

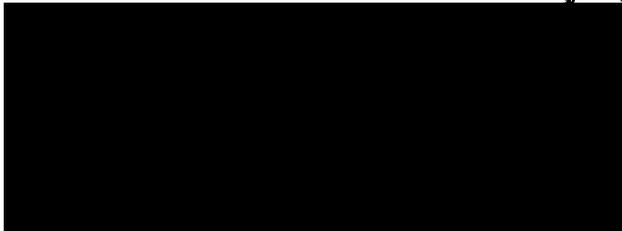
U.S. Citizenship
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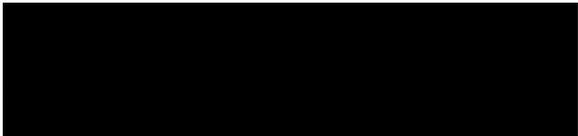
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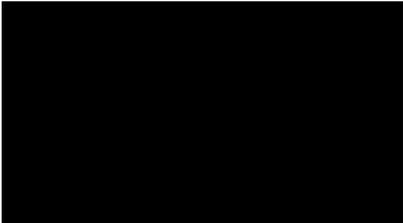
FILE: LIN 02 244 50912 Office: NEBRASKA SERVICE CENTER Date:

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and 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 laboratory that seeks to employ the beneficiary as a fixed prosthetics crown and bridge technician. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a fixed prosthetics crown and bridge technician. Evidence of the beneficiary's duties includes: the Form I-129 and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail fabricating dental crowns and bridges for clinical and educational applications and supervising three assistants in the fabrication process. The petitioner did not state the educational requirements of the proffered position.

The director found that the proffered position was not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that in response to the request for evidence the petitioner submitted a new job description and title, constituting a material change in the proposed employment. The director viewed the changes as an attempt to modify a seemingly less complex position, that would normally be performed by a person with an associate's degree, into a supervisory position. The director stated that the petition will not be approved at a future date under a new set of facts because a petitioner shall not materially change a petition that has already been filed in an effort to make a deficient petition conform to Immigration and Naturalization Service (INS), now CIS requirements. Finally, the director stated that because the material changes destroyed the credibility of the evidence, the record was inconclusive as to whether the proffered position qualifies as a specialty occupation.

On appeal, counsel states that the director's decision to deny the petition constitutes an abuse of discretion; it is contrary to the regulations and is not supported by the evidence. According to counsel, the submitted evidence demonstrates that the proffered position - dental laboratory manager - is a specialty occupation that requires a bachelor's degree in dental technology or its equivalent, and that the beneficiary is qualified for the position. Counsel refers to the January 8, 2003 letter from Professor Perez of Purdue University, Dental Education Program, which states that the proffered position - dental laboratory manager - requires a baccalaureate degree in dental technology, and that the beneficiary qualifies for this position. In addition, counsel contends that the Foundation for International Services, Inc. concurred that the beneficiary is qualified for the position. Counsel states that the director erroneously relied on *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998) because the response to the request for evidence merely described the position in greater detail; no new facts, material changes, or amendments to the initial job description were presented. Counsel maintains that the change to the position's title is intended to more accurately reflect the beneficiary's duties, and emphasizes that the beneficiary is qualified for the position. Finally, counsel submits an affidavit.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

First, the AAO will address the proffered position's title and duties. To do this, the AAO will consider the initial petition; counsel's January 14, 2003 letter, submitted in response to the request for evidence; and the petitioner's affidavit, submitted on appeal, that affirms the contents of counsel's letter.

The job description in the initial petition stated that the beneficiary would fabricate dental crowns and bridges for clinical and educational applications, and supervise three assistants in the fabrication process. Counsel's January 14, 2003 letter stated that the petition should be amended to reflect the job title "dental laboratory manager." The letter, furthermore, stated that the beneficiary will select, train, and evaluate dental technician trainees; communicate with doctors regarding design and technical questions; set up appointments for business development; establish and maintain a quality control program; review technical journals to

evaluate new materials and techniques for implementation in the laboratory; review and manage the laboratory budget; oversee the purchase of raw materials; oversee billing; schedule the maintenance of equipment; and handle personnel matters. The letter, finally, stated that the candidate must have a background in business administration, and that the beneficiary has this training. The petitioner's affidavit reiterated the duties and requirements as stated in counsel's letter.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Based on the evidence contained in the record, the AAO concurs with the director's finding that counsel's January 14, 2003 letter and the petitioner's affidavit materially changed the proffered position's title and duties. None of the duties described in counsel's letter are either explicitly or implicitly mentioned in the initial petition; they are therefore irreconcilable with those of the initial petition. Thus, the AAO will consider only the position's duties and requirements as stated in the initial petition.

It is important to note that doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO finds that the petitioner's affidavit failed to explain the job description's inconsistencies.

Next, the AAO turns to consider the criteria at 8 C.F.R. §§ 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (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." *See 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)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). According to counsel, the submitted evidence demonstrates that the proffered position - dental laboratory manager - is a specialty occupation that requires a bachelor's degree in dental technology or its equivalent, and counsel refers to Professor Perez's January 8, 2003 letter which states that a dental laboratory manager position requires a baccalaureate degree in dental technology.

In determining whether a position qualifies as a specialty occupation, 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

As previously discussed, the position's job title and description as outlined in the initial petition shall be considered in this proceeding. As such, the *Handbook* discloses that the beneficiary's duties reflect those of a dental laboratory technician or ceramist, and it indicates that a bachelor's degree in a specific specialty is not required for this type of position. Thus, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO considers Professor Perez's January 8, 2003 letter unpersuasive. Notably, Dr. Perez's opinion is based on the job description and associated responsibilities of the dental laboratory manager position - the position the AAO disregards. Moreover, Dr. Perez's opinion is not corroborated by independent evidence. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Accordingly, the opinion carries no weight in this proceeding.

It is important to note that Dr. Perez's June 13, 2002 letter stated that the proffered position of fixed prosthetics crown and bridge technician, as initially described in the petition, requires only a dental laboratory technology associate of science degree.

There is no evidence to establish the second criterion: that a degree requirement is common to the industry in parallel positions among similar organizations or the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty.

The proffered position is newly created; therefore, the petitioner fails to establish that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. As previously discussed, the *Handbook* reports that the beneficiary's proposed duties resemble those of a dental laboratory technician, and that a bachelor's degree in a specific specialty is not required for this position. Consequently, no evidence in the record establishes the fourth criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.