



U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-99-279-50670 Office: Vermont Service Center

Date: 16 SEP 2002

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)

IN BEHALF OF PETITIONER:



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, Vermont Service Center, and is now before the Associate Commissioner, Examinations, on appeal. The appeal will be dismissed.

The petitioner is a dental laboratory with five employees and a gross annual income of \$200,000. It seeks to employ the beneficiary as a "dental lab quality control specialist" for a period of three years. The director determined that the petitioner had not established that the offered position is 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.

8 C.F.R. 214.2(h)(4)(ii) further 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 determined that the evidence of record does not demonstrate that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge to perform the duties of the position. The director further stated that the evidence of record does not show that the petitioner has sufficient work normally associated with the duties of a specialty occupation for the beneficiary to perform on a full-time basis for a three-year period.

On appeal, counsel states that the offered position is more like that of a quality control engineer than that of a dental laboratory

technician. Counsel further asserts that the petitioner has sufficient physical premises and level of business activity to support the part-time employment of a quality control specialist. Finally, counsel contends that the director failed to consider the advisory opinion letter submitted in response to the Service request for additional information.

The director has introduced the concept of "speculative employment" into this proceeding. There is no support for the exploration of this concept per se in either statute or regulations. Similarly, the director has questioned the petitioner's ability to pay the beneficiary's offered wage. Wage determinations and the enforcement of their payment with respect to the H-1B classification are the responsibility of the Department of Labor.

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

[The beneficiary] will be responsible for testing finished and semi-finished dentures, and determine if the dentures physical qualities correspond to the dentist's specifications. Furthermore, he will plan, coordinate, and direct quality control program designed to ensure continuous production of products consistent with established standards. He will develop and analyze statistical data and product specifications to establish quality and reliability expectancy of finished products. [The beneficiary] will formulate and maintain quality control objectives and coordinate objectives with production procedures to maximize product reliability and minimize costs. He will plan, direct and organize training activities related to product quality and reliability. In addition, he will investigate and adjust customer complaints regarding quality. [The beneficiary] will also review the production schedules to ascertain work load and prepare schedules and priorities for work with the goal of maximizing product reliability and minimizing costs.

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.

The Service does not agree with counsel's argument that the proffered position is that of a quality control engineer. In these proceedings, the duties of the position are dispositive and not the job title. In this case, the offered position appears to be that of a supervisory dental technician. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 Edition at page 341 describes the work of dental laboratory technicians 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. . . . 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 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 nearly exact replica of the lost tooth or teeth.

According to the Handbook at pages 548-549, most dental laboratory technician jobs are in commercial dental laboratories, which usually are small, privately owned businesses with fewer than five employees. The petitioner is precisely this type of business, and the duties of the offered position appear to be primarily those of a supervisory dental technician. Only an experienced dental laboratory technician would be able to evaluate the quality of the finished product of other dental laboratory technicians to ensure that the dentures are in compliance with the company's established quality standards.

A review of the Handbook at page 549 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a dental laboratory technician. Most dental laboratory technicians learn their craft on the job. 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.

Counsel argues on appeal that the Service failed to give due consideration to an advisory opinion letter submitted by the petitioner in response to the Service request for additional evidence. The letter cited by counsel is from [REDACTED] of Anchor Dental Lab Inc [REDACTED] states that he received a Master of Dental Technology degree from New York University in 1998 and has since worked as a dental technology specialist. [REDACTED] states that the beneficiary's degree in physics and his "professional experience as testing specialist" qualify him as a professional quality control specialist. [REDACTED] further states that such a degree is the standard minimum requirement for entry into the occupation. However, [REDACTED] has not cited any relevant authorities upon which he relied to reach this conclusion, nor has he provided any independent evidence to corroborate his statements. It is noted that the record contains no evidence that the beneficiary has any related work experience in either dental laboratory technology or quality control.

Additionally, 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 proffered position.

Furthermore, 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 has not demonstrated 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 proffered 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 appeal is dismissed.