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OCT 17 2007

FILE: EAC 06 172 54235 Office: VERMONT SERVICE CENTER Date:

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:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 an orthodontics office with five employees. It seeks to hire the beneficiary as a dental assistant. The petitioner endeavors to employ the beneficiary in the nonimmigrant classification as a 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 June 23, 2006, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (4) the director's denial letter; and (5) Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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:

An 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 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.

The petitioner states that it is seeking the beneficiary’s services as a dental assistant. On the Form I-129, the proposed duties for the position are “assist dentist, set up patients.”

The director determined that the petitioner had submitted insufficient evidence to process the petition and requested that the petitioner submit additional information and documentation in support of the petition.

In response to the director’s request for evidence, the petitioner submitted a letter dated June 12, 2006. In its letter, the petitioner stated that the proposed position is for head orthodontic assistant. The petitioner stated that the beneficiary’s “impeccable training and experience are very highly sought after quality in our field because she had true formal education, and not like the 10 week special weekend course that some orthodontic assistants go through.” The petitioner further explained that the beneficiary is qualified for the position since she is fluent in both English and Korean. The petitioner described the responsibilities for the proposed position as follows:

As I mentioned earlier, I want [the beneficiary] to be the head of assistants who will be in charge of training other assistants. Leader needs to be more knowledgeable not only in orthodontics but many other aspects of life. With [the beneficiary’s] bachelor’s degree I believe she can fill that spot and be able to obtain other assistants’ respect quickly.

About 30% of her time will be allocated to train other assistants and develop training system.

For 10% of her time, I am excited to utilize [the beneficiary's] Korean language art skill to go through all of the office forms and literature in Korean to enhance and make corrections if necessary. I also want to develop more patient educational material in Korean with her help.

The director denied the petition on June 23, 2006, concluding that the proffered position is not a specialty occupation.

On appeal, the petitioner asserts that the beneficiary will be the "lead" assistant and will manage other assistants, which requires an individual with a bachelors' degree. The petitioner further explained that normally he hires dental assistants with high school or an associate's degree but requires the lead assistant to have obtained a bachelor's 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 AAO finds that the proffered position is not a specialty occupation.

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 reviewing the 2006-2007 edition of the *Handbook*, the AAO finds that the duties and responsibilities of the proposed position are encompassed within the *Handbook's* entry of (1) dental assistants and (2) office and administrative support workers, supervisors and managers, as discussed below.

In its discussion of the duties of dental assistants, the *Handbook* states the following:

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 and keep patients' mouths dry and clear by using suction or other devices. 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 also may 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.

Dental assistants should not be confused with dental hygienists, who are licensed to perform different clinical tasks. (See the statement on dental hygienists elsewhere in the *Handbook*.)

The *Handbook's* discussion regarding the duties of office and administrative support workers, supervisors and managers also relates to the proposed position, as follows:

All organizations need timely and effective office and administrative support to operate efficiently. Office and administrative support supervisors and managers coordinate this support. These workers are employed in virtually every sector of the economy, working in positions as varied as teller supervisor, customer services manager, or shipping and receiving supervisor . . .

After allocating work assignments and issuing deadlines, office and administrative support supervisors and managers oversee the work to ensure that it is proceeding on schedule and meeting established quality standards. This may involve reviewing each person's work on a computer—as in the case of accounting clerks—or listening to how a worker deals with customers—as in the case of customer services representatives. When supervising long-term projects, the supervisor may meet regularly with staff members to discuss their progress . . .

Supervisors help train new employees in organization and office procedures. They may teach new employees how to use the telephone system and operate office equipment. Because most administrative support work is computerized, they also must teach new employees to use the organization's computer system. When new office equipment or updated computer software is introduced, supervisors train experienced employees to use it efficiently or, if this is not possible, arrange for their employees to receive special outside training.

Therefore, based on its reading of the *Handbook*, the AAO concludes that the proffered position, as described by the petitioner in its letter of support and in response to the director's request for evidence, combines the duties of dental assistant and office and administrative support workers, supervisors and managers. While the majority of the position's duties appear to fall within the *Handbook's* description of dental assistant, the AAO finds that certain duties – training of dental assistants and managing of the assistants -- require the knowledge and/or skills more commonly associated with the occupation of office and administrative support workers, supervisors and managers. Having made such a determination, 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, in a specific field.

The *Handbook* reports the educational requirements for the position of dental assistants as follows: “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.” Thus, a bachelors’ degree is not normally required to fill the position of dental assistant.

With respect to the training required for the duties of office and administrative support workers, supervisors and managers, the *Handbook* states, “most Firms fill office and administrative support supervisory and managerial positions by promoting office or administrative support workers from within their organizations. To become eligible for promotion to a supervisory position, administrative support workers must prove they are capable of handling additional responsibilities.” The *Handbook* indicates that most of these positions are filled on the basis of experience and thus do not rise to this criterion’s standard of employers normally requiring at least a bachelor’s degree or its equivalent in a specific specialty. As such, office and administrative support workers, supervisors and managers do not qualify as a specialty occupation under the first criterion.

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 proffered position, the AAO concludes that the proffered position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion 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. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. The petitioner did not provide any evidence to support this prong. On appeal, the petitioner states, “most orthodontic assistants do not have a bachelor’s degree.” As such, the petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the positions of dental assistants and office and administrative support workers, supervisors and managers described in the *Handbook*. The *Handbook* indicates that such positions generally do not 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 duties for such positions. Although the petitioner asserts that it requires an employee with a bachelor's degree to fill the position of lead assistant in order to "manage other assistants," the petitioner did not submit any documentation corroborating this statement. 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)). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not 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 submitted to demonstrate that the proposed position qualifies under this criterion. On appeal, the petitioner asserts that it normally employs dental assistants that do not have a bachelor's degree. The petitioner states that it will require the lead assistant to have obtained a bachelors' degree. However, the petitioner did not submit documentation to evidence that it exclusively recruits and employs only individuals with a bachelor's degree for the position of lead assistant. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration 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 of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that specific duties to be performed by the beneficiary in the context of the petitioner's business operations possess the requisite specialization and complexity. 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 proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. Accordingly, the AAO will 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.