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U.S. Citizenship
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FILE: WAC 03 090 50307 Office: CALIFORNIA SERVICE CENTER Date: FEB 16 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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for entry of a new decision.

The petitioner is a dental clinic that seeks to employ the beneficiary as a dental specialist/researcher. The petitioner, therefore, 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. On appeal, counsel submits a brief.

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.

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 specialist/researcher. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail researching and writing about dental diseases and treatments. She will research the cause and effect of diseases or conditions that patients exhibit; prepare an analysis of the patients' infections or disorders for review and advise appropriate treatment; keep current about dental research and use the dental library to perform research to diagnose cases; use dental journals, text books, and medical research materials to obtain analysis and evaluation of patients' conditions; and research the correlation between bacteria and gum disease, the impact of diabetes on gum disorders, and the effect of various antibiotics and their effectiveness. The petitioner stated that the position requires a degree in dental medicine, but it does not require licensure because there is no direct patient care.

The director determined that the proffered position was not a specialty occupation. The director stated that the petitioner never explained why its dentist must consult a dental researcher before treating patients. According to the director, because the beneficiary will perform research to diagnose patients' symptoms, she will in fact practice dentistry which entails analyzing diseases and advising about appropriate treatment. Except for the duty to advise about the treatment of patients, the director found that the beneficiary's duty to research was not so complex as to require a degree. The submitted job postings did not convince the director that a degree requirement is common to the industry in parallel positions among similar organizations. Nor was the director persuaded that the petitioner had a past practice of normally requiring a degree for similar positions. The director stated that the beneficiary does not hold licensure to practice dentistry.

On appeal, counsel states that the proposed position's duties do not entail the practice of dentistry; they involve assisting the dentist with research. Counsel states that the petitioner has fifteen employees and one dentist, and that the beneficiary will assist the dentist by analyzing the results of the dentist's examinations, researching cases, and "preparing memos for the dentist's review and decision." Counsel claims that the director did not consider the difference between theoretical research and studies and researching patients' cases. Counsel states that the duties of the position are dispositive in determining whether a position qualifies as a specialty occupation, and cites to an AAO case involving a medical assistant. Counsel claims that in the case, the AAO determined that an assistant was qualified to perform duties that had less responsibility than a physician's duties, but did not require a license, and that the duties presupposed a greater knowledge of medicine than that required by a medical or a physician's assistant. Counsel also cites to a case to support his statement that an employer's size, scope, and newness are not relevant in determining whether a position qualifies as a specialty occupation. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), counsel claims that the DOL reports that some dental school graduates gain experience by working as associates for established dentists.

Upon review of the record, the petitioner has established that the proffered position is a specialty occupation.

The AAO first considers 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. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The *Handbook* reveals that the duties of the proffered position are performed by dentists because they diagnose, prevent, and treat problems with teeth or mouth tissue. The *Handbook* reports:

[D]entists who want to teach or conduct research usually spend an additional 2 to 5 years in advanced dental training, in programs operated by dental schools or hospitals.

Counsel correctly stated that the *Handbook* stated that some dental school graduates work for established dentists as associates; however, it reports that all 50 states and the District of Columbia require dentists to be licensed. The *Handbook* states:

To qualify for a license in most States, a candidate must graduate from one of the 55 dental schools accredited by the ADA's Commission on Dental Accreditation in 2002 and also must pass written and practical examinations.

Counsel's statement that the duties of the proffered position do not entail the practice of dentistry is not convincing. The document in the evidentiary record entitled "Business and Professions Code Section 1625-1636.6" explains under section 1625 that a person practices dentistry in California when the person "performs, or offers to perform, an operation or diagnosis of any kind." The petitioner's November 19, 2002 letter indicated that the beneficiary will practice dentistry. The letter stated:

[The beneficiary] will be conducting the necessary research to determine the cause and or effect of the various diseases or conditions that the patient is exhibiting. She will then prepare a complete analysis of the patient's infection or disorder for review and advise appropriate treatment.

Because the passage plainly describes the beneficiary as performing diagnosis on patients, the proffered position entails the practice of dentistry which is a specialty occupation and requires licensure.

The AAO notes that the submitted job postings fail to establish that the petitioner's requirement of a bachelor's degree in dental medicine is common to the industry in parallel positions among similar organizations. Neither of the companies in the job postings is similar to the petitioner, a dental clinic. System Planning Corporation is a scientific research and development firm serving the national security community, and The Scripps Research Institute is a large non-profit biomedical research institute.

No evidence contained in the record demonstrates that the beneficiary is qualified to perform the duties of the specialty occupation – a dentist. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of a dentist, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record at it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's September 5, 2003 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.