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FILE: EAC 03 182 53503 Office: VERMONT SERVICE CENTER Date: **MAY 02 2008**

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:

[REDACTED]

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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 laboratory. It seeks to employ the beneficiary as a dental 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).

The director initially denied the petition on May 10, 2004. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On January 23, 2008, 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. The director certified his decision to the AAO. The petitioner did not provide a statement, brief, or documentation in response to the notice of certification.

**The record of proceeding before the AAO contains:** (1) the June 2, 2003 Form I-129 with supporting documentation; (2) the director's September 4, 2003 request for further evidence (RFE); (3) counsel for the petitioner's November 26, 2003 response to the director's RFE; (4) the director's May 10, 2004 denial letter; (5) counsel's brief and supporting documentation in support of the appeal, received on June 10, 2004; (6) the AAO's October 25, 2006 remand decision; (7) the director's March 19, 2007 RFE; (8) the petitioner's June 7, 2007 response to the RFE; and (9) the director's January 23, 2008 denial decision and certification to the AAO for review. The AAO reviewed the record in its entirety before issuing its decision.

In response to the director's September 4, 2003 RFE, the petitioner provided the following description of duties:

1. (60% of time) The manufacture of high quality esthetic dental restorations including veneers, pfm crowns and bridges, implants, custom implant abutments and implant based screw & cement retained restorations, inlays, onlays and posts, by:
  - a. Designing the size, style, shape and shade for complicated anterior and full-arch cases using detailed x-rays, molds and computer imaging programs.
  - b. Defining and creating occlusal relations for major restorations.
  - c. The taking of digital images of patients, pre and post-operative.
  - d. Fabricating the restorations from polymer/composite plastics, ceramics, metals and porcelains by waxing investing, casting, deinvesting, shaping, polishing and finishing using specialized tools.
  - e. Performing final contouring and coloring of restorations.
  - f. Fitting of restoration onto patient, making appropriate modifications for proper fit, and discussing ongoing maintenance, cleaning and care.
2. (25-30% of time) Technical consultation and communication with practicing Dentists, advising of technical alternatives, available options, appropriate appliances, proper shading, new developments in implants and restorations, patient scheduling, appliance care, and related technical or patient care issues.

3. **(10-15% of time)** The training of technicians, review of new materials and methods, continuing education, ordering of supplies and materials, maintenance of patient records, updating of treatment plans, and related administrative duties.

The AAO determined that many of the above duties incorporated the duties of a dental laboratory technician. The AAO also cited Title 4, Subtitle 1, Section 4-101, paragraph "1" of the Maryland State Code which defines the term "practice dentistry" and definitions of other terms; Title 4, Subtitle 1, Section 4-402, of the Maryland State Code that set forth the requirements for performing dental laboratory work; and Title 4, Subtitle 3, Section 4-403 and Title 4, Subtitle 3, Section 4-406 that describes licensing and practices.<sup>1</sup> The AAO found that the petitioner's indication that the beneficiary would fit the restoration onto the patient making appropriate modifications for proper fit constituted the practice of dentistry as defined in the Maryland State Code. The AAO determined that the record did not include evidence that the beneficiary is qualified to perform the duties of a dentist, a specialty occupation, in the State of Maryland. As the issue of the beneficiary's qualifications had not been addressed by the director, the AAO withdrew the director's decision and remanded the matter to allow the petitioner the opportunity to address this issue.

On March 19, 2007, the director requested that the petitioner provide evidence that the beneficiary satisfied the educational and licensure requirements of the State of Maryland for the position of a "dentist." In a June 7, 2007 letter in response to the RFE, the petitioner asserted that the licensed dentist takes the dental molds and measurements and fits the appliances to their patient. The petitioner noted that in some circumstances, the dental technologist might be asked to watch the licensed dentist to directly observe the specific modifications that the appliance requires for proper fitting but that the technologist does not physically perform the fitting. The petitioner contended that its dental laboratory and dental technologists completely comply with Maryland State law. The petitioner also submitted a June 1, 2007 letter authored by a dentist indicating that he relied on the beneficiary's expertise on technical issues and that the beneficiary's assistance meant that the beneficiary would be present when he, the dentist, tried dental appliances on patients.

On January 23, 2008, the director denied the petition, determining that the record did not contain evidence from the State of Maryland that the beneficiary is licensed to practice the occupation of dentist and that the evidence of record did not establish that the beneficiary is qualified to perform services in a specialty occupation.

The AAO reviews the director's decision on certification. Although the director did not elaborate on the deficiency of the petitioner's response to the September 19, 2007 RFE, the director's decision is affirmed. The petitioner in this matter provided a June 7, 2007 statement that its dental laboratory and dental technologists complied with Maryland State laws and noted that the beneficiary did not physically perform the fitting. However, this statement is inconsistent with the petitioner's detailed description of duties provided for the record in November 2003. 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).

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<sup>1</sup> Please see the October 25, 2006 AAO decision for the complete terms of the pertinent Maryland Code sections noted.

When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary or materially change a position's title or its associated job responsibilities. On November 25, 2003, the petitioner provided a description of the beneficiary's duties that incorporated the duties of a dentist, a specialty occupation that requires licensure in the State of Maryland to perform. The petitioner did not provide evidence that the beneficiary had obtained the requisite license. The petitioner has not offered an explanation for the inclusion of the duties of a dentist in the initial description or the deletion of such duties in its June 7, 2007 response. The submission of one unsworn statement from a dentist does not alleviate the necessity of the petitioner resolving the inconsistency presented. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Of note, as the particular duty of fitting appliances in patients is material to establishing the proffered position is a specialty occupation, clarification of the inconsistency alone is insufficient to establish the proffered position as a specialty occupation. As the AAO previously determined, the record does not establish that the occupation of a dental technologist incorporates the duties of a specialty occupation. Further, the petitioner has not provided sufficient detail substantiated by documentary evidence that the duties of the particular position offered, absent the duties of a dentist, include the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation in the United States.

The record does not contain evidence that the beneficiary is qualified to perform the duties of a dentist in the State of Maryland and does not contain evidence that a dental technologist position, when the dental technologist does not perform the duties of a dentist, is a specialty occupation. Accordingly, the AAO will not disturb the director's January 23, 2008 denial of the petition.

The petition will be denied and the director's certification affirmed 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 January 23, 2008 decision is affirmed. The petition is denied.