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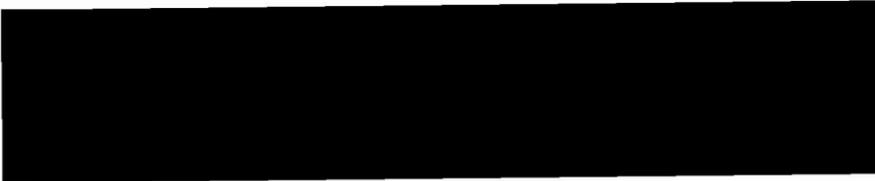
D-2

FILE: WAC 03 215 50191 Office: CALIFORNIA SERVICE CENTER Date: **SEP 28 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 of the 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 practice with five employees. In order to employ the beneficiary as a dental hygienist, 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 acknowledged that the proffered position is that of a dental hygienist, but he determined that the position did not satisfy any of the specialty occupation criteria 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director erred in denying the appeal.

Counsel first notes the director's recognition that, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a bachelor's or master's degree usually is required for dental hygienist positions in research, teaching, or clinical practice in public or school health programs. Counsel argues that this *Handbook* information "illustrates that Bachelor degrees or [an] equivalent requirement for such a position depends on the requirement of the employer."

Counsel next argues, without supporting documentation in the record, that the level of quality at which it provides its dental services "definitely requires a Bachelor degree or equivalent person as Dental Hygienist versus a local dental office that might hire an associate degree graduate or certificate [graduate]."

Counsel also asserts that it is reasonable to require a bachelor's degree because the complexity of dental hygienist work and the fact that, as indicated by the *Handbook*, dental hygienists "should work well with others and must have good manual dexterity, because they use dental instruments within a patient's mouth, with little room for error.

The director's decision to deny the petition was correct. The AAO bases its determination upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's May 17, 2004 brief on appeal, and the documents submitted with the brief.

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

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In her April 6, 2004 letter responding to the RFE counsel provided this description of the work to be performed by the dental hygienist:

- Performs dental prophylaxis and root planning.
- Cleans calcareous deposit, accretions, and stains from teeth and beneath margins of the gums, using dental instruments.
- Feel[s] lymph nodes under patient's chin to detect swelling or tenderness that could indicate presence of oral cancer.
- Feels and visually examines gums for sores and signs of disease.
- Examines gums, using probes, to locate periodontal recessed gums and signs of gum disease.
- Applies fluoride and other cavity preventing agents to arrest dental decay.
- Charts conditions of decay and disease for diagnosis and treatment by dentist.
- Exposes and develops x-rays [sic] film. May administer local anesthetic agents.
- May provide clinical services and health education to improve and maintain oral health of children.

At the outset, the AAO notes that the beneficiary has served as an H-1B dental hygienist for a different dental office. However, this fact is not relevant to the adjudication of the instant petition. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved on the basis of the same evidence and assertions as contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Before proceeding to an evaluation of the evidence of record under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO will explain why it does not accord significant evidentiary weight to the letter provided by ██████ whose dental office previously employed the beneficiary as an H-1B dental hygienist.

letter indicates that hygienists with a bachelor's degree in dental hygiene (BDH) have more comprehensive dentistry knowledge than hygienists without a BDH. This is a reasonable and logical proposition, but it is not probative on the issue of whether performance of the proffered position requires a bachelor's degree level of knowledge of dental hygiene.

The AAO does not accord any probative value to ██████ statement to the effect that only dental hygienists with a BDH are equipped to handle the increased responsibility that, he states, media reports indicate now rest upon dental hygienists to recognize and document "changes in oral health care that could indicate underlying systemic problems." ██████ does not provide the factual foundation upon which he bases his opinion or upon which the media has based their reports. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Further, ██████ opinion is outweighed by the fact that the *Handbook* indicates that (1) state licensing authorities do not require that dental hygienists hold a BDH and (2) employers of dental hygienists do not normally require a BDH or its equivalent.

The AAO finds inconsequential ██████ statement that his letter is submitted in part to prove "that there is a level of complexity involving treating these [sic] patients." That the proffered position involved a level of complexity at ██████ office does not indicate that the position is so complex that it can only be performed by a person with a BDH or its equivalent.

Finally, with regard to his office's hiring history, ██████ neither asserts nor presents any documentation to establish a policy of recruiting and hiring only persons with a BDH or its equivalent. ██████ states:

Historically, all our employees holding this position are graduated from four year college[s] and currently we have two dental hygiene [sic] working in this office, one has a bachelor of science degree and the other has a D.D.S.

