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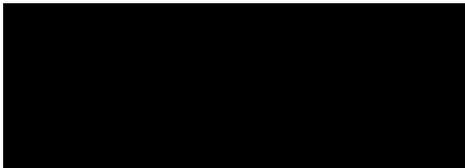
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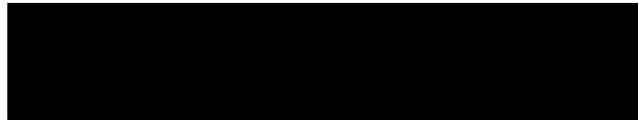
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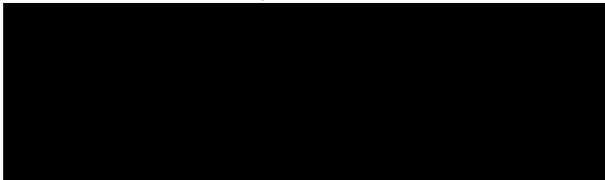
Date: FEB 08 2005

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.

Per Michael F. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 clinic with seven employees. It seeks to hire the beneficiary as a dental-patient education liaison and dental assistant. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation and that the beneficiary was not qualified to perform the duties of a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary's services as a dental specialist/researcher. Evidence of the beneficiary's duties includes: the Form I-129; a November 7, 2002 support letter from the petitioner accompanying the Form I-129; and the petitioner's May 27, 2003 response to the director's request for evidence.

At the time of filing, the petitioner provided a description of its proffered position in which it stated the beneficiary would be required to:

- Assist the dentist in the examination and treatment of patients, including preparing patients, sterilizing and disinfecting instruments, setting up instrument trays, preparing materials, taking and recording patient histories and vital signs of patients, and discussing patients' charts and files with dentist;
- Expose dental diagnostic x rays;
- Make preliminary impressions for study casts and occlusal registrations for mounting study casts; pour, trim and polish study casts, fabricate custom impression trays from preliminary impressions, clean and polish removable appliances, and fabricate temporary restorations;
- Assist dentist in management of medical and dental emergencies;
- Instruct patients in oral hygiene and plaque control programs, provide postoperative instructions prescribed by dentist, and explain treatment programs to patients, including insurance coverage;
- Record treatment information in patient records, as well as patient progress;

- Schedule appointments, prepare bills and receive payment for dental services, complete insurance forms, and maintain clerical records; and
- Review major dental journals for health issues and developments of relevance to patients, and research dental literature to identify suggestions for patient treatment.

In responding to the director's request for evidence, the petitioner restated many of these same duties, giving particular emphasis to the beneficiary's role in the making of crown and ceramic implants, and the importance of her review of dental journals and literature to its practice. As described by the petitioner, its intention is to rely on the beneficiary's identification of health issues and developments relevant to patient care to maintain currency regarding developments in the dental profession, as well as in the treatments available to its patients.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the duties of the proffered position to combine several occupations, including dental hygienist, dental assistant, dental laboratory technician, and administrative assistant, none of which required the minimum of a baccalaureate or higher degree, or its equivalent, for employment in entry-level positions. Accordingly, he determined that the proffered position did not meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In reaching its own conclusion regarding the degree requirements of the proffered position, the AAO has relied upon the 2004-2005 edition of the DOL *Handbook*, comparing the position's duties against those described for a range of dental professions. This review has found that virtually all of the proffered position's duties are listed among the occupations of dental assistant, dental hygienist, and dental laboratory technician. In pertinent part, the *Handbook* states the following regarding dental assistants:

Dental assistants perform a variety of patient care, office and laboratory duties. They work chairside as dentists examine and treat patients. They make patients as comfortable as possible in the dental chair, prepare them for treatment, and obtain their dental records. Assistants hand instruments and materials to dentists.... Assistants also sterilize and disinfect instruments and equipment, prepare trays of instruments for dental procedures and instruct patients on postoperative and general oral health care.

Some dental assistants prepare materials for impressions and restorations, take dental x rays, and process x-ray film as directed by a dentist. They also may remove sutures, apply topical anesthetics to gums or cavity-preventive agents to teeth, remove excess cement used in the filing process, and place rubber dams on the teeth to isolate them for individual treatment.

Those with laboratory duties make casts of the teeth and mouth from impressions, clean and polish removable appliances, and make temporary crowns. Dental assistants with office duties schedule and confirm appointments, receive patients, keep treatment records, send bills, receive payments, and order dental supplies and materials.

