, or they have a combination of formal training and work experience. They 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.

The *Handbook* continues:

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.

Pursuant to California law, the Department of Health Services (the department) licenses clinical laboratory scientists for both generalist and specialty categories. The Cal. Bus. & Prof. Code §1210 indicates that persons with a baccalaureate-level license may serve as technical consultant, technical supervisor, and general supervisor when they have adequate experience or training, and that a clinical laboratory supervisor is licensed pursuant to Cal. Bus. & Prof. Code §§1261, 1261.5, and 1262. The Cal. Code Regs. Public Health Title 17 § 1036.1 describes the responsibilities of a clinical laboratory supervisor, including the day-to-day supervision of the laboratory's operation and personnel, and the position's license requirements.

According to Cal. Bus. & Prof. Code §1261, the department:

[S]hall issue a clinical laboratory scientist's or a limited clinical laboratory scientist's license to each person who is a lawful holder of a baccalaureate or an equivalent or higher degree, who has applied for the license on forms provided by the department and has met the requirements of this chapter and any reasonable qualifications established by regulations of the department.

However, the department indicates that it may make an exception to the degree requirement for the clinical laboratory scientist's license only if:

[T]he applicant for the license has completed a minimum of two years of experience as a licensed trainee or the equivalent thereof, as determined by the department, doing clinical laboratory work embracing the various fields of clinical laboratory activity in a clinical laboratory approved by the department. In addition, the applicant applying under this section must have 90 semester hours or equivalent quarter hours of university or college work or the equivalent thereof, as may be determined by the department, which shall have included at least 23 semester hours or equivalent quarter hours of science courses as specified by regulations of the department. Additional college or university work that includes courses in the fundamental sciences may be substituted for one of the two years of experience in the ratio of 30 semester hours or equivalent quarter hours for each year of experience.

The Cal. Bus. & Prof. Code §1261.5 indicates that the department may issue limited clinical laboratory scientist's licenses in chemistry, microbiology, toxicology, histocompatibility, immunohematology, genetic molecular biology, cytogenetics, or other areas of laboratory specialty or subspecialty. To qualify for admission to the examination for a special clinical laboratory scientist's license, an applicant is required to have graduated from a college or university maintaining standards equivalent, as determined by the department, to those institutions accredited by the Western Association of Schools and Colleges or an essentially equivalent accrediting agency with a baccalaureate or higher degree with a major appropriate to

the field for which a license is being sought; have one year of full-time postgraduate training or experience in the various areas of analysis in the field for which a license is being sought in a laboratory that has the appropriate license; and whenever a limited clinical laboratory scientist's license is established for a specific area of specialization, the department may issue the license without examination to applicants who had met standards of education and training, defined by regulations, prior to the date of the adoption of implementing regulations.

The Cal. Bus. & Prof. Code §1262 discusses the examination and licensing.

The Cal. Bus. & Prof. Code §1260.3 describes the license and educational requirements of technicians and the scope of the position's duties. It indicates that a technician must hold an associate degree or an equivalent or higher degree in chemical, physical, biological, or clinical laboratory science, which includes a minimum of 36 semester units of physical or biological sciences; or have completed 60 semester (90 quarter) units from an accredited college or university, with 36 semester units in physical or biological sciences; or have graduated from a medical laboratory technician training program accredited by the National Accrediting Agency for Clinical Laboratory Sciences or other recognized accrediting program approved by the department; or graduation from an advanced military medical laboratory specialist program approved by the department; and have applied for a license.

Based on the above passages, the state of California does not require a baccalaureate degree in a specific specialty for a clinical laboratory technologist and a technician under Cal. Bus. & Prof. Code §1261; however, a baccalaureate degree in a specific specialty is required under Cal. Bus. & Prof. Code §1261.5. Based on the evidence in the record, the AAO cannot determine whether the proffered position would require a baccalaureate degree in a specific specialty pursuant to Cal. Bus. & Prof. Code §1261.5. Accordingly, the evidence in the record is insufficient to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, quality assurance specialist.

The submitted job postings and evidence from EDD are not persuasive in establishing the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The quality control analyst in the EDD posting works in the biotechnology industry and is charged with determining whether products are produced in accordance with specifications. The petitioner does not develop biotechnology products and the beneficiary will not test product specifications. The proffered position differs from the Clinical Research Management, Inc. posting because the beneficiary will not provide environmental monitoring or rotate in-house water. Nor do the beneficiary's duties involve wastewater quality control as required by The Orange County Sanitation District posting. The proffered position differs from the Kelly Scientific Resources posting: the petitioner is not in the chemical industry, and the beneficiary's duties do not entail testing production samples for a chemical company. For the reasons stated above, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

Based on the evidence in the record, the AAO cannot determine whether the proffered position would require a baccalaureate degree in a specific specialty pursuant to Cal. Bus. & Prof. Code §1261.5. Consequently, the evidence in the record is insufficient to establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 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. Again, based on the evidence in the record, the AAO cannot determine whether the proffered position would require a baccalaureate degree in a specific specialty pursuant to Cal. Bus. & Prof. Code §1261.5. Accordingly, the evidence in the record is insufficient to 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.

As related in the discussion above, 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 on this ground.

The AAO will now discuss whether the beneficiary is qualified to perform the proffered position had it been determined to be a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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.

As already discussed, Cal. Bus. & Prof. Code §1261 imposes certain educational and training requirements for applicants seeking a clinical laboratory scientist's license. Under Cal. Bus. & Prof. Code §1261, the proffered position would not qualify as a specialty occupation; nonetheless, Cal. Bus. & Prof. Code §1261 indicates that the beneficiary is required to hold a license. No evidence in the record indicates the beneficiary possess a clinical laboratory scientist's license. Therefore, the beneficiary is not qualified to perform the duties of the proffered position.

Under Cal. Bus. & Prof. Code §1261.5, the proffered position qualifies as a specialty occupation because to qualify for admission to the examination for a special clinical laboratory scientist's license, an applicant is required to have graduated from a college or university maintaining standards equivalent, as determined by the department, to those institutions accredited by the Western Association of Schools and Colleges or an essentially equivalent accrediting agency with a baccalaureate or higher degree with a major appropriate to

the field for which a license is being sought. The applicant must also have one year of full-time postgraduate training or experience in the various areas of analysis in the field for which a license is being sought in a laboratory that has the appropriate license. There is no evidence in the record indicating that the beneficiary satisfied these requirements. As such, the beneficiary is not qualified to perform the duties of the proffered position.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.