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U.S. Citizenship and Immigration Services

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FILE: WAC 02 238 53253 Office: CALIFORNIA SERVICE CENTER Date: **OCT 30 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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a dental office. It seeks to employ the beneficiary as a dental specialist/researcher. 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).

The director denied the petition on March 20, 2003. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On May 3, 2006, the director denied the petition determining that the petitioner had not shown that the beneficiary possessed the appropriate licensure as required by the proffered position and had not provided an exemption or exception from the requirement and certified his decision to the AAO.

**The record of proceeding before the AAO contains:** (1) the July 22, 2002 Form I-129 with supporting documentation; (2) the director's January 29, 2003 request for further evidence (RFE); (3) counsel for the petitioner's March 5, 2003 response to the director's RFE; (4) the director's March 20, 2003 denial letter; (5) the April 16, 2003 Form I-290B, with counsel's brief and supporting documentation; (6) the AAO's remand decision; (7) the director's December 1, 2005 RFE; (8) counsel's February 13, 2006 response to the RFE; (9) the director's May 3, 2006 denial decision and certification to the AAO for review. The AAO reviewed the record in its entirety before issuing its decision.

In his initial description of the duties of the proffered position the petitioner stated:

[The beneficiary] will administer a dental program in the office and direct activities in accordance with accepted national standards and administrative policies. He will confer with clinical professionals and staff to formulate policies and recommend procedural changes. He will confer with the personnel regarding policies and recommend procedural changes to increase daily production.

Additionally, he will work with the dentists and analyze the medical significance of infection or disease, providing a prognosis and advise on treatment based upon her [sic] research. With information supplied, he will keep up to date on the latest medical research results and utilize the medical library to perform the research necessary to evaluate the cases that are given to him. He will utilize medical journals, textbooks[,] and medical research materials to analyze and evaluate the patients' conditions, particularly regarding AIDS and treatment of gingival diseases. The amount of time spent on research will be determined by the extent of the injuries or rarity of the diseases incurred for each case.

The petitioner listed the specific duties of the proffered position as:

1. As needed, hire additional staff, fire[,] and evaluate their work.
2. Oversee the billing of patients and insurance companies.

3. Coordinate with the various dental laboratories that we utilize to assure that orders are submitted and received in a timely manner.
4. Set up a system to be used by the dental office and lab that will assure a smooth flow of work and improve efficiency.
5. Analyze and evaluate the medical significance of infection and disease in a given case.
6. Provide prognosis and devise treatment programs based upon research.

The petitioner noted that the beneficiary does not provide patient care activities since he is not a licensed dentist in the State of California.

In response to the director's RFE, counsel for the petitioner repeated the various duties listed above, added that the proffered position involves primarily dental research and reporting, utilizing the extensive dental expertise of the beneficiary. Counsel also noted that the beneficiary:

[W]ill be involved in assisting dentists with the analysis of patient records. He will examine patient records to compose dental reports for the ultimate approval of clinic dentists. He will utilize his medical background to provide complete analysis of patients' oral and maxillo-facial conditions based upon the dentist's finding, reports, medical history[,] and laboratory results. [The beneficiary] will record these conditions for diagnosis and future treatment by the dentist. [The beneficiary's] expertise in the area of dental medicine will be utilized in consulting with dentists regarding dental treatment solutions as they relate to patients' conditions.

Counsel identified the approximate time spent on the various duties of the proffered position as:

30 percent spent on administrative duties relating to assurance of the quality of work and compliance with national standards;

40 percent spent on analysis of patient records and assisting dentists in making proper determinations and diagnosis;

30 percent spent on medical and dental research and composition of reports based on such research.

Counsel also noted that the incumbent in the proffered position will not provide any patient care and will not have any contact with patients.

The director initially denied the petition determining that the proffered position was not a specialty occupation. The director's review of the position's duties resulted in his determination that the beneficiary would not be working in a research laboratory but would be working in a dentist office assisting the dentist with several different jobs. The director determined that the proffered position is the position of a dental assistant, an occupation that does not require knowledge associated with the attainment of a baccalaureate degree.