The *Handbook's* discussion regarding the duties of dental hygienists also relates to the proffered position, as follows:

Dental hygienists...teach patients how to practice good oral hygiene, and provide other preventive dental care.... They...take and develop dental x rays....

Dental hygienists also help patients develop and maintain good oral health. For example, they may explain the relationship between diet and oral health or inform patients how to select toothbrushes and show them how to brush and floss their teeth.

Dental hygienists use...models of teeth to explain oral hygiene.

Finally, in light of the petitioner's discussion of its intended reliance on the beneficiary in the making of crowns and ceramic implants, the AAO notes the *Handbook's* description of the duties of dental laboratory technicians:

Dental laboratory technicians fill prescriptions from dentists for crowns, bridges, dentures and other dental prosthetics....

In some laboratories, technicians perform all stages of the work, whereas, in other labs, each technician does only a few. Dental laboratory technicians can specialize in 1 of 5 areas: Orthodontic appliances, crowns and bridges, complete dentures, partial dentures, or ceramics....

The only aspect of the proffered position's duties not addressed by these three occupations is the beneficiary's review of dental journals and research of dental literature to identify potential patient treatments. However, while these activities are not specifically covered in the occupations just discussed, such activities appear to fall within those research activities routinely performed by dental clinics as part of patient treatment programs. As such, they do not constitute the type of original research that would place this work beyond the abilities of dental hygienists and assistants who work closely with dentists in the identification of dental problems and disease. The AAO takes particular note of the clinical training given dental hygienists in the identification of diseases and abnormalities of the mouth, and concludes that such individuals would have the knowledge to conduct the type of research described by the petitioner.

Therefore, based on its reading of the *Handbook*, the AAO concludes that the proffered position, as described by the petitioner in its letter of support and in response to the director's request for evidence, combines the duties of several dental professions. While the majority of the position's duties appear to fall within the *Handbook's* description of dental assistant, the AAO finds that certain duties -- patient education and the more technical aspects of creating crowns and ceramic implants -- require the knowledge and/or skills more commonly associated with the occupations of dental hygienist and dental laboratory technician, respectively.

In reaching this conclusion, the AAO takes note of counsel's concerns regarding the director's finding that the educational duties of the proffered position resembled those of dental hygienists. On appeal, counsel submits excerpts from the State of Virginia's regulations governing the practice of dentistry and dental hygiene, as well as the description of dental hygienist from the Department of Labor's *Dictionary of Occupational Titles (DOT)*, to establish that the petitioner's position does not include the duties of a dental hygienist and that the director erred in reaching this conclusion. The AAO does not, however, find counsel's assertions to be persuasive.

The petitioner in both its November 7, 2002 letter of support and its May 27, 2003 response to the director described duties -- instructing patients in oral hygiene and plaque control programs, and educating them regarding their treatment programs -- that are routinely performed by dental hygienists. As already noted, the DOL *Handbook* specifically refers to the educational duties of dental hygienists, as well as their use of instructional devices, such as models of teeth, in fulfilling their responsibilities. As a result, while the petitioner's position does not reflect all of the duties of a dental hygienist, the director correctly identified the close alignment between the beneficiary's instruction/education of the petitioner's patients and the oral health education performed by dental hygienists.

Counsel also contends that the *DOT* and regulatory materials he submits on appeal support a conclusion that the proffered position does not reflect the duties of a dental hygienist. However, the AAO's reading of these materials does not find this to be the case.

Although the *DOT* is not a persuasive source of information regarding the tasks and work activities associated with a particular occupation, the AAO, nevertheless, notes that its description of the educational duties of dental hygienists uses language that parallels that used by the petitioner to describe its position. The *DOT* states that dental hygienists may "provide...health education to improve and maintain oral health of school children." The petitioner's November 7, 2002 letter of support specifically stated that the beneficiary would instruct patients in oral hygiene and plaque control programs, as well educate them regarding their specific treatment programs. This description clearly aligns the educational role of the beneficiary with that assigned to dental hygienists by the *DOT*. As a result, the *DOT's* discussion of dental hygienist does not support counsel's assertions that the proffered position does not reflect the duties of a dental hygienist.

