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FILE: LIN 03 087 52942 Office: NEBRASKA SERVICE CENTER Date: MAY 03 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:
[Redacted]

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.

Marj Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 an orthodontic practice. In order to employ the beneficiary as an orthodontic technologist, the petitioner 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 documentary evidence.

Counsel correctly asserts that the director's decision is defective because it is based partly upon conclusions derived from research in sources that are not identified in the decision. The provision at 8 C.F.R. § 103.3(a)(1)(i) states that the officer denying a petition "shall explain in writing the specific reasons for denial." The decision's failure (at the last paragraph of its third page) to specify the "[I]ndependent research" and the "further research" upon which it based material findings about the proffered position violates this provision. In light of this substantive defect, the AAO discounted the findings and conclusions that the director based on the unidentified research.

Counsel also correctly notes that the actual duties of a proffered position, rather than the title, should be dispositive in Citizenship and Immigration Services (CIS) determinations on the specialty occupation issue. As is its usual practice in deciding appeals, the AAO focused especially upon the evidence about the proposed duties.

The appeal must be dismissed and the petition must be denied for each of two independent reasons. First, the evidence about the nature of the proposed duties is materially inconsistent. Second, the evidence describing the proposed duties does not establish that they would require the theoretical and practical application of the highly specialized knowledge that is associated with a dental degree and education and/or experience in orthodontics.

In reaching its decision, the AAO considered the entire record, including: (1) the Form I-129 and its supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents submitted with the brief.

The evidence of record indicates that the proffered position is a newly designed type that has not been previously offered by any orthodontist firm in the petitioner's state, Wisconsin.

The first issue to be addressed is the inconsistency in information about the beneficiary's involvement in the petitioner's practice.

On the Form I-129, the petitioner described the proposed duties as follows:

Provide clinical training to 20 orthodontic assistants; train all staff to implement orthodontic software/electronic charting throughout practice; act as Treatment Coordinator for patient treatment planning; assist orthodontists with data input for Invisalign® virtual reality images; train in-house lab techs. See support letter.

The five-page supporting letter from the petitioner's managing partner divided the proposed duties into five "module" areas, namely: (1) "Clinical Trainer"; (2) "Paperless Practice Trainer"; (3) "Treatment Coordinator/Trainer"; (4) "Invisalign Technologist"; and (5) "Laboratory Trainer." The clinical training duties would include: entry-level training of newly hired clinical assistants; on-the-job training and in-service training sessions for new and experienced assistants; and assessment of currently employed assistants' skills, knowledge, and potential for advancement. The treatment coordinator/trainer aspects involve counseling and explaining treatment plans to patients, and training clinical assistants to assume these duties. While stating that the proposed duties require an entry-level dentistry degree and orthodontics experience, the letter also attested that the petitioner's dentists would supervise the beneficiary, and that the duties do not require licensing.

According to the petitioner, the beneficiary's duties would be strictly "non-clinical." (See, for instance, the second paragraph at the second page of counsel's January 21, 2003 letter introducing the petition.)

However, in his letter supporting the proffered position as one requiring knowledge "far beyond what a traditional dental assistant or technologist or technologist would require," Dr. [REDACTED] University states, in part, that duties of this newly designed position would include "assist[ing] the doctors with orthodontic diagnosis, treatment planning and the actual delivery of that care to patients." Hence, Dr. [REDACTED] cites the need for "a basic dental education and additional advanced orthodontic studies." This information contradicts the petitioner's assertion that the beneficiary would not be involved in clinical aspects of the practice.¹

Also, the four-page letter of Dr. [REDACTED] of Orthodontics, Ltd., concludes that the proposed position "can only be performed by a professionally trained individual who has completed dental school and had been the beneficiary of additional training 'specifically in orthodontics.'" Dr. [REDACTED] refers, in part, to "safety considerations" in training orthodontist "auxiliary personnel," and states that only a licensed dentist trained in orthodontics or a teacher "specifically trained in the nuances of orthodontics" could adequately shoulder the responsibility. It is not evident in the record how non-clinical activities would involve safety considerations of the magnitude suggested by Dr. [REDACTED]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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 inconsistency in the petitioner's evidence renders it unreliable. Therefore, the petitioner has not met its burden of proof. Accordingly, the appeal must be dismissed and the petition must be denied.

¹ This also raises the issue as to whether the State of Wisconsin would require licensure for the newly designed position that the petitioner is proffering. The managing partner's assertion that that the duties do not require licensing does not resolve this issue, as it is not supported by documentation from appropriate authorities. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petition must also be denied because the evidence of record is insufficient to establish that the proposed duties actually require the theoretical and practical application of the highly specialized knowledge that is associated with a dental degree and education and/or experience in orthodontics.

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.

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 AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. To the limited extent that they are described in the record, it would appear that the five duty modules comport with the general duties of a dental assistant as described in the 2004-2005 edition of the *Handbook*.

The *Handbook* indicates, however, that most assistants learn their skills on the job, although an increasing number are trained in dental-assisting programs of a year or less duration. In light of this information about on-the-job training, it is not evident why training in the five modules could not be effectively conducted by an experienced dental assistant who has been properly trained in the five module areas by the petitioner's orthodontists and who is working under their supervision. After all, the petitioner has attested that the modules are non-clinical and that licensure is not required. Obviously, if such a dental assistant could conduct the training, the position does not require the services of someone with a baccalaureate or higher degree in dentistry. The validity of this observation is not negated by the evidence submitted about the educational credentials of persons teaching dental courses and conducting dental training. This is because

evidence does not establish that the cited courses and training are the exclusive ways to educate orthodontist dental assistants.

Furthermore, the two dentists' opinions about the requisite educational credentials are too conclusory to be persuasive. They do not specify the actual orthodontist-auxiliary teaching tasks that would necessitate a dental degree, and they do not explain why those tasks would require such a degree. Therefore, their opinions do not present an adequate factual foundation to validate them.

Likewise, the AAO finds that the rest of the petitioner's evidence about the proposed duties is too generally and generically stated to establish why the duties would require the theoretical and practical application of the highly specialized knowledge that is associated with a dental degree and education and/or experience in orthodontics.

Also, the documentation submitted to show the types of degrees that are customarily held by dental instructors is not relevant. None of the instructor positions are parallel to the proffered newly designed position for in-office training.

In light of the evidence of record, the petitioner has not satisfied any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

This is a newly designed position for which there is no showing, under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or the equivalent, in a specific specialty is a normal minimum requirement for entry.

The first prong of the second criterion is not met, because the record does not establish a degree requirement that is common to the industry in parallel positions among similar organizations. The second prong of this criterion is not met, as the petitioner has not shown that this particular position is so complex or unique that it can be performed only by an individual with at least a baccalaureate degree in a specific specialty. The general terms in which the duties are described do not demonstrate that the position would be especially complex or unique.

Of course, as the petition centers on a newly created position, there is no previous hiring history for the petitioner to urge under the third section of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, to the extent that they are depicted in the record, the duties do not appear to be so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). As earlier indicated in this decision, the very nature of the duties is unclear because of inconsistencies in the record. Also, the limited extent to which the duties are described does not establish that they are so specialized and complex as to be usually associated with a baccalaureate or higher degree in dentistry or any other specific specialty.

For the reasons discussed above, the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.

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ORDER: The appeal is dismissed. The petition is denied.