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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

FILE: LIN-01-186-53933 OFFICE: NEBRASKA SERVICE CENTER DATE: DEC 18 2003

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]

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 Director of the Nebraska Service Center denied the nonimmigrant visa petition and affirmed that decision in a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a dental office that employs 11 persons and has a gross annual income of $1.56 million. It seeks to employ the beneficiary as a dental researcher. The director denied the petition because the petitioner failed to establish that the offered position qualified as a specialty occupation.

On appeal, counsel submits a brief and additional evidence. Counsel states, in part, that the offered position 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.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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:

> [A]n 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's letter accompanying the I-129 petition described the beneficiary's part-time duties as follows:

> The [d]ental [r]esearcher's job is to review dental medical journals, paying particular attention to dental health issues that are relevant to dental patients. The dental researcher will elicit and trace back the history of patients with unusual symptoms, review dental charts[,] and consider possible diagnoses for the cases. Based upon the findings of the research, the dental researcher will suggest possible tests or procedures to the doctor. Also, the dental researcher will attend seminars and conferences to acquire updated knowledge regarding the latest procedures, treatments[,] and tools available to achieve optimum effectiveness and productivity in performing job duties. It should be noted that [the] [b]eneficiary will be performing her duties under the strict supervision of a doctor[,] and will not be performing any medical procedures on patients. It is estimated that the job will take no more than sixteen (16) hours a week, based upon a 4 hour day, four (4) days a week.

The letter further stated that the position is newly created to help the doctor and keep him abreast of developments in dentistry. In addition, the letter stated that candidates must possess a bachelor's degree or its foreign equivalent in dentistry.

On August 3, 2001, the director issued a request for evidence, seeking a detailed job description, indicating the percentage of time that will be spent on each duty, and evidence that the

petitioner established one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response, counsel submitted a letter, dated October 23, 2001, describing the beneficiary's duties as follows:

> The [d]ental [r]esearcher will primarily focus on research aimed directly towards the field of [d]entistry and [d]ental [h]ealth conditions. In addition, the research will also include topics aimed at facilitating the dentist to stay at par with the growing cutting edge of knowledge and technology in the field of dentistry.

The letter further stated that about 70 percent of the beneficiary's time would involve the following research:

1. Dentist notices a hazardous dental health related condition.
2. Dentist consults with researcher about the condition.
3. Dental researcher does the research from dental medical books and journals regarding the condition[,] looking at [the] patient['s] history and dental charts.
4. Research assistant consolidates [the] gathered data - considers possible diagnosis - [and] consults [with] the dentist and proposes [the] tests to be conducted.
5. Dentist reviews the investigation and gives the final verdict about the approval or disapproval of [the] tests.
6. Dental [r]esearch [a]ssistant reviews results of [the] tests and provides [the] dentist with [the] latest research for diagnosis and treatment[,] which the dentist reviews and makes a final decision on.

In addition, the letter stated that about 28 percent of the beneficiary's time would be spent researching the following:

1. Noticing trends of dental caries in individuals who are more susceptible to tooth decay, comparing patients' charts and histories. Seeking [sic] out similar histories and conclude as to why certain individuals are more likely to have [a] dental condition than others, [and] also recommend incorporation of DNA mapping to supplement the research[,] if necessary;
2. [S]tudying the theoretical aspects of various bacteria that are present in the oral cavity, learning about their characteristics, chemical and physical properties[,] and the influence the harmful bacteria have on [the] general well being of an individual;
3. Mapping trends for [sic] patients suffering from either [b]enign or malignant tumors of oral cavity ([o]ral [c]ancer). Mapping would be done with a combination of information gathered from [a] patient's dental charts,

patient history[,] and patient interview;
4. Diseases of pulp and periapical tissue's [sic] . . . .
5. Diseases of periodontium . . . .
6. Developmental disturbances of oral and paraoral structures . . . .
7. Oral conditions that are linked to other health hazards (periodontal inflammation and insulin resistance from obesity)

Finally, the letter stated that about 2 percent of the beneficiary's time would be spent in continuing education programs, workshops, and seminars.

