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U.S. Department of Justice

Immigration and Naturalization Service

prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: SRC-01-011-54588 Office: Texas Service Center Date: 04 FEB 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration a Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dental health services business with eight employees and a gross annual income of $250,000. It seeks to employ the beneficiary as a dental consultant for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the petitioner has not demonstrated that the position of dental consultant would require a baccalaureate degree. On appeal, counsel states, in part, that the proffered position requires a dentist fully licensed in Colombia but not fully licensed in the United States. Counsel further states that such clarification demonstrates that the proffered position is a specialty occupation.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> She will develop our dental health programs for use in rural, Spanish-speaking communities [in Colombia] and plans for sales of the most recent technologies in oral hygiene and preventive measures to maintain dental health as well as porcelain and ceramic materials for use by dentists in restorative work. She will have internet-based consultations with dental and medical facilities to determine the level of education required and the

> appropriate equipment for patients, using her knowledge of dental science, physiology, and medical conditions. She will explain the correct sequence of procedures for dental care, the applicability of specific materials for types of dental disease, and advise on appropriate maintenance schedules. To meet the needs of patients in rural areas, she will write assessments of equipment needed and recommend specific products with features to accommodate particular conditions. Finally, she will make recommendations to us on products most desirable in the Latin American market.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the record indicates that the proffered position is for a dental consultant, an occupation that would not normally require a bachelor's degree in dentistry or a related field. The proffered position appears to be similar to the position of dental assistant. A review of the Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at page 341 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a dental assistant. Most assistants learn their skills on the job, though some are trained in dental assisting programs offered by community and junior colleges, technical institutes, trade schools, or the Armed Forces. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area, for the offered position. Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Counsel has provided letters from individuals in Colombia who state that the usual requirement for positions such as the proffered position is a valid license/degree as a Colombian dentist. The proffered position, however, that is reflected on the application and on the labor condition application is not that of a dentist, but a dental consultant. Pursuant to the above discussion, it has not been demonstrated that the position of dental consultant requires a baccalaureate degree in a specific specialty.

Beyond the decision of the director, the petitioner's labor condition application was certified on December 18, 2000, a date subsequent to October 10, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that <u>before filing a petition for H-1B classification in a specialty occupation</u>, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.