In a March 15, 2005 decision, the AAO determined, based on portions of the petitioner's description of the proffered position and statements made by counsel, that the position encompassed duties performed by a dentist, an occupation that is a specialty occupation. The AAO also determined that the record did not contain evidence that the beneficiary had obtained the appropriate licensure to perform the duties of a dentist and remanded the matter to the director to address this issue.

On December 1, 2005, the director requested evidence that the beneficiary had obtained a dental license to practice dentistry in the State of California or a statement from the pertinent California licensing agencies that the duties of the proffered position did not require a dental or other license to perform the duties of the proffered position.

Counsel provided a response on February 13, 2006. Counsel provided his December 12, 2005 letters sent to the Dental Board of California and to the Committee on Dental Auxiliaries of the California Department of Affairs inquiring whether the duties of the proffered position constituted a position requiring a license. Counsel also provided the responses from these two governing bodies.

In a letter dated December 16, 2005, an executive officer of the Committee on Dental Auxiliaries noted that it was not possible to discern from the wording of the proposed duties whether a particular duty required a license and that it was unclear whether the author of the December 12, 2005 letter was inquiring if a particular duty is permissible for an unlicensed dental assistant, a registered dental assistant, a registered dental assistant in extended functions, or a registered dental hygienist. The executive officer of the Committee on Dental Auxiliaries provided a copy of the regulations governing each of the referenced positions and noted that if the duty is not listed in the applicable regulation governing the position, the auxiliary may not perform the duty.

In a February 3, 2006 response to counsel's December 12, 2005 letter, a senior investigator for the California Dental Board noted: "In the clinical field of dentistry there are no such titles as Dental Researcher/Specialist. The duties you describe fall under the duties of a dentist or other auxiliary duties."

Counsel indicated that because the California Dental Board and the California Committee on Dental Auxiliaries did not make a finding in response to his inquiry, the firm conducted its own legal research. Counsel concluded that the beneficiary is exempt from the licensing requirements of section 1625 of the California Business and Professions Code, because the duties of the position do not involve the examination, diagnosis, or treatment of diseases or injuries to human teeth. Counsel claimed that the dental researcher/specialist is not responsible for diagnosis or patient care and all work is performed under the supervision of a licensed dentist, thus under 8 C.F.R. § 214.2(h)(4)(v)(C) as the beneficiary may perform the duties of the position under supervision, the H classification may be granted.

Counsel also asserted that the dental researcher/specialist is not responsible for patient care because the job consists of administrative duties, dental research, and analysis of patient records performed under the supervision of a licensed dentist. Counsel indicated that the beneficiary's duties resemble the duties of a health services manager that include maintaining patient records, planning, organizing, coordinating, and supervising the delivery of healthcare.

On May 3, 2006, the director denied the petition determining that if the described duties fall under the duties of a dentist, the beneficiary is required to have a California State license and that if the described duties do not fall within the confines of the duties of a dentist, the described duties do not comprise a specialty occupation.

The AAO has reviewed the director's decision on certification. Counsel did not submit a brief or other evidence on certification.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation and if the proffered position is a specialty occupation whether the State of California requires the licensure of the beneficiary to perform the occupation. The AAO turns first to the duties of the proffered position, the information provided by the California Dental Board and the California Committee on Dental Auxiliaries, and the statutory and regulatory requirements of 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The AAO does not agree with counsel's analysis of the proffered position. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. In this matter, the petitioner's description of the proffered position is not that of a medical and health services manager.

The AAO takes note of the following discussion in the *Handbook* regarding medical and health services managers:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. Medical and health services managers, also referred to as *health care executives or health care administrators*, plan, direct, coordinate, and supervise the delivery of health care. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

The structure and financing of health care are changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated health care delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work and an increased focus on preventive care. They will be called on to improve efficiency in health care facilities and the quality of health care provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of related services - for example those ranging from inpatient care to outpatient followup care.

The *Handbook's* discussion regarding the duties of administrative services managers provides:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services . . . . These workers manage the many services that allow organizations to operate efficiently.

In small organizations, a single administrative services manager may oversee all support services . . . . As the size of the firm increases, administrative services managers are more likely to specialize in specific support activities. For example, some administrative services managers work primarily as office managers . . . .