This statement does not indicate the majors or academic concentrations of those hired by ██████. The duties of the position offered by ██████ to the beneficiary have not been shown to be the same as the duties in the current petition. Further, the hiring practices of one dental office does not establish an industry practice.

The evidence of record does not support counsel's contention on appeal that the proffered position requires a BDH because the quality of its service exceeds that provided at "a local dental office that might hire [a dental hygienist with] an associate degree graduate or certificate." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has failed to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the Department *Handbook* as an authoritative source on the duties and educational requirements of the occupations that it addresses. Accordingly, the AAO considered the information in the 2006-2007 edition of the *Handbook* with regard to dental hygienists. As evident in the excerpt below from the *Handbook*, the proposed duties described in the record of proceeding do not exceed those of the dental hygienist occupation described in the *Handbook*:

Dental hygienists remove soft and hard deposits from teeth, teach patients how to practice good oral hygiene, and provide other preventive dental care. Hygienists examine patients' teeth and gums, recording the presence of diseases or abnormalities. They remove calculus, stains, and plaque from teeth; perform root planing as a periodontal therapy; take and develop dental x rays; and apply cavity-preventive agents such as fluorides and pit and fissure sealants. In some States, hygienists administer anesthetics; place and carve filling materials, temporary fillings, and periodontal dressings; remove sutures; and smooth and polish metal restorations. 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. 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 hand and rotary instruments and ultrasonics to clean and polish teeth, x-ray machines to take dental pictures, syringes with needles to administer local anesthetics, and models of teeth to explain oral hygiene.

The *Handbook* indicates that dental hygienists require state licensure; but it does not indicate that such licensure requires a BDH. Further, the *Handbook* notes that, while some dental hygiene programs offer a bachelor's or master's degree, some offer a certificate, and most grant an associate dental program.

Counsel's comments about the *Handbook's* information about degree requirements for dental hygienists involved in research, teaching, or clinical practice in public or school health programs is not relevant to the proffered position, which is dental hygienist at the office of private dentists.

The record contains no evidence rebutting the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not a normal minimum entry requirement for dental hygienist positions in private dental offices. Accordingly, the petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which assigns specialty occupation status to a position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the *Handbook* does not indicate an industry-wide requirement for at least a bachelor's degree in a specific specialty. For reasons already discussed, the AAO accords no evidentiary significance to Dr. Faber's letter. Furthermore, Dr. Faber's letter does not assert an industry-wide recruiting and hiring standard. The record contains no attestations from dental professionals or professional dental associations that the position here proffered is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty. The job vacancy announcements submitted into the record do not reflect an industry-wide requirement for a BDH or any other bachelor's degree in a specialty, and they are too few to establish an industry-wide practice.

Next, the evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).

The evidence of record indicates that the proffered position and the duties that comprise it do not exceed the dental hygienist occupation and its associated duties as described in the *Handbook*. The *Handbook* indicates that a BDH or bachelor's degree in a related specialty is not normally required to perform as a dental hygienist. Further, the evidence of record does not establish that the particular position here proffered involves specific duties that are materially more specialized or complex than those of the usual range of general hygienist positions, for which the *Handbook* indicates no usual association with a bachelor's degree in a specific specialty. For the reasons already discussed, Dr. Faber's comments carry no weight with regard to these or any other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The evidence of record does not support counsel's contention on appeal that the proffered position requires a BDH because the quality of its service exceeds that provided at "a local dental office that might hire [a dental hygienist with] an associate degree graduate or certificate." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*; *Matter of Laureano*; *Matter of Ramirez-Sanchez*.

Finally, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

The petitioner's letter submitted on appeal states that the petitioner "has historically hired only dental hygienists who have possessed Bachelor's Degrees." The petitioner asserts no particular major or academic concentration, and thus does not establish eligibility under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner normally require a degree in a specialty.

Also, the petitioner does not present documentation (to include employees names, dates of employment, copies of diplomas, and copies of recruiting documents) to substantiate a history of recruiting and hiring only persons with a BDH. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*; *Matter of Laureano*; *Matter of Ramirez-Sanchez*.

Further, the evidence of record does not establish that the petitioner's requiring a BDH is necessitated by the actual performance requirements of the proffered position. CIS must examine the actual employment of the alien to determine whether a 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.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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