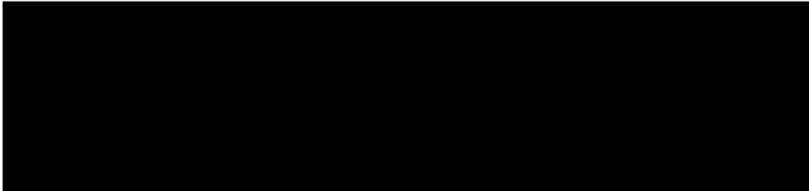


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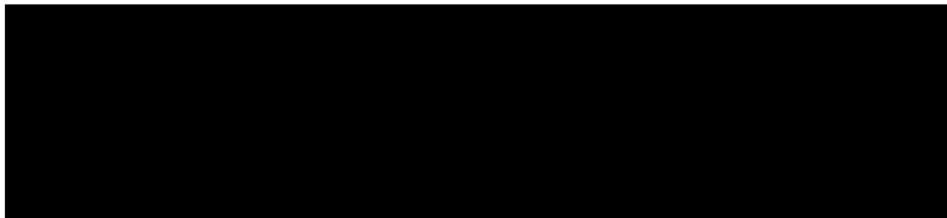
FILE: WAC 03 140 51353 Office: CALIFORNIA SERVICE CENTER Date:

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 appeal will be dismissed. The petition will be denied.

The petitioner is a laboratory and seeks to employ the beneficiary as a medical technology consultant. 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 because the beneficiary is not qualified to perform the services of the offered specialty occupation. On appeal, counsel submits a brief stating that the proffered position does not require a license and the beneficiary is qualified to perform the duties of the proffered position.

The issue to be discussed in this proceeding is whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and  
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As previously stated, the director denied the petition because the beneficiary is not licensed to work in the proffered position in California. Thus, it is implicit in the director's decision that the proffered position qualifies as a specialty occupation. The AAO agrees. The duties of the proffered position, as stated by the petitioner on appeal, are essentially those of a Waived Laboratory Supervisor. Section 1036.3 of the California Code of Regulations states as follows:

S 1036.3 Waived Laboratory Supervisor

- (a) A laboratory director of a clinical laboratory performing waived tests may delegate or reappportion his or her responsibilities, as allowed by Section 1209 of the Business and Professions Code, by utilizing a waived laboratory supervisor. . . . (d), a waived laboratory supervisor shall:
  - (1) Be listed in Section 1206.5 of the Business and Professions Code; and

- (2) Possess at least a baccalaureate degree from an accredited college or university; and
- (3) Have at least one year of training or experience in clinical laboratory testing in those tests or examinations that he or she will be supervising; and
- (4) Document competency in those tests he or she will be supervising to the laboratory director at least semiannually during the first year and annually, or whenever new instrumentation is added, thereafter.

By statute, the proffered position requires a baccalaureate level education. It is, therefore, a specialty occupation.

Section 1206.5 of the California Business and Professions Code further provides:

§ 1206.5. Waived tests and examinations; tests and examinations of specified complexities; performance by authorized persons.

- (a) Notwithstanding subdivision (b) of Section 1206 and except as otherwise provided in Section 1241, no person shall perform a clinical laboratory test or examination classified as waived under CLIA unless the clinical laboratory test or examination is performed under the overall operation and administration of the laboratory director, as described in Section 1209, including, but not limited to, documentation by the laboratory director of the adequacy of the qualifications and competency of the personnel, and the test is performed by any of the following persons:
  - (1) A licensed physician and surgeon holding a M.D. or D.O. degree;
  - (2) A licensed podiatrist or a licensed dentist if the results of the tests can be lawfully utilized within his or her practice;
  - (3) A person licensed under this chapter to engage in clinical laboratory practice or to direct a clinical laboratory;
  - (4) A person authorized to perform tests pursuant to a certificate issued under Article 5 (commencing with Section 101150) of Chapter 2 of Part 3 of Division 101 of the Health and Safety Code.
  - (5) A licensed physician assistant if authorized by a supervising physician and surgeon in accordance with Section 3502 or Section 3535.
  - (6) A person licensed under Chapter 6 (commencing with Section 2700).
  - (7) A person licensed under Chapter 6.54 (commencing with Section 2700).
  - (8) A perfusionist if authorized by and performed in compliance with Section 2590.
  - (9) A respiratory care practitioner if authorized by and performed in compliance with Chapter 8.3 (commencing with Section 3700).
  - (10) A medical assistant, as defined in Section 2069, if the waived test is performed

pursuant to a specific authorization meeting the requirements of Section 2069.

- (11) A pharmacist, as defined in Section 4036, if ordering drug therapy-related laboratory tests in compliance with clause (ii) of subparagraph (A) of paragraph (5) of, or subparagraph (B) of paragraph (4) of, subdivision (a) of Section 4052, or if performing skin puncture in the course of performing routine patient assessment procedures in compliance with Section 2052.1.
- (12) Any other person performing nondiagnostic testing pursuant to Section 1244.

All professions cited in the above regulation require licensing or registration, including laboratory directors under number three (3) of the regulation. As noted in Section 1036.3 of the California Code of Regulations, a clinical laboratory director may delegate or reapportion his or her responsibilities to a waived laboratory supervisor. The waived laboratory supervisor shall be listed in the Business and Professions Code, hold a bachelor's degree, have at least one year of experience in the testing to be supervised, and document competency in the tests to be supervised. A waived laboratory supervisor must hold a license to perform the duties of that position, which include supervision of licensed individuals performing laboratory tests. The petitioner was given an opportunity to provide a statement from the California Department of Health Services indicating that the duties of the position did not require licensing under California law, but failed to do so. Thus, the AAO agrees with the finding of the director, that the duties of the proffered position require a license under California law.

On appeal, the petitioner submits a copy of the beneficiary's clinical laboratory scientist license. That license was issued on August 18, 2003, subsequent to the filing of the Form I-129 petition. The license will not, however, establish the beneficiary's eligibility to perform the duties of the proffered position. A petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The director's decision will not be disturbed.

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 and the appeal shall accordingly be dismissed.

**ORDER:** The appeal is dismissed. The petition is denied.