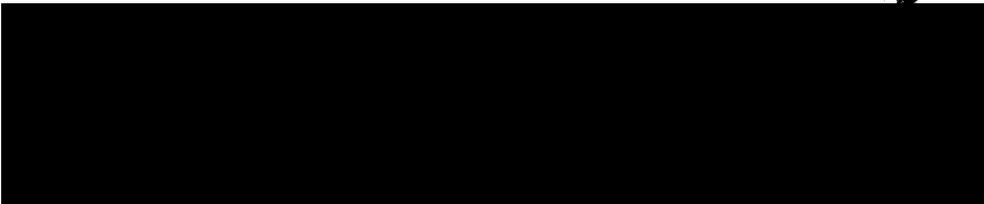


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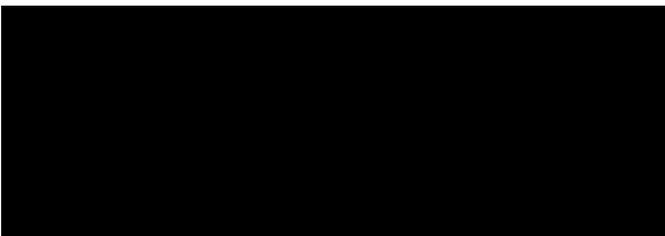
FILE: WAC 03 227 53976 Office: CALIFORNIA SERVICE CENTER Date:

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 is dismissed. The petition is denied.

The petitioner is a dental office that seeks to employ the beneficiary as a dental specialist/researcher. 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 submits a brief.

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 a dental specialist/researcher. 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 analyzing the clinic's practices and procedures, comparing them with national standards and administrative policies; conferring with staff to formulate policies and recommend procedural changes; hiring staff and supervising their work; overseeing billing; setting up the computer system; assisting the dentists with the analysis of patients' records; examining patients' records to compose dental reports for the ultimate approval of the dentists; providing an analysis of the patients' oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history, and laboratory results and record conditions for diagnosis and treatment by the dentist; suggesting to the dentist solutions to patients' conditions; maintaining dental reports and coordinating dental care evaluations and developing criteria and methods for the evaluations; using medical journals, textbooks, and medical research materials to analyze and evaluate patients' conditions, particularly regarding AIDS and treatment of gingival diseases; and researching new developments in the medical and dental care industries. The petitioner stated that the beneficiary was offered the position because she holds the degree of Doctor of Dental Medicine (D.M.D.) from the University of the East, Philippine Islands. The petitioner claimed that the proffered position does not require licensure because there is no patient care.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that the duties of the proffered position are performed by administrative services managers, an occupation that does not require a bachelor's degree. The director found that the proposed duties and level of responsibility do not indicate a complexity or authority that is beyond what is normally encountered in the occupational field, and that it is not common in the industry to require an office manager to possess a bachelor's degree in the field.

On appeal, counsel states that the director ignored the petitioner's statement that it normally requires a doctoral degree in dentistry or its equivalent for the proffered position. Counsel contends that the beneficiary's duty to perform medical and dental research and diagnosis require at least a doctor of dental medicine. Counsel states that the beneficiary will "analyze a dentist's work and make recommendations as to improvement in diagnosis or treatment." Referring to the *Handbook*, counsel states that the job duties are more aligned with a medical and health services manager, an occupation that requires a master's degree in certain fields or a bachelor's degree for some entry-level positions in smaller facilities. Counsel states that on-the-job experience should not be deemed as a standard requirement for a medical and health services manager. According to counsel, the fact that on-the-job experience can qualify a beneficiary for such a position is consistent with the CIS practice of substituting three years of progressive employment for each year of formal education that a beneficiary lacks. Counsel contends that CIS considers educational equivalency when a position usually requires at least a bachelor's degree as the standard. Counsel refers to court decisions to state that administrative and managerial positions qualify as specialty occupations if the position involves supervising employees who occupy specialty occupations and hold specific degrees or the

position's duties are more complex than the customary duties of an administrator or manager. Counsel states that the beneficiary's administrative duties, which involve 30 percent of the position's time, are more complex than the customary duties of an administrator or manager.