Counsel also submitted two letters: one from Dr [redacted] and the other from Dr. [redacted] The letter from Dr. [redacted] stated that, to perform the beneficiary's duties, candidates must possess at least a bachelor's degree in dentistry or its foreign equivalent in dentistry. The letter stated that Dr. [redacted] had four years of experience in dentistry, and alleged that research assistants are an integral part of a dental clinic. The letter from Dr. [redacted] stated that, because the beneficiary's duties are so specialized and complex, candidates must possess at least a bachelor's degree in dentistry or its foreign equivalent in dentistry to perform the duties. Moreover, Dr. [redacted] stated that a baccalaureate degree or its equivalent in dentistry is the minimum for entry into the offered position in the dental industry and that a dental office of any size may require the services of dental research positions. Dr. [redacted] attested to have over two years of experience as a practicing dentist.

Counsel's letter stated that the beneficiary's duties resemble those performed by medical research assistants in that the beneficiary will conduct research that is relevant to the diagnosis and dental health management of patients. Furthermore, the letter stated that the knowledge of dental medicine and related dental health issues is greater than that required to perform dental record technician, dental technician, and dental assistant positions. According to counsel, the scope, level of responsibility, and complexity of the beneficiary's duties exceed these positions, and because candidates are required to possess a bachelor's degree or its foreign equivalent in dentistry, the offered position qualifies as a specialty occupation.

Counsel alleged that the AAO has consistently held that medical researcher and orthodontic research/assistant positions qualify as specialty occupations. Counsel cited specific cases and provided a copy of pages 6-26 to 6-28 of the 2001 edition of the *H-1B Handbook* to validate this allegation.

Moreover, counsel submitted Internet job postings and stated that the postings reveal that employers require candidates to possess a baccalaureate or higher degree or its foreign equivalent in a

specific specialty area of research as the normal minimum for entry into medical researcher positions. One posting, from Memorial Sloan-Kettering Cancer Center, a healthcare facility, sought a senior research assistant to examine genes and required a bachelor's or master's degree in biological sciences, medical technology, or chemistry. The postings from Harvard University sought candidates for research assistant positions, and required candidates to have a BA or BS in chemistry, biochemistry, biology, or a related field.

Next, counsel asserted that the offered position satisfies all criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel stated that the beneficiary's duties are specialized dental health-related duties; that the AAO's decisions and the submitted opinions by practicing dentists establish that medical research assistant and dental researcher positions, with similar responsibilities, qualify as specialty occupations. Counsel maintained that the specialized, complex, and unique functions of the beneficiary's duties reveal that candidates must possess a bachelor's degree or its foreign equivalent in dentistry to perform the duties. Moreover, counsel averred that the industry standard for parallel positions, as evinced by the Internet postings, show that employers require a bachelor's degree in a medical discipline related to the specific position. Counsel further attested that the petitioner normally requires a bachelor's degree or its foreign equivalent in dentistry for the offered position. Finally, counsel claimed that the position involves extensive and complex dental health care duties; thus, candidates must possess knowledge associated with the attainment of a bachelor's degree or its foreign equivalent in dentistry to perform the duties. Counsel asserted that the AAO's decisions and the letters from the dentists substantiate this claim.

On February 11, 2002, the Immigration and Naturalization Service (the Service) denied the petition, finding that the petitioner failed to establish that the offered position qualified as a specialty occupation. The Service stated that counsel's reference to prior AAO decisions was not persuasive because each petition is decided on its own merits. Moreover, the Service stated that a position's title will not dictate whether the position qualifies as a specialty; instead, the totality of the beneficiary's duties, considered within the context of the petitioner's business, indicates whether a position qualifies as a specialty occupation. In addition, the Service stated that it could not judge whether the beneficiary would perform duties for more than one dentist, and also stated that a person not holding a dental degree could perform some of the research duties. With respect to the Internet postings, the Service found that they, by themselves, were insufficient to establish that the offered position was a specialty occupation because the duties in the postings may not have been similar in scope and complexity to the beneficiary's duties.

Counsel filed a motion to reconsider/reopen the Service's denial of the petition. The Service granted the motion on August 9, 2002, and the Service upheld the prior denial.

