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**U.S. Citizenship
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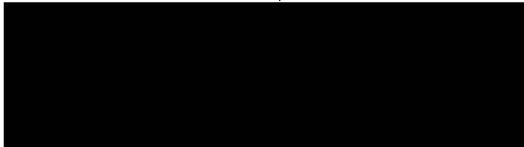


FILE: WAC 05 156 52703 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2007

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.

Robert P. Wiemann

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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, with four employees and \$300,000 in gross annual income. It seeks to extend the employment of the beneficiary as a dental researcher/specialist. 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 determining that the ill-defined position probably involved the practice of dentistry and the petitioner had not provided evidence that the beneficiary is licensed to practice dentistry in the State of California.

The record of proceeding before the AAO contains: (1) the Form I-129 filed May 11, 2005 with supporting documentation; (2) the director's November 10, 2005 request for further evidence (RFE); (3) counsel for the petitioner's February 1, 2006 response to the director's RFE; (4) the director's April 12, 2006 denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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

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.

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.

The petitioner seeks the beneficiary's services as a dental researcher/specialist. Evidence of the beneficiary's duties includes the petitioner's June 1, 2002 letter submitted in support of a previously approved petition and the petitioner's April 28, 2005 letter appended to the instant petition. In the June 1, 2002 letter, the petitioner indicated the individual in the proffered position would: "support our company's expansion program by establishing operational systems and procedures which will help improve the efficiency of our service." The petitioner added that the beneficiary would "administer and direct the activities of the dental office in accordance with accepted national standards, administrative policies and OSHA compliance guidelines," would "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 patients' infection or disorder," would "confer with the clinical staff to formulate policies and recommend procedural changes to increase daily production," and would hire additional staff, fire and evaluate their work." The petitioner further indicated that the beneficiary would "oversee the billing of patients and insurance companies," would "coordinate with the various laboratories that [it] utilize[s], to assure that orders are submitted and received in a timely manner to improve efficiency."

In the April 28, 2005 letter appended to the instant petition, the petitioner indicated the beneficiary would divide her time between the following duties:

[The beneficiary] will be in charge of all non-clinical job duties and will continue to ensure that the dental practice runs smoothly. She will continue to administer a dental program and formulate dental policies, standards[,] and procedural changes.

Discuss with the Dentist the patients' dental records prior to starting treatment of a patient.

Conduct patient screening procedures; such as assessment of oral health conditions, review of the health history, oral cancer screening, head and neck inspection, dental charting and taking blood pressure and pulse.

Study x-rays and discuss with the dentist the case and appropriate treatment to be followed.

Oversee the conventional procedures such as root canal filling.

Supervise surgical procedures such as apicoectomies and retorfills [sic].

Assist the Dentist in taking and developing radiographs (x-rays).

Make impressions of patient's teeth for study casts (models of teeth used by dentists to evaluate patient treatment needs).

Order items like Crowns, Bridges, Dentures, both complete and partial with the Dental Laboratory Technicians. She will then follow up on the fabrication of these prosthetics and make sure that these are received on time, and on receipt, make sure that the prosthetics made matches the order.

Coordinate the placement of orthodontic appliances.

Oversee the preparation and fitting of ortho [sic] bands.

Instruct the patients in the proper care and use of appliances.

Coordinate the selection of head gear, arch wires, elastics, ligatures, mouth mirrors, probes, forceps, brushes and scalpels.

Oversee complex fixed and removable restorative procedures including tooth preparation, impressions and occlusal recordings, filling of full, overdenture, and partial dental fabrication.

Coordinate complex dental care involving periodontic and prosthodontic rehabilitation.

Supervise the set up of the armamentarium for oral, nitrous oxide analgesia, intramuscular, and intravenous conscious sedation.

Oversee selection of the proper specimen container and notification of the laboratory.

Help the dentist in the in-patient care wherever necessary [and help with] out[-]patient follow up care.

Analyze the treatment that is being offered and will design a treatment program to create and maintain a favorable public image for the business as well as promote the dental practice's services.

Collect, research, compile statistics on the patients and the effectiveness of the treatment.

Instruct patients on postoperative and on general oral health care and on good oral hygiene.

Help patients develop and maintain good oral health. She will also explain the relationship between diet and oral health, inform patients how to select toothbrushes, and show patients how to brush and floss their teeth.

