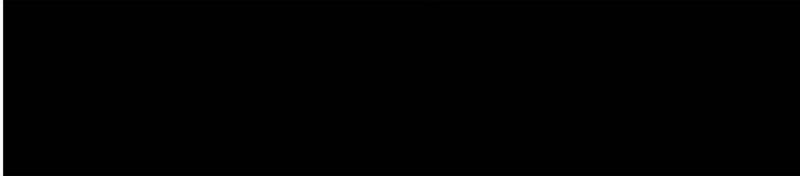


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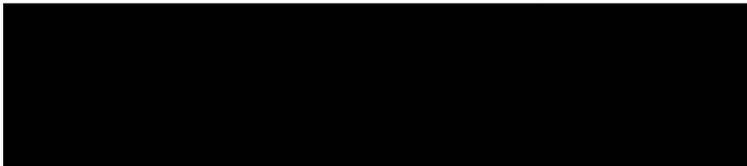
Date: OCT 05 2006

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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 that seeks to employ the beneficiary as a “special dental assistant on implants and prosthetics.” 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 on the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding 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 for evidence; (4) the director’s denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

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 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 proposed position.

According to counsel’s July 14, 2003 response to the director’s request for additional evidence, the duties of the proposed position would include conducting research and case studies; aiding in the treatment planning process of complex surgical procedures; gathering information, including cephalometric tracing, diagnostic casting, and photo analyses; assisting in the preparation of case presentations related to implant and prosthodontics and other dental-related problems; preparing slides for use in seminars and lectures; assisting in the education of patients; educating patients regarding the steps of surgical procedures, what they should expect, and offering post-operative instructions; ensuring that the room is ready for surgical procedures by having the surgical stent used and ensuring that the correct implants, drills, and surgical instruments are present; assisting the dentist by receiving and preparing patients for dental treatment and preparing materials and equipment for use by the dentist; maintaining records related to appointments, examinations, treatment, and supplies; exposing, processing, and mounting dental radiographs; performing basic laboratory procedures, such as pouring alginate impressions to create diagnostic casts; taking impressions, making sure that laboratory slips are properly filled, and following up for delivery; placing and removing temporary restrictions; making sure that rooms are well-stocked; ordering supplies; maintaining equipment and inventory; following universal precautions and OSHA requirements to ensure a safe environment for patients and staff; and performing any other tasks requested by the dentist or staff that are consistent with the office’s operation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation. Counsel states the following:

It cannot be overemphasized that a practice that engages in distinct specializations such as implants and prosthodontics dentistry involve[s] theoretical knowledge and dentistry skills more unique, complex[,] and intricate than that required by an ordinary practice of general dentistry. Evidently, the requirements for hiring a Special Dental Assistant on implants and prosthodontics practice are different, and much higher and stringent, than that required for an ordinary dental assistant for an ordinary dental practice.

In determining whether a proposed 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 Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. In its adjudication of this appeal, the AAO consulted the 2006-2007 edition of the *Handbook*.

In reaching its conclusion regarding the degree requirements of the proposed position, the AAO has compared the position’s duties against those described for a range of professions. This review has found that virtually all of the proposed position’s duties are listed among the occupations of office and

administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienists.

In pertinent part, the *Handbook* states the following regarding the duties of office and administrative support worker supervisors and managers:

All organizations need timely and effective office and administrative support to operate efficiently. Office and administrative support worker supervisors and managers coordinate this support. These workers are employed in virtually every sector of the economy. . . .

Although specific functions of office and administrative support worker supervisors and managers vary significantly, they share many common duties. For example, supervisors perform administrative tasks to ensure that their staffs can work efficiently. Equipment and machinery used in their departments must be in good working order . . . They also request new equipment or supplies for their department when necessary.

Office and administrative support worker supervisors and managers also evaluate each worker's performance. . . .

Office and administrative support worker supervisors and managers often act as liaisons between the administrative support staff and the professional, technical, and managerial staff.

The *Handbook's* discussion regarding the duties of dental laboratory technicians also relates to the proposed position. According to the *Handbook*, dental laboratory technicians fill prescriptions from dentists for crowns, bridges, dentures, and other dental prosthetics. The *Handbook* notes that such technicians can specialize in one of five areas: orthodontic appliances, crowns and bridges, complete dentures, partial dentures, or ceramics. Dental laboratory technicians first build a model, and then use the model to cast a framework for the prosthetic device.

