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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-99-181-52220 Office: Vermont Service Center Date: JAN 14 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)

PUBLIC COPY

IN 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 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. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter for further consideration and action. The director subsequently denied the petition again, and certified his decision to the AAO for review. The decision of the director will be affirmed.

The petitioner is a dental practice with 13 employees and a gross annual income of $666,986. It seeks to employ the beneficiary as a "dental researcher and analyst" for a period of three years. The director determined that the beneficiary would be performing work usually performed by dental hygienists and denied the petition because the beneficiary was not licensed as a dental hygienist in the State of New York.

On appeal, the petitioner argued that the position being offered to the beneficiary was not that of a dental hygienist, but rather that of a dental researcher and analyst, an occupation that does not require licensure in the State of New York. The petitioner deleted one duty from the initial list of duties to be performed by the beneficiary because this duty is typically performed by dental hygienists and as such requires licensure in the State of New York. Specifically, the petitioner deleted the following duty:

> Providing patient education, charting caries, taking impressions for study casts, any other function in the definition of the practice of dentistry as may be delegated by a licensed dentist in accordance with regulations promulgated by the commissioner.

The Administrative Appeals Office withdrew the director's decision and remanded the matter for a determination as to whether the proffered position qualifies as a specialty occupation.

The director denied the petition a second time because the petitioner had not established that the proffered position is a specialty occupation.

The petitioner has not submitted a new brief or any additional evidence in response to the notice of certification.

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 regulation at 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 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:

> Analyzing and supervise dental researches [sic], supervising and instructing other staff and managers with regard to various field research material, creating internal reports based on research material, coordinating a defined mechanism for coordinating instruction between dental hygiene faculty and other faculty who assisting [sic] dentist.

The petitioner subsequently submitted the following description of the duties of the position:

> 1. Analyzing and supervise dental researches as well as making service quality control report based on samples of outcomes assessment measure that assess patients' perceptions of quality of care, patient satisfaction surveys and results and patient tracking data and patient pool availability analysis;
>
> 2. Supervising and instructing other staff and managers with regard to various field [r]esearch material as well as a wide range of printed materials and instructional aids, equipment, skeletal and anatomic models and replicas, sequential samples of laboratory procedures, slides, films, video, and other

media which depict current techniques, the results of patient records review.

3. Planning and analyzing research requirements such as timely electronic access to a wide variety of professional scientific literature, current and back issues of major scientific and professional journals related to dentistry and dental hygiene.

4. In charge of creating internal reports based on research material such as results from institutional research used in interpreting admissions data and criteria and/or correlating data with dentistry performance.

5. Researching and evaluating budget resources and strategic plan, long-term equipment replacement plan, management and assessment plan, period analysis supporting the validity of established admission criteria and procedures.

6. Coordinating a defined mechanism for coordinating instruction between dental hygiene faculty and other faculty who are assisting the dentist.

7. Writing articles for other staff on the technical production and engineering innovations.

8. Established post-exposure guidelines as defined by the Centers for Disease Control and Prevention, protocols on preclinical/clinical/ laboratory asepsis and infection/biohazard control and disposal of hazardous waste, policies and procedures regarding individuals with bloodborne infectious diseases, on the use of ionizing radiation in accordance with knowledge of medicine, dentistry, dental hygiene and the biomedical sciences.

9. Overseeing the daily operations such as an ongoing review of a patient records to assess the appropriateness, necessity and quality of care provided compliance records with applicable state and/or federal regulations quality assurance process for the patient care.

10. Providing patient education, charting caries, taking impressions for study casts, any other function in the definition of the practice of dentistry as may be delegated by a licensed dentist in accordance with regulations promulgated by the commissioner.