Administer and direct the activities of the dental practice in accordance with accepted national standards, administrative policies and OSHA compliance guidelines.

Oversee the dental assistants and dental hygienists employed by our dental office.

Create brochures explaining the benefits of cosmetic surgery.

In response to the director's RFE, requesting information from the California licensing agencies that the position described did not require a dental license, counsel for the petitioner provided his December 12, 2005 letters sent to the Dental Board of California and to the Committee on Dental Auxiliaries of the California Department of Affairs inquiring whether the duties of the proffered position constituted a position requiring a license. Counsel also provided a response from the California Committee on Dental Auxiliaries. In a letter dated December 16, 2005, an executive officer of the Committee on Dental Auxiliaries noted that it was not possible to discern from the wording of the proposed duties whether a particular duty required a license and that it was unclear whether the author of the December 12, 2005 letter was inquiring if a particular duty is permissible for an unlicensed dental assistant, a registered dental assistant, a registered dental assistant in extended functions, or a registered dental hygienist. The executive officer of the Committee on Dental Auxiliaries provided a copy of the regulations

governing each of the referenced positions and noted that if the duty is not listed in the applicable regulation governing the position, the auxiliary may not perform the duty.

Counsel indicated that because the California Dental Board and the California Committee on Dental Auxiliaries did not make a finding in response to his inquiry, the firm conducted its own legal research. Counsel concluded that the beneficiary is exempt from the licensing requirements of section 1625 of the California Business and Professions Code, because the duties of the position do not involve the examination, diagnosis, or treatment of diseases or injuries to human teeth. Counsel claimed that the dental researcher/specialist is not responsible for diagnosis or patient care and all work is performed under the supervision of a licensed dentist, thus under 8 C.F.R. § 214.2(h)(4)(v)(C) as the beneficiary may perform the duties of the position under supervision, the H classification may be granted.

Counsel also asserted that the dental researcher/specialist is not responsible for patient care because the job consists of administrative duties, dental research, and analysis of patient records performed under the supervision of a licensed dentist. Counsel indicated that the beneficiary's duties resemble the duties of a health services manager as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, that include maintaining patient records, planning, organizing, coordinating, and supervising the delivery of healthcare.

Counsel contended that the dental research/specialist would continue to perform administrative duties, maintenance of patient records and dental research under the supervision of a licensed dentist, that the duties of the position do not require a license and neither California Dental Board nor the California Committee on Dental Auxiliaries had determined that the duties of the position required a license. Counsel referenced an April 23, 2004 interoffice memorandum issued by William R. Yates, Associate Director for Operations (Yates memorandum) indicating: "In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference."¹ Counsel noted that the petition involved the same parties and the same underlying facts and that CIS had not noted any material change in circumstances and that no material change had taken place.

On April 12, 2006, the director determined that the record did not contain adequate information to substantiate counsel's assertion that a license was unnecessary for the beneficiary to perform the duties described. The director concluded that the proffered position probably required a dental license and that counsel had not offered sufficient evidence to find otherwise.

On appeal, counsel for the petitioner asserts the duties of the position do not require a dental license because the position does not require clinical diagnosis or patient care and all work is performed under the supervision of a licensed dentist. Counsel contends that in both the initial petition and the instant extension petition, the petitioner indicated that the applicant would not provide any patient care because she is not a licensed dentist in the State of

¹ The memorandum noted that prior approved petitions should not be given deference when it had been determined that a material error with regard to the previous petition had occurred, or a substantial change in circumstances had taken place, or new material information adversely impacted the petitioner's or beneficiary's eligibility.

California; rather, that the job consists of administrative duties and clinical research performed under the supervision of a licensed dentist. Counsel reiterates his prior contention that the position's duties resemble the duties of a health service manager as described in the *Handbook*. Counsel asserts that if a license is required to perform the duties described in this matter, then the occupations of dental assistant, medical assistant, and nursing assistant, as well as a health services manager, could not be performed without a license. Counsel contends that as long as the beneficiary "may assist the dentist in making a diagnosis of the patient's medical or dental condition" and the final responsibility for diagnosis and treatment remains with the dentist, a license is not required.

