U.S. Department of Homeland Security

PUBLIC COPY

Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[redacted]

FILE: WAC 01 104 52575 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2004

IN RE: Petitioner: [redacted]
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:

[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 nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental office that currently employs eight people and has a gross annual income of $1,000,000. It seeks to temporarily employ the beneficiary as a dental trainee for a period of three years.

The acting director denied the petition because he determined that the petitioner had not established that the beneficiary possessed the necessary license to practice the proffered position, or, in the alternative, that the proffered position did not require a license. The decision states, in pertinent part:

> The beneficiary will be employed as Dentist Trainee. However, the beneficiary does not hold the required state license from the State of Nevada. The petitioner has not established that the beneficiary is eligible to fully practice the specialty occupation. Furthermore, the petitioner has not submitted evidence to establish that the beneficiary may perform the duties of the proposed position without a license.

The request for additional evidence that preceded the denial identified the beneficiary qualification issue in this section:

> Licensure: Submit a copy of the beneficiary's permanent [license] as a dentist trainee. If the beneficiary is not in possession of a permanent unrestricted license, submit a temporary license, interim permit or other authorization issued by the authority that authorizes the beneficiary to practice the profession. Or submit evidence that the alien may practice the profession without a license.

On appeal, counsel notes, in part, that the request for licensure evidence focused on an incorrect state: the beneficiary would work in Nevada, not California. Counsel also contends that this "blatant error bolsters our contention that the Director failed to review and analyze the entire record." The AAO notes that the state location error did not mislead, and that the record supports the director's conclusion.

Counsel contends that the dismissal was erroneous in light of the "listed duties and explanation" that counsel provided in reply to the request for evidence:

> Despite [the reply's] listed duties and explanation, the Director summarily dismissed the petition by providing a conclusory statement that the petitioner has not submitted evidence to establish that the beneficiary may perform the duties of the proposed position without a license. The Director failed to provide an analysis of why a proposed duties and explanation did not support the finding that the beneficiary may practice the profession without a license.

If a proposed H-1B temporary position requires a license, the petitioner must establish that the beneficiary possesses it. 8 C.F.R. § 214.2(h)(4)(v)(A) states:

> *General*. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage employment in that occupation.

The regulations at 8 C.F.R. §§ 214.2(h)(4)(v)(B) and (C) address situations where a state provides for temporary licensure or the performance of licensed-required duties under the supervision of licensed senior or supervisory personnel.

The descriptions of the proposed duties that appear in the record, are critical in deciding whether the licensure is relevant to this proceeding.

The Form I-129 listed the job title as "Dental Trainee" and, for a nontechnical description of the position stated, "Under full supervision of a licensed dentist, trainee will provide general dentistry, but not limited to: oral diagnosis and treatment planning, prophylaxis, root planning, and oral hygiene instructions, restorative, fixed and removable prosthetics, endodontics, and oral surgery."

In a letter of support that accompanied the Form I-129, the petitioner's proprietor repeated this duty description.

As initially described by the petitioner at the time of filing the Form I-129, the proffered position clearly falls within the practice of dentistry as defined at Nevada Revised Statutes (NRS) section 631.215, "Persons deemed to be practicing dentistry", which reads:[1]

> 1. Any person shall be deemed to be practicing dentistry who:
>
> (a) Uses words or any letters or title in connection with his name which in any way represents him as engaged in the practice of dentistry, or any branch thereof;
>
> (b) Advertises or permits to be advertised by any medium that he can or will attempt to perform dental operations of any kind;
>
> (c) Diagnoses, professes to diagnose or treats or professes to treat any of the diseases or lesions of the oral cavity, teeth, gingiva or the supporting structures thereof;
>
> (d) Extracts teeth;
>
> (e) Corrects malpositions of the teeth or jaws;
>
> (f) Takes impressions of the teeth, mouth or gums other than as authorized by the regulations of the Board;
>
> (g) Examines a person for, or supplies artificial teeth as substitutes for natural teeth;
>
> (h) Places in the mouth and adjusts or alters artificial teeth;
>
> (i) Does any practice included in the clinical dental curricula of accredited dental colleges or a residency program for those colleges;
>
> (j) Administers or prescribes such remedies, medicinal or otherwise, as are needed in the treatment of dental or oral diseases;

---

[1] For the NRS text, the AAO consulted the Law Library section of the Nevada State Internet site, www.leg.state.nv.us.