The AAO has also reviewed the copies of the regulations governing the practice of dentistry and dental hygiene in Virginia, as submitted by counsel, and concludes they do not preclude dental hygienists from providing educational services of the type described by the petitioner. While the regulatory language submitted by counsel states that oral health education is not considered to be part of the practice of dental

hygiene or dentistry (18 VAC 60-20-240), the regulations governing the duties that must be delegated to dental hygienists also states that nothing in the language governing such delegations prevents a licensed dental hygienist from providing educational services (18 VAC 60-20-220). This material, therefore, also fails to support counsel's contention that the director erred in reaching his conclusion that proffered position was, in part, that of a dental hygienist.

Having concluded that the duties of the proffered position of dentist-patient education liaison and dental assistant parallel those of dental assistants, hygienists and laboratory technicians, the AAO turns to the *Handbook* to determine whether these occupations normally require applicants for employment to have the minimum of a baccalaureate or higher degree, or its equivalent. The *Handbook* states the following regarding the educational requirements for dental assistants:

Most assistants learn their skills on the job, although an increasing number are trained in dental-assisting programs offered by community and junior colleges, trade schools, technical institutes, or the Armed Forces....

For dental hygienists, the requirements as discussed by the *Handbook* are:

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....

In 2002, the Commission on Dental Accreditation accredited about 265 programs in dental hygiene. 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.

The *Handbook* offers the following regarding the training of dental laboratory technicians:

Most dental laboratory technicians learn their craft on the job.... Becoming a fully trained technician requires an average of 3 to 4 years, depending upon the individual's aptitude and ambition, but it may take a few years more to become an accomplished technician....

Training in dental laboratory technology also is available through community and junior colleges, vocational-technical institutes, and the U.S. Armed Forces. Formal training programs vary greatly both in length and in the level of skill they impart.

In 2002, 25 programs in dental laboratory technology were approved (accredited) by the Commission on Dental Accreditation.... Accredited programs normally take 2 years to complete and lead to an associate degree. A few programs take about 4 years to complete and offer a bachelor's degree in dental technology.

In that the *Handbook* finds no baccalaureate or higher degree, or its equivalent, to be required for employment in any of the occupations whose duties comprise the proffered position, the AAO concludes that the proffered position cannot qualify as a specialty occupation on the basis of a degree requirement under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

A review of the record finds the petitioner to have submitted no evidence to establish that its degree requirement is standard within its industry or that it normally requires a degree for its position. The petitioner has, however, described its position as being particularly complex, both in its letter of support and in response to the director's request for evidence. On appeal, counsel also emphasizes the complex nature of the proffered position's duties. The AAO will, therefore, consider the evidence submitted by the petitioner and counsel in determining whether the stated specialization and complexity of the proffered position satisfies the requirements of the fourth criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A).

In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has again reviewed the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of someone trained as a dental assistant, dental hygienist or laboratory technician. As part of that review, the AAO has considered the specific duties that counsel identifies as supporting a finding that the proffered position is a specialty occupation:

- Identifying, treating, and educating all candidate patients in what their treatment plan is and how to best utilize their insurance coverage to restore their mouths;
- Keeping close track of patient and treatment variables, the relative progress that each patient is making, and entering data into a computer program so that treatment can be closely monitored and customized to meet the needs of each patient;
- Reviewing major professional dental journals for health issues and developments of particular relevance to the patients, eliciting detailed patient histories and discussing with the dentist the patients' charts and file, as well as research dental literature to find research suggestions for patient treatment;
- Explaining to the patients, using dental and medical terminology, what treatment they will undergo, and when and how it will be done;

- Teaching patients how restoration of the dental cavity will be performed using the insurance coverage that they have available to them; and
- Finding, developing, and utilizing educational devices to help patients understand their path to health and responding to answer any patients' questions.

While the AAO finds that certain of the above duties may give the proffered position greater responsibility than that of a dental assistant, it, nevertheless, does not find them to be so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. All of the instructional responsibilities described above -- educating patients regarding their treatment plans -- are duties similar to those regularly performed by dental hygienists who are not required to have a baccalaureate or higher degree to practice their profession. The research duties of the position, as already discussed, do not involve original research but are of the type routinely undertaken by dental clinics as part of patient treatment programs, and can be performed by individuals with the appropriate clinical training or experience, such as dental hygienists. Finally, the recording of patients' progress, whether manually or electronically, appears to be a responsibility that, according to the *Handbook*, is carried out by dental assistants.

Having considered the duties of the proffered position, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by dental assistants, dental hygienists and dental laboratory technicians. As a result, the AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth 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.

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