

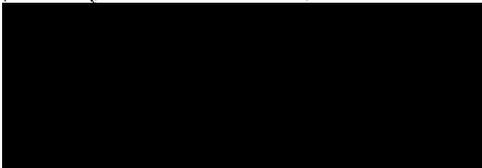
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: WAC-02-198-50301 OFFICE: CALIFORNIA SERVICE CENTER

DATE: NOV 20 2003

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:

SELF-REPRESENTED

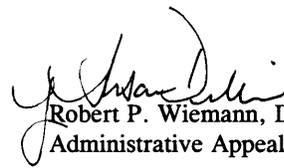
INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory that employs two persons and has a gross annual income of \$247,535.00. It seeks to employ the beneficiary as an assistant dental technician. The director denied the petition because the position is not a specialty occupation.

On appeal, the petitioner submits a written statement and new evidence. The petitioner states, in part, that the labor condition application (LCA) certified by the Department of Labor is evidence that the position is a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

The petitioner asserts that the assistant dental technician position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title 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 CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 (5th Cir. 2000). The critical element is not the title of the position or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In its initial petition, the petitioner described the job duties to be performed by the beneficiary as follows: "Partial designing and partial & full dentures." Subsequent to the filing of the petition, the director requested from the petitioner a detailed job description; the percentage of time to be spent on each duty; the beneficiary's level of responsibility and hours per week of work; the types of employees supervised; the minimum education, training, and experience necessary to do the job; and evidence the proffered position meets regulatory criteria. Additionally, the director requested a credential evaluation of the beneficiary's foreign credentials; the beneficiary's school transcripts; the beneficiary's arrival/departure Form I-94 card; and a more detailed description of the petitioner's organization.

In response to this request, the petitioner provided the following job description that was not part of a signed letter, nor on company letterhead or otherwise established as the position description for the petitioner as offered to the beneficiary:

The job is 100% technical in the field of dentistry, and is related to the processing of prosthesis or attachments that try to rehabilitate the patient with chewing functions and the aesthetics of the human mouth. The process is fulfilled in a process of steps that take about 1 to 3 days, and each one of the [illegible] from beginning to end. The level of responsibility of this type of job is secondary because the main responsibilities are attributed to the dentist in charge of the case in which the technician will work under his own instructions according to each individual case. This is a full time job because the work comes day after day with new [illegible]. Each one of the finished jobs are [sic] supervised by the owner technician of the laboratory before it is delivered to the dentist in charge of the case. The minimum education required [illegible] the completion of high school, a dental technician course, and one year of working experience. The elaborated jobs [sic] in this laboratory include the following descriptions, steps, and times for each step:

<u>Description:</u>	<u>Steps:</u>	<u>Time per step:</u>
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Full upper or lower dentures	3	[illegible]	3 days
Partial upper or lower dentures	4	[illegible]	3 days
Upper or lower stay plates	1	[illegible]	1 day
Space maintainers	2	[illegible]	3 days
Denture repairs	1	[illegible]	1 day
Denture realignment	1	[illegible]	1 day

The petitioner also submitted a document titled "Requirements for Dental Technician," that was not part of a signed letter or on the petitioner's letterhead. The document stated the following:

The basic educational requirement for dental laboratory technicians is a high school diploma. Useful high school courses include chemistry, shop, mechanical drawing, art and ceramics. Individuals who do best as dental laboratory technicians combine the precision, patience, and dexterity of a skilled craftsperson with a generous amount of artistic talent. They must be able to carry out written and sometimes verbal instructions exactly, because each dental fixture has to be constructed according to very specific designs provided by the dentist. Good eyesight and color discrimination and the ability to do delicate work with one's fingers are also important. Many dental technicians learn their craft on the job. Others prepare for their career by attending a formal training program that leads to an associate degree in applied science. A typical two-year curriculum might include courses in denture construction, processing and repairing dentures; tooth construction, waxing and casting.

Also submitted with the petitioner's response to the director's request for evidence was a copy of a General Evaluation Report from Educational Credential Evaluators, Inc., which states that the beneficiary's credentials are the U.S. equivalent of "[c]ompletion of four and one-half years of study in a dentistry program." The beneficiary's diplomas and transcripts, in Spanish with English translations, were also submitted, along with the beneficiary's Arrival/Departure Form I-94.

Finally, the petitioner also submitted a document titled "Company Information," which is signed by the petitioner's owner, in response to the director's request for evidence. The document states that the owner established his business in 1996 and local dentists give him accounts.

A certified LCA pre-dating the petitioner's nonimmigrant visa filing is in the record of proceeding; however, it is not clear when it was submitted.

The director denied the petition because the proffered position is not a specialty occupation according to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which specifies that a baccalaureate or higher degree or its equivalent is not required to enter into a dental technician occupation.

On appeal, the petitioner submits a written statement, and newspaper advertisements, which are new evidence. The petitioner states, in part, that the labor condition application (LCA) certified by the Department of Labor is evidence that the position is a specialty occupation.

The petitioner has not met any of the requirements to qualify the offered position as a specialty occupation. The position is most analogous to a dental laboratory technician delineated by the *Handbook*; however, a dental laboratory technician is not a specialty occupation. The *Handbook*, 2002-2003 edition, at page 548, describes the duties to be performed by a dental laboratory technician as follows:

Dental laboratory technicians fill prescriptions from dentists for crowns, bridges, dentures, and other dental prosthetics. First, dentists send a specification of the item to be fabricated, along with an impression (mold) of the patient's mouth or teeth. Then, dental laboratory technicians, also called dental technicians, create a model of the patient's mouth by pouring plaster into the impression and allowing it to set. Next, they place the model on an apparatus that mimics the bite and movement of the patient's jaw. The model serves as the basis of the prosthetic device. Technicians examine the model, noting the size and shape of the adjacent teeth, as well as gaps within the gumline. Based upon these observations and the dentist's specifications, technicians build and shape a wax tooth or teeth model, using small hand instruments called wax spatulas and wax carvers. They use this wax model to cast the metal framework for the prosthetic device.

