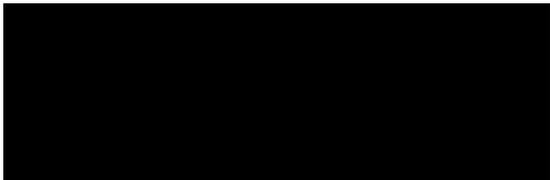




U.S. Citizenship
and Immigration
Services

D2



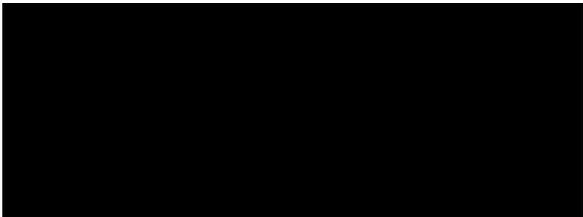
FILE: WAC 02 130 50798 Office: CALIFORNIA SERVICE CENTER Date:

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.

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 service that seeks to employ the beneficiary as an orthodontics research assistant. 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 states that the proffered position qualifies as a specialty occupation.

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.

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 an orthodontics research assistant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail updating the petitioner with breakthroughs in organizing, constructing, and repairing appliances for straightening teeth, removing separators, and selecting and fitting bands; furnishing information about advances in dental equipment and appliances, efficiency in systems and procedures, office computerization, relationships with patients, maintaining records, and new laws and regulations. The petitioner stated that a candidate for the proffered position must possess at least a bachelor's degree in dental medicine.

The director determined that the proffered position was not a specialty occupation. The director found the cited AAO decision (EAC 94 156 50594) was not binding since it was never published. The director was not persuaded that dentists normally require the services of a research associate to keep informed about technological breakthroughs, developments in equipment or procedures, or recent laws and regulations. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that it does not describe dentists as normally requiring an orthodontics research assistant to perform research studies to keep abreast of developments in the field. The director emphasized that the petitioner must have a reasonable and credible offer of employment consistent with its needs, and that this can be established by demonstrating that the proposed duties are normal and customary in similar organizations in the petitioner's industry. The director noted that there is no evidence that would show that similar businesses require the services of a research associate or that the petitioner has unique and specific needs for such services.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and that the director erroneously denied the petition. Citing to a prior AAO decision, counsel states the director erroneously denied the petition based on the irrelevant factors of the petitioner's income level and the size of its business, determining they did not justify the employment of an orthodontics research assistant. Counsel stresses that the director does not deny that the proposed duties require advanced knowledge and expertise in dentistry, and that the nature of the duties require knowledge that is associated with the completion of a baccalaureate degree or its equivalent related to the occupation. Finally, counsel contends that the practice of dentistry requires ongoing studies and research.

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.

In the September 17, 2002 letter, the petitioner asserted that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding does not, however, contain the supporting evidence submitted to the Vermont Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the

AAO cannot determine whether the prior petition is parallel to the immediate petition. Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO next 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 the appeal brief, counsel contends that the beneficiary will review major dental journals and literature for dental issues and developments of particular relevance to the petitioner's patients; however, the evidentiary record reveals that the petitioner never confirmed this duty. The statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the AAO will disregard counsel's inclusion of this particular duty.

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 evidentiary record discloses that the petitioner has failed to establish that the proposed duties actually require 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 requirement for entry into the occupation. As described by the petitioner, the proposed duties are vague and lack specificity. In the September 17, 2002 letter, the petitioner does not elaborate on the beneficiary's duties. For example, the petitioner never delineated how a "technological breakthrough" would impact the duties of "organizing, constructing[,] and repairing appliances for straightening teeth; removing separators; and selecting and fitting bands." Because the proposed duties are unduly vague, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because it cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

According to counsel, the director denied the petition because the income level and the size of petitioning entity did not justify the employment of an orthodontics research assistant. This statement misconstrues the

director's decision to deny the petition. In the denial letter, the director pointed out that the *Handbook* does not describe a dentist's office as normally requiring the services of a research associate. Furthermore, the DOL's *Career Guide to Industries (CGI)* indicates:

[T]he typical staffing pattern in dentists' offices consists of one dentist with a support staff of dental hygienists and dental assistants. Larger practices are more likely to employ office managers and administrative support workers.

Thus, the director correctly observed that dentists' offices, regardless of size and income, do not usually employ the services of an orthodontics research assistant. Larger practices tend to employ office managers and administrative support workers; they do not hire orthodontics research assistants.

No evidence in the record of this proceeding establishes the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Neither is there evidence in the record that would establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

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. Counsel maintains that the director does not deny that the proposed duties require advanced knowledge and expertise in dentistry, and that the nature of the duties would require the knowledge that is associated with the completion of a baccalaureate degree or its equivalent in the occupational field. Counsel contends that the practice of dentistry requires ongoing studies and research.

Counsel's statements are not convincing. Given the vagueness of the job description, the petitioner cannot 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.

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.