

U.S. Citizenship
and Immigration
Services



[Handwritten signature]

[Redacted]

FILE: LIN 03 193 50674 Office: NEBRASKA SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [Redacted]
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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

for 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 family dental health group that seeks to employ the beneficiary as a registered dental hygienist. 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, the petitioner states that the proffered position qualifies as a specialty occupation.

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 registered dental hygienist. Evidence of the beneficiary's duties includes, in part: 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, in part: reviewing patient health histories; conducting preliminary oral examinations; taking intra-oral photographs; exposing and processing x-rays; performing oral prophylaxis; applying fluoride treatments and sealants; educating patients about oral hygiene procedures; maintaining patient records; administering local anesthesia; condensing, carving, and polishing amalgam restorations, crowns, and supra-gingival areas; taking impressions for diagnostic models; retracting gingival tissue prior to impression; fabricating temporary restorations; and placing and removing elastic orthodontic separators. The petitioner stated that a candidate must possess a bachelor's degree in dental hygiene.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by a dental hygienist, and that an associates degrees is sufficient for practice in a private dental office. The director stated that the petitioner did not show a past practice of hiring candidates with bachelor's degrees in dental hygiene.

The petitioner contends that the position qualifies as a specialty occupation. The petitioner contends that it has a past practicing of hiring candidates with bachelor's degrees in a specific specialty. On appeal, the petitioner submits evidence to support its contention.

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.

The AAO first considers 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 *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)).

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. A careful review of the *Handbook* discloses that the director correctly determined that the duties of the proffered position mirror those of a dental hygienist. Based on the information in the *Handbook*, a dental hygienist removes soft and hard deposits from teeth, teaches patients how to practice good oral hygiene. Hygienists examine patients' teeth and gums, recording the presence of diseases or abnormalities. They remove calculus, stains, and plaque from teeth; perform root planing as a periodontal therapy; take and develop dental x-rays; and apply cavity-preventive agents such as fluorides and pit and fissure sealants. In some States, hygienists administer anesthetics; place and carve filling materials, temporary fillings, and periodontal dressings; remove sutures; and smooth and polish metal restorations. Although hygienists may not diagnose diseases, they can prepare clinical and laboratory diagnostic tests for the dentist to interpret. Hygienists sometimes work chairside with the dentist during treatment. Dental hygienists use hand and rotary instruments and ultrasonics to clean and polish teeth, x-ray machines to take dental pictures, syringes with needles to administer local anesthetics, and models of teeth to explain oral hygiene.

The DOL relates that dental hygienists must be licensed by the State in which they practice. To qualify for licensure, a candidate must graduate from an accredited dental hygiene school and pass both a written and clinical examination. Most dental hygiene programs grant an associate degree, although some also offer a certificate, a bachelor's degree, or a master's degree. A minimum of an associate degree or certificate in dental hygiene is required for practice in a private dental office. A bachelor's or master's degree usually is required for research, teaching, or clinical practice in public or school health programs. Based on this information, the petitioner fails to establish the first criterion because a dental hygienist position requires only an associate degree.

There is no evidence in the record that would establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations or that the position can be performed only by an individual with a degree.

The petitioner claims that it establishes the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) by normally requiring a degree or its equivalent for the position. On appeal, the petitioner submits evidence that it has hired two candidates with bachelor's degree in dental hygiene.

The petitioner's claim and evidence is not persuasive. 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. CIS 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 baccalaureate or

higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were 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 baccalaureate or higher degrees. *See id.* at 388. As previously related, the DOL reports that the duties of the proffered position mirror those of a dental hygienist, and as such, it would not require a bachelor's degree.

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. There is no evidence in the record that would show that the duties of the proffered position are complex, requiring a candidate holding a bachelor's degree. As the DOL relates, a bachelor's or master's degree is required for a research position. This level of education is not required for practicing in a private dental office, however.

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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.