

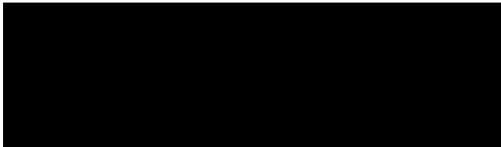
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U.S. Citizenship
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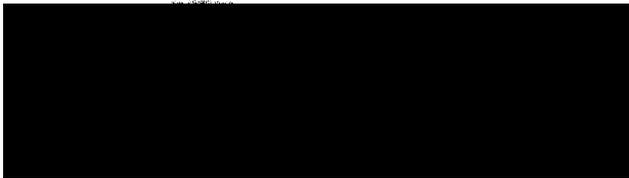
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FILE: WAC 03 153 53755 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2005

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a dental clinic. It seeks to employ the beneficiary as a dentist specialist/researcher and to classify her 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 ground that the proffered position is not 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.

As provided in 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 (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In a letter accompanying its petition (Form I-129) the petitioner described itself as a dental clinic with two employees providing routine dental examinations and oral care, emergency treatment and surgery, and a full range of diagnostic services. The petitioner indicated that it needed the services of a full-time dental specialist/researcher "to direct the activities of the dental practice in accordance with accepted national standards, administrative policies and OSHA [Occupational Safety and Health] compliance guidelines." The duties of the position were described as follows:

[The beneficiary] will maintain complete dental reports and related documentation of the patients. She will examine patients' records to compose complete dental reports for the ultimate approval of the dentist. She will keep up to date on the latest dental research results and utilize the dental library to perform the duties. She will coordinate dental care evaluation and develop criteria and methods for such evaluation/reports. She will confer with clinical staff to formulate policies and recommend procedural changes. She will confer with the personnel regarding operational policies and recommend procedural changes. [The beneficiary] will be responsible for setting up a system of operation and activities to be implemented in the dental office and laboratory that will assure a smooth flow of work and improve overall efficiency of the business.

The petitioner indicated that the position does not involve any direct patient care, which the beneficiary could not perform in any event because she is not a licensed dentist in the State of California. According to the petitioner, however, the position requires a strong dental background, the knowledge of which can only be obtained by attending a dental school. The beneficiary earned a doctor of dental medicine degree from Centro Escolar University in Manila, the Philippines, on October 16, 1990.

In a subsequent letter responding to the RFE, the petitioner provided a more detailed description of the proffered position:

The research that is going to be conducted involves complex issues and topics that require a firm understanding of Oral Physiology and Oral Anatomy among other areas. As a researcher the Beneficiary will not be merely researching what type of toothpaste is superior. The research will involve complex and life threatening diseases. Areas included in such research are the effects pregnancy has on oral health, such as pregnancy gingivitis and tumors. In addition the research will include the effects that diabetes has on oral care, such as increased infections and periodontal disease. Furthermore, many instances of diabetes can be detected from an oral examination, and as such, the Petitioner must know what symptoms to look for.

Additionally, the recent trend in herbal supplements and medications has caused the dental industry to monitor and research the effect said medications can have on oral care. Reaction with these supplements can interfere with medications the dentist prescribes and therefore these effects must be researched to avoid any dangerous combinations of medications. To further protect the patients the Beneficiary will be required to research the most current infection control procedures as prescribed by the Centers for Disease Control and Prevention and the American Dental Association.

Finally, research in the area of Oral Cancer is of the utmost importance as oral cancer accounts for roughly 9,000 deaths annually. The Beneficiary will be responsible for researching early detection methods of this life threatening cancer.

The petitioner reiterated its contention that the education and training needed to perform the job require a degree in dental medicine, which the beneficiary possesses.

The director determined that the position offered to the beneficiary is not a specialty occupation. Specifically, the director found that the record failed to establish that baccalaureate level training was required to perform the duties of the proffered position, or that other dental offices similar to the petitioner's require a dental specialist/researcher to possess at least a baccalaureate degree, or that the petitioner has in the past required employees in the position to have a baccalaureate or higher degree in a specialized area, or that the specific duties of the position are so specialized and complex that they can only be performed by an individual with a specialty degree. The director concluded that the proffered position did not qualify as a specialty occupation under any of the four criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel restated the petitioner's argument that the specialized nature of the dental specialist/researcher position requires the ability to analyze patient records and conduct dental research, which requires the knowledge of a doctoral degree in dental medicine like that earned by the beneficiary. Counsel points out that dentists have advanced degrees in a specialty area – as discussed in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, which CIS routinely consults as an authoritative source of information about the duties and educational requirements of particular occupations – which makes them a specialty occupation. The proffered position, however, does not involve any direct dental care requiring a dental degree or a dental license. Thus, the *Handbook's* entry for dentists does not establish that the dental specialist/researcher position is a specialty occupation. Further, no evidence has been submitted on appeal to refute the director's finding that a baccalaureate or higher degree in dentistry or a related specialty is not the normal minimum requirement for entry into the position proffered by the petitioner. The AAO notes that there is considerable discrepancy between the initial job description in the letter accompanying the petition, in which the duties of the position were described largely as administrative and office support functions, and the response to the RFE, in which far more emphasis was placed on the job's research functions. Even accepting the second description, however, it is not clear from the evidence that an experienced dental assistant – *i.e.*, an individual with less than a baccalaureate or higher degree in dentistry or a related specialty – could not perform the services of the job. Thus, the record fails to establish that a baccalaureate or higher degree is the normal minimum requirement for entry into the proffered position, as required to meet the first alternative criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Counsel asserts that the requirement of a specialty degree is common in the industry for similar positions, which meets the second alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Factors typically considered by CIS under this regulatory criterion are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). Counsel refers to previously submitted internet job announcements of research

positions in other companies. None of the advertisements are for dental researchers, however, and none of the companies is a dental clinic or in a line of business related to the field of dentistry. In addition, all of the advertising companies appear to be far larger than the petitioner in the scope of their business operations. Accordingly, the job announcements do not represent parallel positions in similar organizations, as required for the position proffered by the petitioner to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proffered position does not meet the third alternative criterion of a “specialty occupation” set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – “the employer normally requires a degree or its equivalent for the position” – because the subject position did not previously exist and the petitioner has no hiring history.

Counsel asserts that the dental specialist/researcher position meets the fourth alternative criterion of a specialty occupation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the duties are so specialized and complex that they require a depth of medical and dental knowledge associated with the attainment of a baccalaureate or higher degree. Counsel complains that CIS failed to explain how the duties of the job can be performed without that level of education. The burden is on the petitioner to establish its entitlement to the immigration benefit it seeks, however, not on CIS to disprove its entitlement. Based on the petitioner’s initial description of the position, it appeared that the duties included significant administrative and office support functions. Subsequent descriptions in the response to the RFE and in the appeal indicate more research-oriented duties, but have not been supported by any documentary evidence of the dental clinic’s business operations demonstrating its need for the high-caliber services it claims to seek from the beneficiary. Simply going on record without supporting documentary evidence does not satisfy the petitioner’s burden of proof. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972).

Thus, the petitioner has failed to establish that the proffered position meets any of the criteria of a specialty occupation outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. See section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b). The petitioner has not established that the beneficiary will be performing services in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

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