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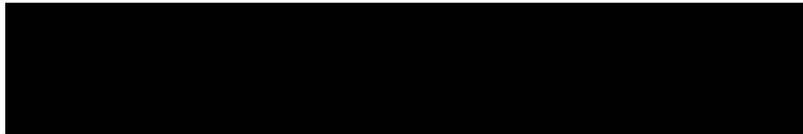
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FILE: LIN 04 176 50865 Office: NEBRASKA SERVICE CENTER Date: **SEP 13 2006**

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the nonimmigrant visa petition. 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 non-profit hospital. It seeks to extend the employment of the beneficiary as a medical technologist. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On November 9, 2004, the director denied the petition determining that the petitioner had not provided the beneficiary's required certification as a medical technologist in accordance with section 212(a)(5)(C) of the Act. The director observed that Citizenship and Immigration Services (CIS) had requested evidence that the alien had received a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS) or an equivalent credentialing organization; but that the petitioner's response did not include the required certificate.

The issue before the AAO is whether the petitioner's failure to submit the certification requested by the director is a basis for denying the instant petition.

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.

On July 25, 2003, the Department of Homeland Security (DHS) published a final regulation implementing this section of the Act. The rule establishes that certain nonimmigrant health care workers are required to obtain certification in accordance with section 212(a)(5)(C) of the Act. On September 22, 2003, the Associate Director for Operations issued a memorandum providing guidance to the final regulation and updating the Adjudicator's Field Manual AD 03-31. *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31*; Memorandum of William R. Yates, Associate Director for Operations, CIS, DHS, (September 22, 2003) ("Yates Memo"). The Adjudicator's Field Manual was expanded to include a new chapter at 30.12. The revision of the Adjudicator's Field Manual at 30.12 in pertinent part reads:

(b) Health Care Occupations Requiring Certification. The health care occupations requiring certification are nurses (licensed practical nurse, licensed vocational nurses, and registered nurses), physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants.

(f) Implementation Dates.

- (1) Prior to July 26, 2004, the DHS will admit and approve applications for extension of stay or change of status for nonimmigrant health care workers without requiring certification. The temporary admission, extension of stay, or change of status of such a nonimmigrant will be subject to the following conditions:
  - (i) The admission, extension of stay, or change of status may not be for a period longer than 1 year from the date of the decision, even if the relevant provision of 8 CFR 214.2 would ordinarily permit the alien's admission for a longer period;
  - (ii) The alien must obtain the requisite health care worker certification within 1 year of the date of decision to admit the alien or to extend the alien's stay or change the alien's status; and
  - (iii) Any subsequent petition or application to extend the period of the alien's authorized status or change the alien's status must include proof that the alien has obtained the health care worker certification if the extension or stay or change of status is sought for the primary purpose of the alien's performing labor in an affected health care occupation. If the alien is adjusting status, all eligibility requirements must be met at the time of filing the application for adjustment of status. 8 CFR 103.2(b)(12). Therefore, a health care worker in one of the affected occupations must submit evidence of certification at the time the adjustment of status is filed.
- (2) On or after July 26, 2004, if an alien seeks admission to the United States, a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if his or her primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations. The DHS will then exercise its discretion to waive the certification requirement only on a case[-]by[-]case basis.

The petitioner submitted the Form I-129 on June 1, 2004. On September 14, 2004, the director requested evidence that the beneficiary had been certified by the CGFNS or an equivalent credentialing organization. In its September 22, 2004 response, the petitioner provided copies of two certificates issued to the beneficiary, one from the American Medical Technologists and the other from the American Medical Technologists Institute for Education recognizing her completion of its continuing education module on microbiology. The petitioner did not, however, submit the healthcare worker certification requested by the director. On appeal, the petitioner offers no additional documentation related to the beneficiary.