Counsel again references the Yates memorandum and avers that it is established CIS policy to give deference to a prior determination of eligibility for a nonimmigrant classification unless there is a material error in regard to the prior approval, a substantial change in circumstances, or new material information that adversely affects the petition or beneficiary's eligibility. Counsel asserts there has been no change in circumstances and that the petitioner has submitted evidence that the duties of the petition do not require a license because they consist of administrative duties and clinical research performed under the supervision of a licensed dentist.

Counsel's assertions are not persuasive. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title.² 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's description of the proffered position is not that of a medical and health services manager.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. In reaching its own conclusion regarding the degree requirements of the proffered position, the AAO has relied upon the *Handbook*, comparing the position's duties against those described for a range of dental professions. This review has found that the petitioner has not provided a meaningful description of many of the tasks associated with the proffered position, that some of the tasks are lifted directly from the *Handbook's* report on dental assistants and dental hygienists; and that some of the duties encompass duties associated with the duties of a dental laboratory technician and administrative or office manager.

The AAO observes that the description of the proffered position's duties contained in the letter in support of the initially approved petition included responsibilities of administering and directing the activities of the dental office in accordance with accepted national standards, administrative policies and OSHA compliance guidelines

² In this matter, the Dental Board of California does not recognize the title of dental specialist. Counsel provided a February 3, 2006 letter from the Dental Board in California in another matter before the AAO indicating that there is no such title as dental researcher/specialist.

and conducting 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 patients' infection or disorder." These duties are too broadly stated to enable CIS to determine that the proffered job would or would not involve duties that would require a license in the State of California. The AAO observes that the California Business and Professions Code Section 1625(e) states that a person practices dentistry within the meaning of this chapter who "manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed." The remaining portion of the petitioner's general description is also too general to enable an adequate appraisal of the actual duties the beneficiary would perform and whether or not those duties would require a license to perform them in the State of California. If the previous approval of the proffered position as a specialty occupation and the beneficiary's eligibility to perform the duties of the position without a license was based solely on the description provided, such approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material error on the part of the director. Moreover, the AAO finds the information from the California Committee on Dental Auxiliaries in its December 16, 2005 letter is new material that adversely impacts on the beneficiary's eligibility to perform the duties of a specialty occupation.

The AAO also observes that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications or the beneficiary's eligibility. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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). As determined above, if the previous approval was based on the description provided, CIS would have materially erred in approving the previously filed petition. CIS 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).

Turning to the description of the proffered position as the petitioner expanded upon the duties in the instant petition, the AAO finds that many of the listed duties do not provide a clear understanding of the task(s) the beneficiary will be performing. For example, "[c]oordinat[ing] complex dental care involving periodontic and prosthodontic rehabilitation" is not sufficiently clear to discern whether the performance of this duty involves the work of a dentist, a dentist auxiliary, or a dentist auxiliary that requires licensure or registration in the State of California. Likewise, the petitioner's description of a duty that requires the beneficiary to oversee a task does not provide sufficient information to determine if the beneficiary will be performing the duties of a licensed dentist who oversees dental auxiliaries or if oversight is something of a different nature altogether. In yet other examples, the AAO cannot discern whether the beneficiary's discussion of the patients' dental records, discussion of x-rays and appropriate treatment, and designing a treatment program to create a favorable public image are tasks requiring the services of a dentist or of a dental assistant as the duties are ill-defined and lack clarity of purpose. The AAO observes again that, if the proffered position includes diagnosing or providing treatment, or planning, placing, condensing, carving, or removing permanent restorations, or other surgical or cutting procedures on hard or soft tissue, the individual performing these tasks must be licensed as a dentist in the State of California. The record does not reflect that the petitioner requires licensure in the position or that it is seeking a licensed dentist. As the record is not sufficiently clear regarding the actual duties of the proffered position as it

relates to these tasks, the AAO will not find that the proffered position is that of a dentist, thus requiring proof of State licensure.

The petitioner has provided some detail in the extensive list of duties of the proffered position that identifies a specific task. A review of the *Handbook* shows that the identifiable tasks are related to the occupations of dental assistant, dental hygienist, and administrative/office manager.

In pertinent part, the *Handbook* states the following regarding 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 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.

The following duties of the petitioner's description of the proffered position align most closely with those of a dental assistant:

- Assist the dentist in taking and developing radiographs (x-rays).³
- Coordinate the placement of orthodontic appliances.
- Oversee the preparation and fitting of orthodontic bands.
- Instruct the patients in the proper care and use of appliances.
- Coordinate the selection of headgear, arch wires, elastics, ligatures, mouth mirrors, probes, forceps, brushes, and scalpels.
- Set up of the armamentarium for oral, nitrous oxide analgesia, intramuscular, and intravenous conscious sedation.
- Instruct patients on postoperative and on general oral health care and on good oral hygiene.