The AAO next turns to the *Handbook's* discussion of the duties of 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 may also remove sutures, apply topical anesthetics to gums or cavity-preventive agents to teeth, remove excess

cement used in the filling 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.

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

Although hygienists may not diagnose diseases, they can prepare clinical and laboratory diagnostic tests for the dentist to interpret. Hygienists sometimes work chairside with the dentist during treatment.

Dental hygienists also help patients develop and maintain good oral health. . . .

The only aspect of the proposed position's duties not addressed by these occupations would be the beneficiary's duties to track and compile dental implant statistical data and research case studies for the dentists' lectures and publications. 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. There is no evidence that they constitute a type of research that would be beyond the abilities of trained dental assistants and hygienists.

Therefore, based upon its reading of the *Handbook*, the AAO concludes that the proposed position, as described by the petitioner in its letter of support and in response to the director's request for additional evidence, combines the duties of office and administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienists.

Having concluded that the duties of the proposed position combine those of office and administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienists, the AAO next 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 office and administrative support worker supervisors and managers:

Most firms fill office and administrative support supervisory and managerial positions by promoting office or administrative support workers from within their organizations.

For laboratory dental technicians, the requirements as discussed by the *Handbook* are as follows:

Most medical, dental, and ophthalmic laboratory technicians learn their craft on the job; however, many employers prefer to hire those with formal training in a related field.

Becoming a fully trained [dental laboratory] 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 2004, 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.

The *Handbook* offers the following information regarding the training of 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.

Finally, the *Handbook* states the following with regard to the educational requirements for dental hygienists:

Dental hygienists must be licensed by the State in which they practice. To qualify for licensure in nearly all states, a candidate must graduate from an accredited dental hygiene school and pass both a written and clinical examination. . . .

In 2004, the Commission on Dental Accreditation accredited about 266 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. . . .

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 proposed position, the AAO concludes that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth 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 proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as 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.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, no evidence to satisfy this prong has been submitted. Accordingly, the petitioner has not established eligibility under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of the second criterion requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, there has been no demonstration that the proposed position is more complex or unique than the general range of office and administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienist positions in other, similar organizations, which would not require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions.

On appeal, counsel notes the petitioner's specialized dental practice, contending that such specialization renders the proposed position a specialized occupation. However, the AAO does not agree. The issue on appeal is not the level of specialization of the petitioner's dentists, as the position proposed is not that of a dentist. Rather, the issue is whether the proposed position's duties are also at a level of specialization so as to render its duties H-1B caliber.

Such a demonstration has not been made here. Although counsel reiterates several times the complexity of the dentists' duties on appeal, he offers no additional information regarding the complexity or uniqueness of the proposed position's duties. As presently described in the record, these duties do not rise above those normally performed by office and administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienists.

Therefore, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence has been presented. As such, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(4) – that 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 more specialized or complex than those associated with other office and administrative support worker supervisors and managers, dental laboratory technicians, dental assistants, and dental hygienist positions, for which the *Handbook* indicates neither a requirement for or usual association with at least a baccalaureate degree in a specific specialty. Again, simply arguing that the duties performed by the petitioner's dentists are highly specialized and complex does not establish that the duties of the proposed position are similarly specialized and complex. The evidence does not establish that this particular position requires 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 proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

Counsel's assertion in his response to the director's request for additional evidence that CIS has approved similar petitions in the past is not persuasive. 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). Although the AAO may attempt to hypothesize as to whether the prior petitions were similar to the position proposed here or were approved in error, no such determination may be made without review of the original records, in their entirety. If the prior petitions were approved based on evidence substantially similar to the evidence contained in this record of proceeding, however, those approvals would constitute error on the part of the director. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, the AAO notes that, on appeal, counsel refers to the proposed position as a "special geriatric/research assistant." However, this was the first mention of any duties related specifically to geriatric patients, and the position was never given this title before this appeal. A petitioner cannot offer a new position to the beneficiary on appeal or materially change the proposed position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO did not consider this assertion by counsel in its adjudication of the appeal.

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.