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U.S. Citizenship  
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Services

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FILE: WAC 03 227 50302 Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005

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, Director  
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 full-service medical laboratory that seeks to employ the beneficiary as a clinical/laboratory technologist. 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 on the basis that the petitioner had not established that the proposed position qualifies for classification as a specialty occupation and that the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a clinical/laboratory technologist. Evidence of the beneficiary's duties includes: the Form I-129; the documents accompanying the Form I-129; the petitioner's letter of support; the RFE response; the documents accompanying the RFE response; the Form I-290B; and the appellate brief. The petitioner's letter of support set forth the following description of the duties of the proposed position:

Perform laboratory tests, clinical procedures, and biochemical analysis of body fluids such as blood, urine, and spinal fluids. Apply basic scientific theory and technical skills in the operation of chemical analyzer instruments, instruments for bacteriological testing[,] and diagnostic instruments. Conduct tests to determine presence of normal and abnormal components. Perform blood group, type, and compatibility tests for transfusion purposes. Analyze test results and record findings.

The petitioner provided the following additional evidence in the RFE response:

The beneficiary would be performing the above duties 40 hours per week. About 70 percent of the beneficiary's work hours would be involved in performing the tests and procedures on body fluids or tissue, using various testing and diagnostic instruments. The remaining 30 percent of the beneficiary's work hours would be involved in analysis and recording findings. Both parts of the job would involve the application of basic science theory and technical skills acquired from a 4-year Bachelor's degree program in Medical Technology.

The director denied the petition, stating:

In [the] instant case, the job duties described by the petitioner do not appear to be those usually performed by medical technologists. In the petitioner's words, the beneficiary will apply 'basic scientific theory' to complete the laboratory tests. Furthermore, a great deal of time will be spent operating standard laboratory equipment, in line with the medical technician description provided by [the] *OOH*. The petitioner's response to the

Service's RFE reveals that 70% of the beneficiary's efforts will be spent, 'performing the tests and procedures on body fluids, using various testing and diagnostic instruments.' Only 30% of his time would be spent on analysis. Rather, the lack of complexity fits duties usually performed by medical [technicians].

On appeal, counsel contends that the director erred in denying the petition. Counsel asserts the following:

The fact that the [b]eneficiary will be handling laboratory equipment and performing clinical tasks for 70 percent of his work-time *versus* analyzing and recording findings for 30 percent of his work-time, does not make his job duties any less complex [emphasis in original]. He would be utilizing scientific theory and technical skills in clinical/laboratory tasks just as much [as] he would be utilizing scientific theory and technical skills in analyzing and writing/recording tasks. Therefore, the inference made by B.C.I.S. [sic] regarding the lack of complexity of the position offered based on the amount of work-time spent on clinical/laboratory tasks is not warranted.

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.

In determining whether a position qualifies as a specialty occupation, Citizenship and Immigration Services (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 *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

At issue on appeal is whether the duties of the proposed position are more closely aligned to those of medical technologists or medical technicians. As a preliminary matter, it is noted that the *Handbook* labels a medical technologist a clinical laboratory technologist and a medical technician as a clinical laboratory technician.

In the introduction to its discussion of the two positions, the *Handbook* offers a general description of the duties common to both technologists and technicians:

Clinical laboratory personnel examine and analyze body fluids, tissues, and cells. They look for bacteria, parasites, and other microorganisms; analyze the chemical content of fluids; match blood for transfusions; and test for drug levels in the blood to show how a patient is responding to treatment. These technologists also prepare specimens for examination, count cells, and look for abnormal cells. They use automated equipment and instruments capable of performing a number of tests simultaneously, as well as microscopes, cell counters, and other sophisticated laboratory equipment. Then they analyze the results and relay them to physicians. With increasing automation and the use of computer technology, the work of technologists and technicians has become less hands-on and more analytical.

The complexity of tests performed, the level of judgment needed, and the amount of responsibility workers assume depend largely on the amount of education and experience they have.

The *Handbook* provides the following information regarding the duties of a clinical laboratory technologist:

*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* provides the following information regarding the duties of a clinical laboratory technician:

*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.

The *Handbook* makes no mention of the percentages of time that individuals working in the two positions would spend performing tests and procedures versus analyzing the results of those tests and procedures. The *Handbook's* discussion of the duties of clinical laboratory technologists specifically mentions that they entail performing tests.

The AAO finds no evidence in the record to support the director's contention that the beneficiary would be operating "standard laboratory equipment." It also appears that the director relied heavily upon the petitioner's use of the phrase "basic scientific theory" in the denial.

The AAO finds that the duties of the proposed position are most closely aligned to those of clinical laboratory technologists. As such, the AAO next turns to the *Handbook's* discussion of whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* reports the following educational requirements for those seeking employment as clinical laboratory technologists:

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; although it is possible to qualify through a combination of education, on-the-job, and specialized training.

Although the *Handbook* does report that it is possible to qualify through a combination of education and experience, the fact that a degree is "usually required" rises to the "normally required" criterion imposed by the regulation.

Thus, the position satisfies the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the occupation. The AAO therefore agrees with the petitioner's contention that the proposed position qualifies for classification as a specialty occupation.

The AAO next turns to the issue of whether the beneficiary is qualified to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), in order to qualify to perform services in a specialty occupation, an 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.

The beneficiary earned a bachelor's degree in medical technology from the University of Baguio, in the Philippines, in 1989. The petitioner attempts to prove the beneficiary is qualified to perform the duties of a specialty occupation under the second criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C), which requires a demonstration that the beneficiary holds 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under this second criterion 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.

The record contains an evaluation of education issued by [REDACTED] dated July 31, 2003. [REDACTED] has determined that the beneficiary's foreign degree is equivalent to a bachelor's degree in medical technology from an accredited institution of higher education in the United States. Thus, the beneficiary's foreign education satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), so he therefore satisfies the second criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C) as well.

However, the petition may not be approved. When the director denied the petition, his disagreement with the petitioner's contention that the proposed position qualifies as a specialty occupation was only the first of two reasons for the denial. The beneficiary's lack of California licensure was the second basis of the denial.

No evidence has been submitted on appeal to overcome this second basis of denial.

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.

Pursuant to 8 C.F.R. § 214.2(h)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

(A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.

(E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

According to the *Handbook*, “[s]ome States require laboratory personnel to be licensed or registered. Information on licensure is available from State departments of health or boards of occupational licensing.”

The requirements for licensure in California can be found at the website of the California Department of Health Services, Division of Laboratory Science.<sup>1</sup> Licensure is required.

The record does not reflect that the beneficiary possesses California licensure. Nor does it appear that temporary licensure, as contemplated by the regulations, is available in California. Neither counsel nor the petitioner has addressed this issue.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Thus, the beneficiary is not qualified to perform the duties of a specialty occupation. The petition therefore cannot be approved.

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.

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<sup>1</sup> California Department of Health Services, Division of Laboratory Science, <http://www.dhs.ca.gov/ps/ls/default.htm> (accessed June 16, 2005).