³ The AAO observes that Article 5 Section 1085 of the California Business and Professions Code requires a dental assistant who operates dental radiographic equipment for the purpose of oral radiography to comply with the requirements of section 1656 of the Code. The record does not provide evidence that the beneficiary has so complied.

- Make impressions of patient's teeth for study casts (models of teeth used by dentists to evaluate patient treatment needs).

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

Dental hygienists...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...take and develop dental x rays....

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...x-rays machines to take dental pictures, syringes with needles to administer local anesthetics, models of teeth to explain oral hygiene.

The following duties of the petitioner's description of the proffered position align most closely with those of a dental hygienist:

- Conduct patient screening procedures; such as assessment of oral health conditions, review of the health history, oral cancer screening, head and neck inspection, dental charting and taking blood pressure and pulse.
- Help patients develop and maintain good oral health, explain the relationship between diet and oral health, inform patients how to select toothbrushes, and show patients how to brush and floss their teeth.

The *Handbook's* discussion regarding the duties of administrative services managers also relates to the proffered position, as follows:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services These workers manage the many services that allow organizations to operate efficiently.

* * *

In small organizations, a single administrative services manager may oversee all support services As the size of the firm increases, administrative services managers are more likely to specialize in specific support activities. For example, some administrative services managers work primarily as office managers

The petitioner's indication that the beneficiary will order items like crowns, bridges, and dentures, and follow up on the fabrication of prosthetics, making sure that they are received on time, on receipt, and matches the order are administrative functions.

Turning now to the occupation of medical and health services managers, the AAO takes note of the following discussion:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. Medical and health services managers, also referred to as *health care executives or health care administrators*, plan, direct, coordinate, and supervise the delivery of health care. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

The structure and financing of health care are changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated health care delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work and an increased focus on preventive care. They will be called on to improve efficiency in health care facilities and the quality of health care provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of related services - for example those ranging from inpatient care to outpatient followup care.

* * *

Clinical managers have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. For example, directors of physical therapy are experienced physical therapists, and most health information and medical record administrators have a bachelor's degree in health information or medical record administration. Clinical managers establish and implement policies, objectives, and procedures for their departments; evaluate personnel and work; develop reports and budgets; and coordinate activities with other managers.

* * *

In group medical practices, managers work closely with physicians. Whereas an office manager may handle business affairs in small medical groups, leaving policy decisions to the physicians themselves, larger groups usually employ a full-time administrator to help formulate business strategies and coordinate day-to-day business.

The *Handbook* notes that a small group of 10 to 15 physicians may employ one administrator to oversee personnel matters, billing and collection, budgeting, planning, equipment outlays and patient flow, while a large practice of 40 to 50 physicians might have a chief administrator and several assistants to handle each area. The AAO does not find the proffered position to be closely aligned to the employment just described. While the

petitioner indicates that the proffered position would require the beneficiary to ensure that the dental practice runs smoothly and administer a dental program, formulate dental policies, standards, and procedural changes, the petitioner does not further describe what those duties entail.⁴ The AAO also notes that the petitioner uses the same terminology as the *Handbook* when indicating the beneficiary will help the dentist with in-patient care wherever necessary and with out-patient follow up care. The AAO, however, does not find that the description of the duties of the proffered position provides sufficient detailed information to substantiate that the proffered position is that of a health services manager. Reciting portions of the *Handbook* to establish a position as a specialty occupation without providing the detail necessary to relate the duties to the petitioner's particular business is insufficient to establish the position as a specialty occupation. 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)).

Based on its reading of the *Handbook*, the AAO concludes that the proffered position, as described by the petitioner combines the duties of several dental professions. While the majority of the position's duties are not clearly defined and the AAO cannot discern whether the tasks are the tasks of a dentist, a dental auxiliary, or a registered dental auxiliary, some tasks appear to fall within the *Handbook's* description of dental assistant, or a dental hygienist or an office administrator. The record does not support counsel or the petitioner's assertion that the proffered position is that of a medical and health and services manager.