On appeal, counsel asserts that the offered position qualifies as a specialty occupation. First, according to counsel, five alleged experts in dental medicine have determined that the offered position qualifies as a specialty occupation because the skills required to perform the position's duties are associated with the attainment of a bachelor's degree in dentistry. Letters from Dr. [redacted] Professor and Department Head, Dental Laboratory Technology, Allied Health Division, ECC/S State University of New York, and Dr. [redacted] Associate Professor, Southern Illinois University College of Applied Sciences and Arts, Department of Health Care Professions, state that candidates must possess a bachelor's degree in dentistry to perform the beneficiary's duties, as they are specialized and complex. Also, counsel claims that three dentists: Dr. [redacted] Dr. [redacted] and Dr. [redacted] D.D.S., have opined that only a person with a baccalaureate degree or its foreign equivalent in dentistry can perform the beneficiary's duties. It is important to note that Dr. [redacted] is employed with Affordable Dental Care, the petitioning entity, and the letters provided by Dr. [redacted] and Dr. [redacted] are not on company letterhead. Counsel submitted Dr. [redacted] and Dr. [redacted] resumes. Next, counsel asserts that a proper evaluation of the beneficiary's duties presupposes knowledge of dental medicine and related dental health issues, and this knowledge can only be obtained through the attainment of a bachelor's degree in dentistry. Also, counsel claims that the AAO has repeatedly maintained that the medical researcher and orthodontic research/assistant positions qualify as specialty occupations.

Counsel avers that the petitioner established the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because a baccalaureate or higher degree or its equivalent is the minimum for entry into the occupation. Counsel maintains that the beneficiary's duties resemble those performed by medical research assistants in that the beneficiary will conduct research that is relevant to the diagnosis and dental health management of patients. In addition, counsel alleges that the AAO has consistently held that medical researcher and orthodontic research/assistant positions qualify as specialty occupations. Finally, counsel states that the Internet postings reveal that employers require candidates to possess a baccalaureate or higher degree or its foreign equivalent in a specific specialty area of research as the normal minimum for entry into medical researcher positions.

Counsel's assertion that the beneficiary's duties reflect those of medical research and orthodontic research/assistant positions is misplaced. In the first place, counsel has submitted Internet

job postings to establish that the beneficiary's duties parallel those performed by orthodontic research/assistant positions; however, the beneficiary's duties and the petitioner's industry and organization differ significantly from the Internet job postings. For example, the beneficiary's duties are performed in a dental clinic, not in a university's research facility or a healthcare facility researching cancer; in addition, not one of the beneficiary's duties resemble, even remotely, those of the Internet postings. Next, the letters from Dr [redacted] Dr [redacted] Dr. [redacted] D.D.S., Dr. [redacted] and Dr. [redacted] although relevant, fail to establish that the beneficiary's duties resemble those performed by medical research and orthodontic research/assistant positions because the letters do not attest to this.

Third, Citizenship and Immigration Services (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 *Handbook* is instructive because it provides a comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into an occupation and advance within that occupation.

According to the *Handbook*, the duties of the offered position are comparable to those performed by dentists. For instance, over 90 percent of the beneficiary's duties involve researching medical and dental publications; reviewing the results of tests, patient histories, and dental charts; and providing the dentist with the latest research for diagnosis and treatment. On pages 250-251, the *Handbook* reports that dentists diagnose, prevent, and treat teeth and tissue problems.

The petitioner claims that the beneficiary will not provide patient care; however, the duties of assisting dentists in determinations and diagnoses by reviewing patient records and researching medical and dental publications, obviously constitute patient care. Thus, like a dentist, the beneficiary would need to satisfy licensing requirements. The *Handbook*, at pages 250-251, reports that all 50 States and the District of Columbia require dentists to be licensed. In most States, candidates must graduate from a dental school accredited by the American Dental Association's Commission on Dental Accreditation, and pass written and practical examinations to qualify for a license.

There is no evidence contained in the record indicating that the beneficiary holds a license to practice dentistry; accordingly, the beneficiary is not qualified to perform the duties of the offered position.

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.