After the wax tooth has been formed, dental technicians pour the cast and form the metal and, using small hand-held tools, prepare the surface to allow the metal and porcelain to bond. They then apply porcelain in layers, to arrive at the precise shape and color of a tooth. Technicians place the tooth in a porcelain furnace to bake the porcelain onto the metal framework, and then adjust the shape and color, with subsequent grinding and addition of porcelain to achieve a sealed

finish. The final product is nearly an exact replica of the lost tooth or teeth.

In some laboratories, technicians perform all stages of the work, whereas in other labs, each technician does only a few. Dental laboratory technicians can specialize in one of five areas: Orthodontic appliances, crowns and bridges, complete dentures, partial dentures, or ceramics. Job titles can reflect specialization in these areas. For example, technicians who make porcelain and acrylic restorations are called *dental ceramists*.

The duties described in the *Handbook* reflect the duties of the petitioner's proffered position, which involves the fabrication of dental prosthetics. A review of the *Handbook*, at page 549, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a dental laboratory technician:

Most dental laboratory technicians learn their craft on the job. They begin with simple tasks, such as pouring plaster into an impression, and progress to more complex procedures, such as making porcelain crowns and bridges. Becoming a fully trained technician requires an average of 3 to 4 years, depending upon the individual's aptitude and ambition, but it may take a few years more to become an accomplished technician.

Training in dental laboratory technology also is available through community and junior colleges, vocational-technical institutes, and the Armed Forces. Formal training programs vary greatly both in length and in the level of skill they impart.

In 2000, 30 programs in dental laboratory technology were accredited by the Commission on Dental Accreditation in conjunction with the American Dental Association (ADA). These programs provide classroom instruction in dental materials science, oral anatomy, fabrication procedures, ethics, and related subjects. In addition, each student is given supervised practical experience in a school or an associated dental laboratory. Accredited programs normally take 2 years to complete and lead to an associate degree.

Graduates of 2-year training programs need additional hands-on experience to become fully qualified. . . .

The *Handbook* clearly shows that a dental laboratory technician does not require a bachelor's degree in a specific field of study to enter into the position. Instead of specifying a specific field of study required to enter into the field, the *Handbook* indicates that an individual with a high school or two-year post-secondary school degree could be accepted for a dental laboratory technician position. Additionally, most dental laboratory technicians merely learn their occupation through experience. Thus, the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is not the normal minimum requirement for entry into the dental laboratory technician occupation.

The petitioner also submitted documentation that corroborates the premise that no degree is required for the dental laboratory technician position. The petitioner's information about the position's requirements unequivocally states that a high school diploma or even a two-year associate degree is required to enter into the position. The petitioner did not specify that a baccalaureate degree or higher, or its equivalent, in a specific specialty is required to enter into the dental laboratory technician occupation. Thus, the petitioner's evidence indicates that a baccalaureate or higher degree, or its equivalent, is not the normal minimum requirement for entry into the dental laboratory technician occupation.

On appeal, the petitioner asserts that its certified LCA is evidence that a dental laboratory technician position is a specialty occupation. The petitioner refers to the occupational codes corresponding to various occupational categories established by the Department of Labor (DOL). The petitioner submits an appendix to the LCA titled "Three-Digit Occupational Groups - Professional, Technical, and Managerial Occupations and Fashion Models." "078" is the code corresponding to occupations in medical and dental technology. The petitioner's assertion is incorrect. The codes established by DOL do not correlate to CIS's determinations concerning occupations that qualify as specialty occupations. The codes could be for occupations requiring a degree or not requiring a degree. The title of the appendix makes it clear that the occupational groups are for professional and technical and managerial occupations but does not state that all of the occupations listed are specialty occupations. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that dental laboratory technicians require a degree. The record does not contain any evidence concerning an industry professional association or expert affidavits.

The petitioner submitted two newspaper advertisements on appeal, presumably in an effort to establish the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). However, neither of the advertisements requires a degree for the positions. There is also no description of the advertised positions' duties or the employers seeking a "dental lab tech" and "laboratory supervisor" to facilitate a determination that the employers are similar to the petitioner's organization or the positions are parallel to the petitioner's proffered position. There is no evidence in the record to support that a degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. The petitioner offered no evidence concerning its past hiring practices for the proffered position. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support a claim that 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 position involves fabrication of dental prosthetics and does not differ from the description provided from the *Handbook* which indicates that a baccalaureate or higher degree is not required for the occupation. The duties of the proffered position are not complex duties that require the application of specialized and complex knowledge. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the record does not establish that the beneficiary is qualified to perform services in a specialty occupation as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). The credential evaluation in the record of proceeding states that the beneficiary has the equivalent of four and one-half years of studies in dentistry, which is inconclusive. Dental programs are not offered as baccalaureate

programs in the United States. Spending four and one-half years towards dentistry studies is different than completing a U.S. baccalaureate degree program in a specific specialty at an accredited college or institution. However, as the appeal is being dismissed on another ground, the issue will 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. The petition is denied.