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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: EAC-00-259-52933 Office: Vermont Service Center Date: OCT 10 2002

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 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 that 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. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a dental laboratory with 24 employees and a stated gross annual income of $2.1 million. It seeks to employ the beneficiary as a dental technician 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 argued that the Service had erred in denying the current petition because it had already approved a prior petition submitted on the beneficiary's behalf by a different employer for an identical position. Counsel asserted that the proffered position was a specialty occupation because it was professional in nature.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not established that the proffered position is a specialty occupation because it had not demonstrated that a baccalaureate degree in specialized area was required for employment in this position.

On motion, counsel argues that the petitioner has clearly and unequivocally stated that it "...has never and will not hire any person for the position offered without the prerequisite of the possession of a bachelor's degree in dental technology or its equivalent." Counsel contends that this statement is sufficient to characterize the proffered position as a specialty occupation pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A)(3). Counsel also includes a letter from the petitioner's president to support the motion.

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 sole issue raised by counsel on motion is whether the proffered position is a specialty occupation because the petitioner has

always, and will continue to hire only individuals possessing a bachelor's degree in dental technology or its equivalent for this position. In a letter that accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

* Read prescriptions and examine dental models and impressions to and [sic] repaired;
* Fabricate full or partial dentures using wax, plaster, or plastic models, grinders and polishers;
* Cast plaster molds of dentures and crowns to be repaired;
* Select and mount replacement teeth in model to match color and shape of natural teeth;
* Mold wax over setup to form contours of gums; and
* Polish surfaces of case dentures, bend an[d] solder gold and platinum wire to construct dental frames.

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 Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 Edition, describes the duties of dental laboratory technicians at page 548 as follows:

> Dental laboratory technicians fill prescriptions from dentists for crowns, bridges, 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 onto the impression and allowing it to set.... 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.... 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 a near exact replica of the lost tooth or teeth.

The duties of the position as described by the petitioner are clearly those of a dental laboratory technician, also known as dental technician. The Handbook does not indicate at page 549 that a baccalaureate or higher degree in a specialized area is required for employment as a dental laboratory technician. Some dental technicians learn their trade on the job. Others learn at junior and community colleges, vocational-technical institutes, or through the armed forces. Training usually takes two years. Thus, the petitioner has not shown that a bachelor's degree in a specific area or its equivalent is required for the position being offered to the beneficiary.

Counsel's arguments, as well as the statement from the petitioner's president regarding its past and future hiring practices for the offered position are noted. However, the petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the position of dental technician. Moreover, the reasoning of both counsel and the petitioner's president is problematic when viewed in light of the statutory definition of specialty occupation. 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. As with employment agencies as petitioners, the Service 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-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 bachelor's degrees. See id. at 388.

In this case, the proffered position of dental technician does not meet the statutory definition of specialty occupation. The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has indicated that it requires a bachelor's degree in dental technology or a related field for employment in the offered job, such a requirement is the petitioner's preference rather than an indication that the position is a specialty occupation requiring a bachelor's degree in a specific area of study.

The petitioner's president states its degree requirement is evidence of a valid industry standard because it is representative of similar companies within this particular industry. However, the opinion of one party cannot be considered as evidence of an industry standard. Furthermore, the petitioner has failed to provide any independent evidence that would tend to support this statement. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972). Therefore, it cannot be concluded that the petitioner has demonstrated that businesses similar to it in their type of operations, number of employees, and amount of gross annual income require the services of individuals in parallel positions.

The petitioner has failed to establish 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 in a specific specialty.

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.

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 previous decision dated December 8, 2001, by the Associate Commissioner dismissing the appeal is affirmed.