



U.S. Citizenship
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FILE: WAC 04 003 50244 Office: CALIFORNIA SERVICE CENTER Date: **FEB 21 2006**

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 a dental office and seeks to employ the beneficiary as a dental technology consultant. 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 beneficiary is not qualified to perform the duties of the offered position. On appeal, the petitioner submits a brief stating that the director mischaracterized the position, and that the beneficiary is qualified to perform the duties of the position.

The director found that the position is a dental hygienist, and that the beneficiary is not qualified to perform the duties of the position because the beneficiary is not licensed as a dental hygienist as required by the State of California. For reasons set forth below, the AAO finds also that the petitioner is not qualified to perform the duties of the position, which involve dentistry, and requires licensure. Thus, the petitioner has not overcome the decision of the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In order to discuss the licensing issue, the AAO will first determine whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(I) of the Act, 8 U.S.C. § 1184(i)(I), 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.

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

[A]n 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 are 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 proceedings before the AAO contains: (1) the 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) the Form I-290B with 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 technology consultant. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. The duties initially submitted by the petitioner in its letter of September 30, 2003 were closely related to those performed by dental hygienists. In response to the director’s request for evidence, however, the petitioner clarified and expanded upon the duties to be performed by the beneficiary. Some of the additional duties listed were as follows:

- Examine and diagnose dental malocclusions and oral cavity anomalies;
- Diagnose teeth and jaw or other dental-facial abnormalities;
- Examine patients in order to assess abnormalities of jaw development, tooth position, and other dental-facial structures;
- Prepare diagnostic and treatment records; and
- Study diagnostic records such as medical/dental histories, plaster models of the teeth, photos of a patient’s face and teeth, and X-rays in order to develop patient treatment plans.

The petitioner requires a minimum of a bachelor's degree in dental technology or a related field for entry into the proffered position.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. Some of the duties of the proffered position are those normally performed by dentists. The *Handbook* notes that dentists diagnose, prevent, and treat teeth and tissue problems. As indicated in the petitioner's response to the director's request for evidence, the beneficiary would: examine and diagnose dental malocclusions and oral cavity anomalies; diagnose teeth and jaw or other dental-facial abnormalities; prepare diagnostic and treatment records; study diagnostic records such as medical/dental histories, plaster models of the teeth, photos of a patient's face and teeth, and X-rays in order to develop patient treatment plans; and examine patients in order to assess abnormalities of jaw development, tooth position, and other dental-facial structures. It is, therefore, concluded that the proffered position is a specialty occupation as the position requires the beneficiary to perform duties normally performed by licensed dentists.

It is noted that § 1625 – 1636.6 of the California Business and Professions Code explains under section 1625 that a person practices dentistry in California when that person “performs, or offers to perform, an operation or diagnosis of any kind.” The duties detailed by the petitioner clearly indicate that the beneficiary will make patient diagnoses, and recommend medical solutions for patients' conditions. The proffered position, does, therefore, encompass the practice of dentistry in the State of California which requires a license. The petition may not be approved, however, as the beneficiary is not qualified to perform the duties of the occupation. The beneficiary must satisfy governmental licensing requirements for dentists. As noted in the *Handbook*, all 50 States and the District of Columbia require dentists to be licensed. In most states, candidates must graduate from a dental school accredited by the American Dental Association's Commission on Dental Accreditation, and pass written and practical examinations to qualify for a license. The beneficiary is not a graduate of an accredited dental school, nor is he licensed to practice dentistry.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As the petitioner has not established that the beneficiary is a licensed dentist as required by the State of California, the beneficiary is not qualified to perform the services of the specialty occupation.

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 failed to sustain that burden.

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