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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 222 51270 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 7 2007

IN RE: Petitioner:
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:

[redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a dental office with 2 employees and a gross annual income of $430,000. It seeks to employ the beneficiary as a dental specialist/researcher. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 March 1, 2004. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On May 22, 2006, the director denied the petition determining that the petitioner had not shown that the beneficiary possessed the appropriate licensure as required by the proffered position and had not provided an exemption or exception from the requirement. The director certified his decision to the AAO.

The record of proceeding before the AAO contains: (1) the Form I-129 filed July 1, 2002 with supporting documentation; (2) the director's March 1, 2003 request for further evidence (RFE); (3) counsel for the petitioner's April 9, 2003 response to the director's RFE; (4) the director's March 1, 2004 denial letter; (5) the March 31, 2004 Form I-290B, with counsel's brief and supporting documentation; (6) the AAO's August 3, 2005 remand decision; (7) the director's August 29, 2005 RFE; (8) counsel's September 22, 2005 response to the RFE; (9) the director's May 22, 2006 denial decision and certification to the AAO for review. The AAO reviewed the record in its entirety before issuing its decision.

In the initial description of the duties of the proffered position in a May 10, 2002 letter in support of the petition, the petitioner stated:

> [The beneficiary] will be performing a variety of duties. She will administer and direct the activities of the dental office in accordance with accepted national standar[d]s, administrative policies and OSHA compliance guidelines.
>
> [The beneficiary] will conduct the necessary research to determine the cause and or effect of the disease that the patient is exhibiting or prepare a complete analysis of the patient's infection or disorder. She will confer with the clinical staff to formulate policies and recommend procedural changes to increase daily production. [The beneficiary] will as needed, hire additional staff, fire and evaluate their work.
>
> [The beneficiary] will oversee the billing of patients and insurance companies. She will also coordinate with the various laboratories that we utilize, to assure that orders are submitted and received in a timely manner to improve efficiency.

In an April 9, 2003 response to the director's RFE, the petitioner, through counsel, added that it needed a dental specialist/researcher who has undergone formal training in the field of dental medicine. The petitioner added in pertinent part:

> [The beneficiary] will be involved in assisting dentist with the analysis of patient records. She will examine patient records to compose dental reports for the ultimate approval of clinic dentists. She will utilize her medical background to provide complete analysis of patients' oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history and laboratory results. [She] will record these conditions for diagnosis and future treatment by the dentist. [The beneficiary's] expertise in the area of dental medicine will be utilized in consulting with dentists regarding dental treatment solutions as they relate to patients' conditions.

Counsel identified the approximate time spent on the various duties of the proffered position as:

> 30 percent spent on administrative duties relating to assurance of the quality of work and compliance with national standards;
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> 40 percent spent on analysis of patient records and assisting dentists in making proper determinations and diagnosis;
>
> 30 percent spent on medical and dental research and composition of reports based on such research.

Counsel also noted that the incumbent in the proffered position will not provide any patient care and will not have any contact with patients.

The director initially denied the petition determining that the proffered position was not a specialty occupation. Upon review of the position's duties and the petitioner's two-person dental clinic, the director determined the petitioner was not sufficiently complex to warrant the services of a health service manager.

In an August 3, 2005 decision, the AAO determined, based on portions of the petitioner's description of the proffered position and statements made by counsel, that the position encompassed duties performed by a dentist, an occupation that is a specialty occupation. The AAO also determined that the record did not contain evidence that the beneficiary had obtained the appropriate licensure to perform the duties of a dentist and remanded the matter to the director to address this issue.

On August 29, 2005, the director requested evidence that the beneficiary had obtained a dental license to practice dentistry in the State of California or a statement from the pertinent California licensing agencies that the duties of the proffered position did not require a dental or other license to perform the duties of the proffered position.

In a September 22, 2005 response, counsel acknowledged that the beneficiary did not have a license to perform the duties of a dentist in the State of California. Counsel asserted that the beneficiary "will assist the dentist with research and analysis of patients' records" and "will work under the supervision of [a] licensed specialist." Counsel referenced Section 1625 of the California Business and Professions Code and asserted that the beneficiary's duties did not include any of the enumerated functions. Counsel stated: "The Dental Specialist/Researcher assists the dentists with analyzing of patients' records, and recommending to the dentists a particular treatment plan." Counsel noted that the beneficiary will not be engaged in patient care of any kind

unlike a dentist, and the responsibilities of treating and operating on the patient is left to the dentist; thus the position does not require a state-issued license.