Upon review of the record, the petitioner has not established that the proffered position is 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.

Counsel claims that the beneficiary will devote 30 percent of her time to administrative duties, 40 percent to assisting dentists in determinations and diagnosis by reviewing patients' records, and 30 percent to medical and dental research. Because counsel states that the beneficiary will perform duties similar to a health services manager and that the job involves medical research, we will analyze information in the *Handbook* about these job classifications. According to the *Handbook*, employers require either a master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration as the standard credential for most generalist positions in the field or a bachelor's degree for some entry-level positions in smaller facilities and at the departmental level within healthcare organizations. The *Handbook* states that "[p]hysicians' offices and some other facilities may substitute on-the-job experience for formal education."

The petitioner does not require a master's degree for the proffered position. Because the *Handbook* indicates that employers in smaller facilities substitute on-the-job experience for formal education, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent in a specific specialty, D.M.D., is the normal minimum requirement for entry into the particular position, dental specialist/researcher.

Counsel's contention, that CIS considers educational equivalency when a position usually requires at least a bachelor's degree as the standard, is not persuasive. Educational equivalency is considered by CIS only when

a specific degree does not exist in an occupational field, *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). In the instant case, the *Handbook* reports that employers seeking candidates to fill administrative and health services manager jobs may substitute on-the-job experience for formal education. CIS will not consider educational equivalency for these jobs because the *Handbook* indicates that specific bachelor's degrees exist in the occupational field, for example, in health administration.

Counsel claims that the beneficiary will engage in medical research. In the *Handbook*, the job classification that engages in medical research is the medical scientist. The *Handbook* states that medical scientists research human diseases in order to improve human health. A bachelor's degree would be the minimum requirement in order to enter into the field of medical research, per the *Handbook*. According to the *Handbook*, whatever the branch of science involved, and no matter what the setting for the research may be, it appears that the main focus of such researchers is on finding solutions to very specific problems, or answers to very specific questions. The solutions or answers which they seek, however, have a broad application rather than an individual scope. The goals of medical researchers are not necessarily the same as those of medical or dental practitioners, who diagnose individuals and seek solutions for those particular patients.

The duties of the proffered position appear to be focused on individual patient diagnosis and care. The research involved, consisting of analyzing patients' oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history, and laboratory results, is the type of research done by dentists and their staff in order to treat patients. This is not the type of research contemplated by the *Handbook* or the submitted job announcements in reference to the researcher positions. The dental literature the beneficiary would read, in fact, publishes the work of the medical and dental scientists conducting studies in laboratories and clinical facilities. There is no information on record to indicate that this is the type of work to be performed in the proffered position.

To satisfy the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submitted job postings. However, the postings fail to establish that the requirement of a doctoral degree in dentistry or its equivalent is common to the industry in parallel positions among similar organizations. None of the companies in the postings require a doctoral degree in dentistry or its equivalent and the duties of their positions differ from the proffered position. Further, the companies in the postings are either dissimilar in nature to the petitioner or their nature is undisclosed. Novum Pharmaceutical Research Services, Inc. offers study services to the generic, pharmaceutical, biotechnology industries; it differs from the petitioner, a small dental clinic. Novum Pharmaceutical Research Services, Inc. required a degree in biological sciences or a health-care related field. The UCLA/RAND posting sought a candidate to provide research support for an asthma program; it required a college degree in science or a health-related field. Kelly Scientific Resources sought a candidate with a BS in a scientific discipline or a health-related field to assist the clinical trials manager. Consequently, the postings are inadequate to establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor is there evidence to establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor does the evidence in the record 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. Counsel claims that the petitioner stated that it normally requires a doctoral degree in dentistry or its equivalent for the proffered position. However, 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 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.

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. Again, the *Handbook* reveals that an administrative and health services manager would not require a bachelor's degree in a specific specialty, and that the duties of the proffered position do not resemble those of a medical scientist, a medical research position.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. 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.