Having concluded that the defined duties of the proffered position of dental specialist parallel those of dental assistants, hygienists and administrative services managers, the AAO 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. Factors considered by the AAO when determining these criteria include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, and reports that the industry requires a degree.

The *Handbook* states the following regarding the educational requirements for 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....

For dental hygienists, the requirements as discussed by the *Handbook* are:

⁴ Again, the AAO notes that California Business and Professions Code Section 1625(e) defines the practice of dentistry to include any person who "[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed." The record does not reflect that the beneficiary is a licensed dentist in the State of California or that the petitioner requires a license in dentistry. Thus, the petitioner in this matter does not appear to be seeking a manager for the dental practice which would require licensure as a dentist under California law.

Dental hygienists must be licensed by the State in which they practice. To qualify for licensure, 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. A bachelor's or master's degree usually is required for research, teaching, or clinical practice in public or school health programs.

The *Handbook* offers the following regarding the training of administrative services managers:

Educational requirements for these managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement needed to enter a position as office manager.

In that the *Handbook* finds no baccalaureate or higher degree, or its equivalent, to be required for employment in any of the occupations whose defined 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)(1).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), has qualified it under one of the three remaining criteria.

The petitioner in this matter has not submitted job announcements or industry letters to establish that a degree requirement is common to the industry in parallel positions among similar organizations. In addition, the AAO observes that the December 16, 2005 letter from the Committee on Dental Auxiliaries finds the petitioner's description too esoteric to determine whether the job duties described are for particular occupations. The petitioner has not established that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner also fails to establish that the proffered position is so complex or unique that only an individual with a degree can perform the position. As discussed above, the defined duties of the proffered position track the duties of a dental assistant, and possibly a dental hygienist, and office administrator, positions that are commonly performed by non-degreed individuals. Further, without a meaningful description of the job duties of a particular position, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. The petitioner has not satisfied either prong of the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(2) and, therefore, is unable to establish the proffered position as a specialty occupation on the basis of an industry-wide degree requirement or to distinguish it from similar, but non-degreed employment based on its unique nature or complexity.

The petitioner has also failed to establish that it normally requires a degree or its equivalent for the position. Although the petitioner employed the beneficiary, an individual with a foreign degree in dentistry, in an H-1B classification prior to submitting this extension request, that employment cannot be used to establish that the petitioner normally requires a degreed individual for the position of dental assistant. The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not provided documentary evidence of other employees in the proffered position who have attained a baccalaureate degree or its equivalent. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Turning to the fourth criterion and whether the evidence submitted establishes 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, the AAO finds that it does not. In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has again reviewed the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of someone trained as a dental assistant, dental hygienist or an administrative services manager.

The AAO finds that while the petitioner may rely on the beneficiary to a greater extent than normally expected, due to the beneficiary's foreign training as a dentist, the specific duties of the proffered position are not so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Having considered the defined duties of the proffered position, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by dental assistants, dental hygienists, or administrative services managers.⁵ The petitioner's reliance on the skill and education of this particular beneficiary does not elevate the described duties to that of a specialty occupation. The petitioner has listed the duties of a dental assistant, a dental hygienist, and an administrative services manager, to describe the tasks the beneficiary will perform in the proffered position. The petitioner has not provided a definitive description of duties or of other evidence that establishes that the position includes duties that are so specialized or complex that the position requires an individual with a baccalaureate or higher degree. The AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

⁵ The AAO notes once again that the general references in the proffered position indicating the beneficiary will provide treatment, diagnosis, or oversight of various tasks, suggest that the position may be that of a dentist, a specialty occupation that requires licensure in the State of California. As the record does not include evidence that the beneficiary has obtained a dental license, the petition could not be approved on the basis of performance of these duties as they appear to include the duties of a dentist and the beneficiary has not been licensed to perform the occupation.

Beyond the decision of the director, the AAO observes that the record contains evidence that the beneficiary graduated from the Philippine Dental College in 1990 with a doctor of dental medicine and letters from foreign employers indicating the beneficiary worked as a dental hygienist. The record, however, does not contain a credentials evaluation of the beneficiary's foreign education. Thus, the record does not contain evidence that the beneficiary is qualified to perform any position that requires a four-year degree. For this additional reason the petition may not be approved. 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).

The petition will be denied and the appeal dismissed for the above stated reasons. 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 appeal is dismissed. The petition is denied.