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 the petitioner's assertion that the proffered position most closely resembles that of an operations research analyst. The Department of Labor (DOL) describes the work of operations research analysts in the Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 176-177 as follows:

> Operations research and management science are terms that are used interchangeably to describe the discipline of applying advanced analytical techniques to help make better decisions and to solve problems. . . .
>
> The prevalence of operations research in the Nation's economy reflects the growing complexity of managing large organizations that require the effective use of money, materials, equipment, and people. Operations research analysts help determine better ways to coordinate these elements by applying analytical methods from mathematics, science, and engineering. They solve problems in

> different ways and propose alternative solutions to management, which then chooses the course of action that best meets the organization's goals. . . .

In this case, although the petitioner's description of the duties bears a superficial resemblance to some of the duties of an operations research analyst, the Service is not persuaded to classify the position as such. The beneficiary will not be applying advanced analytical techniques from mathematics, science, and engineering to help a large organization make more effective use of money, materials, equipment, and people. Additionally, according to the Handbook at page 177, most operations research analysts work for telecommunication companies, air carriers, computer and data processing services firms, financial institutions, insurance carriers, engineering and management services firms, and the federal government. There is no indication in the Handbook that small medical or dental practices normally require the services of operations research analysts.

The duties that the petitioner endeavors to have the beneficiary perform are primarily those of an office and administrative support worker manager in a dental office. The Handbook describes the position of an office and administrative support worker manager as follows:

> Office and administrative support supervisors and managers often act as liaisons between the clerical staff and the professional, technical, and managerial staff. This may involve implementing new company policies or restructuring the workflow for their departments. They may also keep their superiors informed of their progress and abreast of any potential problems. Often this communication takes the form of research projects and progress reports. Because they have access to information such as their department's performance records, they may compile and present these data for use in planning or designing new policies.

A review of the DOL's Handbook, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as an office and administrative support worker manager. Most businesses fill administrative and office support supervisory and managerial positions by promoting clerical or administrative support workers within their organizations. In addition, certain personal qualities such as strong teamwork and problem solving skills and a good working knowledge of the organization's computer system are often considered as important as a specific formal academic background.

In support of its assertion that the proffered position requires a baccalaureate degree in dental science or a related field, the

petitioner submitted a "professional position evaluation" performed by [redacted] DMD, MD, Assistant Professor of Oral and Maxillofacial Surgery, Harvard School of Dental Medicine. [redacted] states that the proffered position is a specialty occupation because it requires bachelor's-level educational training in dental science or a related field, as well as the application of specialized knowledge in these fields. [redacted] has not, however, provided any credentials setting forth her ability to give expert testimony regarding the question of whether the proffered position qualifies as a specialty occupation. Furthermore, no evidence has been submitted with this letter to corroborate the opinions and comments contained therein. As such, this letter is insufficient evidence to show that a baccalaureate degree in a specific specialty is the normal minimum requirement for entry into the occupation.

The petitioner has not submitted any documentary evidence to show that it requires a bachelor's degree in a dental-related field or its equivalent for the proffered position.

In an effort to show that the requirement of a baccalaureate degree in a specific specialty is an industry standard, the petitioner submitted letters from representatives of three other dental firms. Each author states that the requirement of a baccalaureate degree in dental hygiene or a related field is standard to the industry in parallel positions. None of these representatives provided any independent evidence to corroborate this statement. Additionally, the attention of the Service is drawn to the fact that all three of these letters are virtually identical and appear to have been written by the same person. The Service must, therefore, question whether these letters actually represent the opinions of the respective writers of these letters. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988). Additionally, three letters do not demonstrate an industry standard. Consequently, it cannot be concluded that the petitioner has submitted sufficient evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

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 in a specific specialty. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the minimum requirement for employment as a dental researcher and analyst.

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.

With respect to counsel's objection to denial of this petition in view of the approval of a similar petition in the past, the Service is not required to approve applications or petitions where eligibility has not been demonstrated. The director's decision does not indicate whether he reviewed the prior approval of the initial nonimmigrant petition, and this record of proceeding, as presently constituted, does not contain a copy of the previous petition and its supporting documentation. If the prior petition was approved based on the same evidence contained in this record of proceeding, however, the approval of the initial petition would have involved gross error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the service nor any other agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

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 director's November 21, 2001 decision to deny the petition is affirmed. The petition is denied.