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U.S. Citizenship
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Services



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MAY 11 2005

FILE: WAC 03 145 50372 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:

SELF-REPRESENTED

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 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 employee leasing service company that seeks to employ the beneficiary as a dental health service administrator. 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, the petitioner submits a letter.

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.

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 health service administrator. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's April 3, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing, implementing and maintaining policies and procedures related to dental health services; planning, directing, coordinating and supervising the delivery of dental health services to patients at dental clinics; preparing a dental health service management report; providing assistance to the controller in the preparation of the company's annual budget; and evaluating and providing orientation to new employees. In response to the director's request for evidence, the following duties were added: supervising the company's accountant and marketing analyst. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in any medical, dental or healthcare-related field.

The director found that the proffered position was not a specialty occupation, because it is a combination of a dental assistant and an office administrator. The director also stated that the petitioner did not establish that it would actually be employing the beneficiary. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that it has provided evidence to establish the position's complexity due to the supervisory duties associated with the position. The petitioner also states that the requirement for a dental health administrator with a degree is not dependent on the size of the organization but on the nature of its business and its needs to fill the position. The petitioner asserts that the beneficiary is able to perform the duties of the proffered position due to her knowledge of the dental healthcare setting, her proficiency in medical terminology and her previous management experience. Finally, the petitioner states that the beneficiary would be supervising and controlling the accountant and the marketing specialist, which are both specialty occupations and that a supervisor without a degree may not control personnel with a degree.

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.

The AAO turns first 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; 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.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not agree with the director that the position is a combination of a dental assistant and office administrator. Some of the proposed duties could fall under each of those position descriptions, but the proffered position description is primarily that of a health services manager. While the *Handbook* states that the general requirement for a health services manager is a master's degree, and a bachelor's degree is adequate for some entry-level positions in smaller organizations, it also states, "Physician's offices and some other facilities may substitute on-the-job experience for formal education." The petitioner provided no information about its client's business or worksite, so there is no evidence in the record to establish that it is a type

of business that would require a baccalaureate degree in a specialty rather than experience to fill the proffered position. Thus, the petitioner has failed to establish the first criterion.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. There is no evidence in the record regarding the petitioner's client's past hiring practices. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

Although the record contains a staffing agreement between the petitioner and its client, the site where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. The description is essentially identical to the general one provided in the letter of support; therefore, the petitioner has not demonstrated that the work that the beneficiary will perform for the client is a dental health service administrator or that it will qualify as a specialty occupation.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear 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 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.

Beyond the decision of the director, the petitioner did not establish the existence of an employer-employee relationship. The staffing agreement notes that the petitioner will be considered the beneficiary's employer "for all purposes," and that it would pay the beneficiary's compensation and be responsible for withholding all federal and state taxes. Section 3.2, however, states, "Client shall have full and complete direction and supervision over all employees." The language of the agreement is clear as to who would maintain control over and supervise the beneficiary. The petitioner would be compensating the beneficiary, but for all intents and purposes, it appears that the client would be the actual employer. A United States employer must have an

employer-employee relationship with respect to its employees, as indicated by the fact that it may supervise or otherwise control the work of any such employee. 8 C.F.R. § 214.2(h)(4)(ii).

The AAO notes that the beneficiary would not be qualified to perform an occupation that requires a license. California Business and Professions Code, Section 1625(b) states that a person practices dentistry within the meaning of the chapter if he or she “[p]erforms, or offers to perform an operation or diagnosis of any kind,” and Section 1625(e) states that a person is considered to be practicing dentistry is he or she “[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.”¹

The duties of the proffered position include planning, directing, coordinating and supervising the delivery of dental health services, duties that are clearly related to providing care for the patient. In addition, the duties include developing, implementing and maintaining policies and procedures, which would fall under duties of managing a dental office. As a result, a license would be required, since the duties are included in the California Code’s definition of practicing dentistry.

For these additional reasons, the petition may not be approved.

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 www.leginfo.ca.gov, accessed 3/16/05.