Based on the record before it, the AAO finds the petitioner has not complied with the filing requirement at 8 C.F.R. § 212.15(n)(2)(iii), which after July 26, 2004 requires any petition or application filed to extend the

period of an alien's authorized stay or change his or her status to include proof that the alien has obtained certification from the CGFNS or an equivalent credentialing organization. Currently, the only organizations authorized to issue health care worker certifications, other than the CGFNS, are those identified in the preceding regulatory language – the National Board for Certification in Occupational Therapy for occupational therapists and the Foreign Credentialing Commission on Physical Therapy for physical therapists. Only the CGFNS may certify individuals in all seven health care occupations. *See* 8 C.F.R. § 212.15(e).

Pursuant to the regulation at 8 C.F.R. § 103.2(b)(1):

An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form . . . .

As the petitioner has failed to provide a CGFNS-issued health care worker certification for the beneficiary, the Form I-129 it has filed on behalf of the beneficiary may not be approved. Accordingly, the appeal will be dismissed.

On appeal, counsel for the petitioner asserts: (1) that the director's decision before the time had expired to provide the requested evidence violated due process; (2) that the rule promulgated at 8 C.F.R. § 212.15(c) applies to immigrants not non-immigrants; (3) that the certification process should not apply to this beneficiary as she entered the United States as a nonimmigrant in June 2002, the regulation at 8 C.F.R. § 212.15(c) was not effective until September 23, 2003, and the regulation should not be applied retroactively; and (4) that the beneficiary, as a laboratory technologist, performs duties that are substantially similar to a medical researcher, an occupation not subject to the ground of inadmissibility found at section 212 (a)(5)(C) of the Act.

Counsel's assertions are not persuasive. The director in the RFE informed the petitioner that it could submit all the evidence requested, some or none of the evidence requested and ask for a decision based on the record, or could withdraw the petition. He specifically noted, however, that the petitioner was required to submit all of the evidence at one time, that a submission of only part of the evidence requested would be considered a request for a decision based upon the record. 8 C.F.R. § 103.2(b)(11). Accordingly, the director, once he received the petitioner's September 22, 2004 response to the RFE, considered the record to be complete and made his decision on the information therein.

With regard to counsel's assertion that the certification requirement does not apply to non-immigrants, he misunderstands the rule promulgated at 8 C.F.R. § 212.15(c). The regulation at 8 C.F.R. § 212.15(a) states in pertinent part:

(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 care occupation listed in paragraph (c) of this section is inadmissible unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

The regulation is applicable to both immigrants and non-immigrants.

Counsel also misunderstands the implementation language at 8 C.F.R. § 212.15(n) as it affects the instant petition. As referenced above, CIS has established the implementation dates for the required certification for medical technologists. In this matter, the director's decision was issued after July 26, 2004. Thus, the petitioner's request to extend the beneficiary's status is subject to the provisions of section 212(a)(5)(C) of the Act. The AAO finds no reason to disturb the director's decision in this regard. The petitioner submitted its request to extend the beneficiary's status on June 1, 2004, some time after the September 23, 2003 effective date of the provision. The provision is not being applied retroactively in this matter.

Finally, the petitioner's attempt to turn the beneficiary's duties into that of a "medical researcher," an occupation not subject to section 212(a)(5)(C) of the Act, is not persuasive. The description of the beneficiary's duties is indicative of an individual providing indirect health care to patients. Moreover, the beneficiary's education, as substantiated by her American Medical Technologists certificate, her certificate that recognizing completion of the American Medical Technologists Institute for Education's continuing education module on microbiology, and her diploma issued by the University of Santo Tomas, The Catholic University of the Philippines, conferring a bachelor's of science medical technology degree, is in the field of medical technology, not medical research. The record is not persuasive in establishing otherwise. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO also notes that the petitioner's failure to submit a health care worker certification for the beneficiary renders her inadmissible to the United States. While the issue of the beneficiary's inadmissibility is not within the AAO's jurisdiction, the AAO notes that the regulation at 8 C.F.R. § 214.1(a)(3) requires every non-immigrant alien who applies for admission to or an extension of stay in the United States to establish that he or she is admissible or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. Based on the evidence of record, the beneficiary appears to be inadmissible to the United States under the ground set forth at section 212(a)(5)(C).

The burden of proof in this proceeding 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.