(k) Uses X-ray radiation for dental treatment or dental diagnostic purposes; or

(l) Determines:

(1) Whether a particular treatment is necessary or advisable; or

(2) Which particular treatment is necessary or advisable.

2. Nothing in this section:

(a) Prevents a dental assistant, dental hygienist or X-ray technician from making radiograms or X-ray exposures for diagnostic purposes upon the direction of a licensed dentist.

(b) Prohibits the performance of mechanical work, on inanimate objects only, by any person employed in or operating a dental laboratory upon the written work authorization of a licensed dentist.

(c) Prevents students from performing dental procedures that are part of the curricula of an accredited dental school or college or an accredited school of dental hygiene or an accredited school of dental assisting.

(d) Prevents a licensed dentist or dental hygienist from another state or country from appearing as a clinician for demonstrating certain methods of technical procedures before a dental society or organization, convention or dental college or an accredited school of dental hygiene or an accredited school of dental assisting.

(e) Prohibits the manufacturing of artificial teeth upon receipt of a written authorization from a licensed dentist if the manufacturing does not require direct contact with the patient.

Because the petitioner's initial filing described the proffered position in terms that clearly fall within the relevant state's statutory definition of the practice of dentistry, and because

the record contains no evidence of a state license, the director's decision must be affirmed.

Furthermore, because the duties as described at the time of the filing of the petition appeared to involve the practice of dentistry ("general dentistry, but not limited to: oral diagnosis and treatment planning, prophylaxis, root planning, and oral hygiene instructions, restorative, fixed and removable prosthetics, endodontics, and oral surgery"), the director acted correctly in denying the petition when, in response to the request for licensure evidence, the petitioner presented no evidence of temporary or permanent licensure or of state provision for dental practice under the supervision of a dentist. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

In reply to the request for additional evidence, which gave notice of the licensure issue, counsel provided this "listed duties and explanation" that he now relies upon as establishing that there is no licensure requirement:

> The offered position, DENTIST TRAINEE, is identical to an unlicensed intern position for a recent graduate of dental medicine. It is a position that offers an on-the-job training and is 100% fully supervised by a licensed dentist. The position is also similar to intern-architects. This entry-level and training period gives an intern-architect practical work experience while he or she prepares for the Architect Registration Examination. In the instant case, the job offer will provide a DENTIST TRAINEE practical work experience while he prepares for the dental board examination.
>
> The TRAINEE, though versed in general dental areas, will not perform any general dentistry services, or any diagnosis and/or treatment. He will observe the process of diagnosis and treatment and discuss with the supervising dentist the reasons behind a particular diagnosis and/or treatment.
>
> He will review a patient's dental history and prepare an oral report and/or analysis for use of the diagnosing and treating dentist. In addition, he will primarily review claims, evaluate dental services performed, and manage a staff of dental assistants and [a] receptionist. He will make follow up calls to patients under the care of the clinic.

> Further, he will attend, as assigned by the company, various seminars/conferences/continuing education in dentistry-related topics in new practice trends/technologies, prepare seminar reports and discuss items covered in the report.
>
> [The beneficiary] will ensure that [the] clinic's policies and procedures are being complied with from a patient's intake to completion of treatment. He will evaluate and assess the efficiency of current clinic practices and make recommendations for improvements. He will conduct regular inventory of [the] clinic's dental supplies for immediate replenishment and will be in charge over negotiating with suppliers.
>
> Although the position does not involve direct contact with patients, the position requires an applicant with appropriate professional and personal qualifications. Undergraduate academic preparation is required especially in the area of dentistry. Strong analytical skills, oral and written communication skills, and ability to manage time effectively are highly valued characteristics. In sum, the nature of the business and job description justify the hiring requirements which require a bachelor's degree in dental medicine and at the same time not require a Nevada state dentist license. (Emphasis in original)

The AAO has disregarded this new description of duties because it is materially different from, and even contradictory to, the duties as initially presented by the petitioner. A request for evidence is not an opportunity to redefine a proffered position.

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 when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (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.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.