The petitioner indicates the beneficiary will administer a dental program in the office and direct activities in accordance with accepted national standards and administrative policies, formulate policies and recommend procedural changes, and confer with personnel regarding policies and recommend procedural changes to increase daily production. When the petitioner provides more detail regarding the general statements above, the duties tend to resemble those of an office manager. For example, the beneficiary is responsible for hiring staff and evaluating their work, overseeing the billing of patients and insurance companies, and coordinating with dental laboratories and insuring a smooth flow of work. The petitioner indicates that the beneficiary will be spending 30 percent of his time on these administrative type duties. The petitioner does not submit sufficient information to establish that the beneficiary's 30 percent of time devoted to administrative tasks, is time spent performing the duties of a health services manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

A review of the proffered position, comparing the position's duties against those described for a range of dental professions, the letters from the California Dental Board and the California Committee on Dental Auxiliaries, and the California regulations pertaining to the duties that may be performed by the various dental and dental auxiliary positions, reveals that the majority of the proffered position's duties comprise the duties of a dentist. The AAO acknowledges that the petitioner specifically states that the beneficiary does not provide patient care activities and does not have contact with the patients; however, the petitioner's list of duties encompasses duties under the general heading of providing patient care.

The *Handbook* reports: "Dentists diagnose, prevent, and treat problems with teeth or mouth tissue." Although the beneficiary in this matter may not directly treat patients, the petitioner indicates the beneficiary will "analyze the medical significance of infection or disease," "provid[e] a prognosis and advise on treatment based upon her [sic] research," and "perform the research necessary to evaluate the cases that are given to him." It is the acts of providing a prognosis, analyzing and evaluating patient cases, and advising on treatment that encompass the tasks of a dentist who diagnoses and treats problems with teeth or mouth tissue. The skills that the petitioner is relying upon to assist it in providing patient care are the very skills that require the individual providing the prognosis, advice, and evaluations to have a dental license.

As the director noted in his RFE, section 1625 of the California Business and Professions Code states that the practice of dentistry includes anyone who normally performs, or causes to be performed by a dentist, the examination, diagnosis of any kind, and treatment of various disorders of the teeth. Again, the beneficiary's advice on treatment, evaluations, and prognosis of various infection and disease in a given case are acts that require a dental license. As the AAO noted in its prior determination, the petitioner indicates that the beneficiary in this position will spend 40 percent of his time on analysis of patient records and assisting dentists in making proper determinations and diagnosis. This portion of the beneficiary's duties aligns with the duties of a dentist, a

specialty occupation that requires a license. In addition to these duties, the beneficiary's review of medical journals to analyze and evaluate patients' conditions, his analysis of patient records, and recordation of conditions for diagnosis and future treatment are duties that encompass advice for patients' treatment and diagnosis, a duty of a dentist.

While the California Dental Board did not identify which duties on the petitioner's list of duties were those of a dentist, it indicated that the duties fell under the duties of a dentist or other auxiliary duties. The California Committee on Dental Auxiliaries, on the other hand, refrained from stating whether a particular duty required a license because it could not discern the exact nature of the duties from the petitioner's description of the duties. The petitioner may not expand the duties of the position by attributing general tasks to the position in an effort to obtain a designation of a specialty occupation without the attendant requirement that the individual who performs the duties have a dental license. The AAO determines that in this matter the record includes duties that require the utilization of a dentist, an occupation that is a specialty occupation that requires a license.

Counsel's conclusion that the beneficiary is exempt from the licensing requirements of Section 1625 of the California Business and Professions Code because the beneficiary is not involved in the examination, diagnosis, or treatment of diseases or injuries to human teeth is inconsistent with petitioner's previous statements. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, counsel does not address which duties the beneficiary would be performing under supervision; does not indicate who will be supervising those duties; and does not substantiate how the beneficiary may perform the duties of the proffered position without a license, even if the beneficiary performs the duties under supervision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. **The unsupported assertions of counsel do not constitute evidence.** *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains sufficient evidence to establish that the proffered position includes the duties of a dentist, a specialty occupation. The record, however, does not contain evidence that the beneficiary is qualified to perform the duties of the occupation. For reasons related in the preceding discussion, the petitioner has not established that the beneficiary is eligible to perform the duties of the proffered position in California. Accordingly, the AAO will not disturb the director's May 3, 2006 denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, 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 met that burden.

**ORDER:** The director's May 3, 2006 decision is affirmed. The petition is denied.