Counsel again noted that the beneficiary would assist the dentist and must have a thorough substantive knowledge of dentistry but like a legal researcher hired by a lawyer and a medical researcher hired by a physician, did not need a license. Counsel cited unpublished decisions for the supposition that a college degree in a medical field would be necessary for an assistant to perform various duties but because of less responsibility would not need a license. Counsel provided a list of positions from the Dental Board of California[1] that required licensing and noted that the position of "dental specialist/researcher" was not included in the list.

On May 22, 2006, the director denied the petition observing that the petitioner had not provided letters from the appropriate state-licensing agency attesting to the beneficiary's exemption from licensing requirements and had not provided evidence that the beneficiary possessed the appropriate license.

The AAO has reviewed the director's decision on certification. Counsel did not submit a brief or other evidence on certification. The issue before the AAO is whether the State of California requires licensure of the beneficiary to perform the duties of the proffered position as described.

A review of the proffered position, comparing the position's duties against those described for a range of dental professions and the California regulations pertaining to the duties that may be performed by the various dental and dental auxiliary positions, reveals that the proffered position's duties include the duties of a dentist. The AAO acknowledges that the petitioner specifically states that the beneficiary does not provide patient care activities and does not have contact with the patients; however, the petitioner's list of duties encompasses duties under the general heading of providing patient care.

The Department of Labor's *Occupational Outlook Handbook* (*Handbook*) reports: "Dentists diagnose, prevent, and treat problems with teeth or mouth tissue." Although the beneficiary in this matter may not directly treat patients, the petitioner indicates the beneficiary will spend 40 percent of her time analyzing patient records and assisting dentists in making proper determinations and diagnosis. More specifically, the petitioner indicates the beneficiary will use her expertise in the area of dental medicine to consult with dentists regarding treatment solutions as they relate to patients' conditions and "utilize her medical background to provide complete analysis of patients' oral and maxillo-facial conditions based upon the dentist's finding, reports, medical history and laboratory results." It is the acts of providing a prognosis, analyzing and evaluating patient cases, and advising on treatment that encompass the tasks of a dentist who diagnoses and treats problems with teeth or mouth tissue. The skills that the petitioner is relying upon to assist it in providing patient care are the very skills that require the individual providing the prognosis, advice, and determinations to have a dental license.

Section 1625 of the California Business and Professions Code states that the practice of dentistry includes anyone who normally performs, or causes to be performed by a dentist, the examination, diagnosis of any kind, and

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[1] In another matter before the AAO, counsel submitted a February 3, 2006 letter from the Dental Board in California indicating that there is no such title as dental researcher/specialist.

treatment of various disorders of the teeth. Again, the beneficiary's advice on treatment, determinations, and diagnosis of various infection and disease in a given case are acts that require a dental license. The beneficiary's time (40 percent) spent on the analysis of patient records and assisting dentists in making proper determinations and diagnosis are the duties that align with the duties of a dentist, a specialty occupation that requires a license. In addition to these duties, the beneficiary's review of medical journals to analyze and evaluate patients' conditions, her analysis of patient records, and recordation of conditions for diagnosis and future treatment are duties that encompass advice for patients' treatment and diagnosis, a duty of a dentist.

The AAO determines that in this matter the record includes duties that incorporate the duties of a dentist, an occupation that is a specialty occupation that requires a license.

Counsel's conclusion that the beneficiary is exempt from the licensing requirements of Section 1625 of the California Business and Professions Code because the beneficiary is not involved in the examination, diagnosis, or treatment of diseases or injuries to human teeth is inconsistent with petitioner's previous statements. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, counsel does not address which duties the beneficiary would be performing under supervision; does not indicate who will be supervising those duties; and does not substantiate how the beneficiary may perform the duties of the proffered position without a license, even if the beneficiary performs the duties under supervision. 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*, 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). To reiterate, it is the duties of the proffered position that involve analysis and recommendation of treatment that elevates the position to that of a dentist, an occupation that requires a license in the State of California.

The AAO finds counsel's reference to unpublished decisions unpersuasive. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO does not find that the petitioner in this matter has provided a description of duties that includes the duties of any specialty occupation that does not require a license.

The record contains evidence sufficient to establish that the proffered position includes the duties of a dentist, a specialty occupation. The record, however, does not contain evidence that the beneficiary is qualified to perform the duties of the occupation. For reasons related in the preceding discussion, the petitioner has not established that the beneficiary is eligible to perform the duties of the proffered position in California. Accordingly, the AAO will not disturb the director's May 22, 2006 denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 met that burden.

ORDER: The director's May 22, 2006 decision is affirmed. The petition is denied.