

identifying data deleted to
prevent clearly unwarranted
disclosure of personal information

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D1



FILE: WAC 03 049 50291 Office: CALIFORNIA SERVICE CENTER Date: 5/1/03

IN RE: Petitioner: [Redacted]
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:

SELF-REPRESENTED

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 staffing company that seeks to employ the beneficiary as a dental health service manager. 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 proffered position is not a specialty occupation. The director also found that the petitioner had not complied with the terms of its previously approved petitions. On appeal, the petitioner submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (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 dental health service manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 26, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing, implementing and maintaining policies and procedures related to dental health services; planning, directing, coordinating and supervising the delivery of dental health services to patients at dental clinics; preparing a dental health service management report; and providing assistance to the controller in the preparation of the company's annual budget. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in any medical, dental or healthcare-related field.

The director found that the proffered position was not a specialty occupation. The director also stated that the petitioner did not establish that it would actually be employing the beneficiary. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that it would be the actual employer of the beneficiary. The petitioner also states that its record of filing numerous petitions relates to its business of staffing other organizations, and that it has a high turnover rate. The petitioner states that a license is not required for the proffered position. The petitioner asserts that previous petitions, which were identical to the current petition, were approved.

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 turns first to 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.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. While the *Handbook* states that the general requirement for a health services manager is a master's degree, and a bachelor's degree is adequate for some entry-level positions in smaller organizations, it also states, "Physician's offices and some other facilities may substitute on-the-job experience for formal education." The petitioner provided no information about its client's business or worksite, so there is no evidence in the record to establish that it is a type of business that would require a baccalaureate degree in a specialty rather than experience to fill the proffered position. Thus, the petitioner has failed to establish the first criterion.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. There is no evidence in the record regarding the petitioner's client's past hiring practices. In *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

Although the record contains a staffing agreement between the petitioner and its client, where the beneficiary will actually work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform for the client will qualify as a specialty occupation, nor what the client's requirements are for an individual filling the proffered position.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

Regarding the petitioner's assertion that identical petitions were previously approved, the record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director also found that the petitioner had not actually employed many of the individuals for whom it had previously received approval, and when it did employ them, they were frequently paid at a significantly lower rate than had been asserted on the Form I-129 at the time of filing. The petitioner did not directly address this issue on appeal, and did not overcome the director's findings.

An H-1B alien is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case, the petitioner did not establish that the beneficiary would be coming to the United States to perform services in a specialty occupation.

Beyond the decision of the director, the AAO notes that the beneficiary is not qualified to perform an occupation that requires a license. California Business and Professions Code, Section 1625(b) states that a person practices dentistry within the meaning of the chapter if he or she "[p]erforms, or offers to perform an operation or diagnosis of any kind," and Section 1625(e) states that a person is considered to be practicing dentistry if he or she "[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.¹

The duties of the proffered position include planning, directing, coordinating and supervising the delivery of dental health services, duties that are clearly related to providing care for the patient. In addition, the duties include developing, implementing and maintaining policies and procedures, which would fall under duties of managing a dental office. As a result, a license would be required, since the duties are included in the California Code's definition of practicing dentistry.

The AAO also notes that the beneficiary is not qualified to perform the services of a specialty occupation. The educational equivalency submitted by the petitioner states that the beneficiary has the equivalence of "[f]our years of study in a dentistry program with a one-year compulsory rotating internship," but does not state that this course of study is equivalent to a bachelor's degree from a U.S. college or university, as required by the regulations in order to establish eligibility to perform a specialty occupation. For this additional reason, the petition may not 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.

¹ www.leginfo.ca.gov, accessed 3/16/05.