

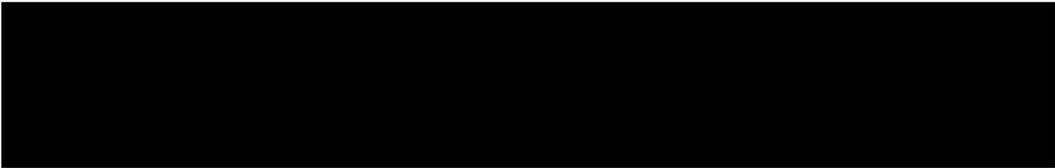
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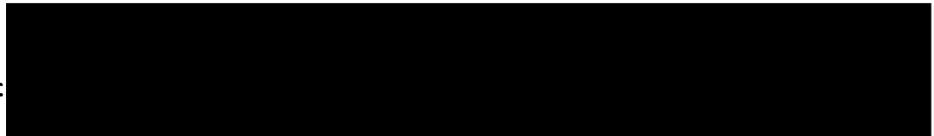
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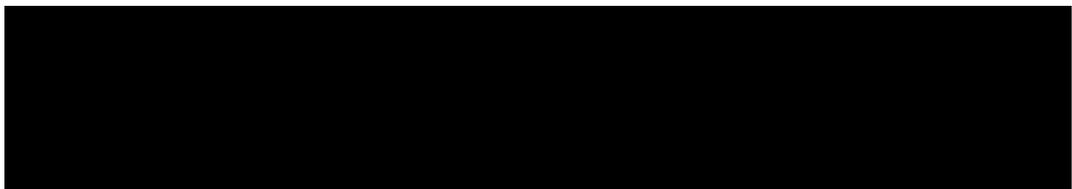
FILE: WAC 05 072 50984 Office: CALIFORNIA SERVICE CENTER Date: FEB 21 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On June 10, 2005, the Director, California Service Center, denied the H-1B nonimmigrant visa petition that is the subject of this proceeding. On appeal, the Administrative Appeals Office (AAO) issued a decision, dated September 28, 2006 that withdrew the director's decision, determined that the proffered position appeared to include the practice of dentistry and thus was a specialty occupation, and remanded the petition to the director for further action and a new decision addressing whether the beneficiary is qualified to practice dentistry in the State of California.

On February 5, 2007, the director denied the petition on the basis of the petitioner's failure to provide evidence in response to the director's request for evidence (RFE) on the licensing issues. The director cited 8 C.F.R. § 103.2(b)(13) and 8 C.F.R. § 103.2(b)(15) as the basis for the decision. The director also certified her denial decision to the AAO on February 5, 2007, as well as notifying the petitioner of the certification and informing the petitioner of its right to submit a brief or written statement to the AAO within 30 days. The AAO, not having received a brief within the 30 days as stated on the certification notice, issued its decision on April 2, 2007, affirming the director's February 5, 2007 decision.

The record in this matter also contains evidence that the petitioner filed a Form I-290B, Notice of Appeal, date-stamped as received by the California Service Center on March 5, 2007. The Form I-290B was annotated to indicate that a brief and/or evidence would be sent to the AAO within 30 days. The record also contains a brief in support of a motion to reconsider/appeal the director's denied petition that was submitted to and dated-stamped to show receipt by the AAO on April 2, 2007 and was date-stamped to show receipt by the California Service Center on April 6, 2007. On November 19, 2007, the AAO noted that it had not received a brief or written statement within 30 days of the director's certification, as the certification notice directed. The AAO, however, reopened the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision. The AAO notified the petitioner that it would be permitted a period of 30 days in which to submit a brief. On December 19, 2007 new counsel submitted a brief in support of the appeal. The AAO has reviewed the record in its entirety before rendering this decision.

The petitioner is a dental office. It seeks to employ the beneficiary as a medical research assistant. 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 issue in this matter is whether the proffered position as described is a specialty occupation and if so whether the beneficiary is qualified to practice the occupation in the State of California.

The petitioner initially indicated in a December 27, 2004 letter appended to the petition that: "[i]n the advancement of her research activities, [the beneficiary] will also assist dentists in their treatment of a variety of patients" and "[the beneficiary] will elicit detailed patient histories through interview and examination, and subsequently research medical literature to find innovative and appropriate treatment solutions based upon patient age and medical conditions." In a May 23, 2005 response to the RFE, the petitioner indicated: "[s]he will also assist dentists in their treatment of a variety of patients using her own experiences as well as sharing the results of her research and investigation."

The record contains a November 20, 2006 letter authored by the Executive Officer of the Committee on Dental Auxiliaries, in which the Executive Officer specifically noted that diagnosis and treatment planning were among the nine functions that a dental assistant is not allowed to perform under Section 1085 of Title 16 of the California Code of Regulations. In an April 23, 2007 letter submitted on appeal, [REDACTED], Chief of Enforcement of the Dental Board of California states:

This letter is in response to your letter regarding the duties of Medical Research Assistants. Our legal department has reviewed the documents you provided. The Board is in agreement with the INS opinion that this person would need a dental license if they perform the duties as outlined in the December 27, 2004 letter from [REDACTED]

On appeal, new counsel asserts that per [REDACTED], the absence of the beneficiary's described duty of "assist[ing] dentists in their treatment of a variety of patients," the job description would fall within the standard duties of a medical research assistant and would not require a license. Counsel contends that the petitioner when "informed of this oversight, claimed that it was not his intention to require [the beneficiary] to 'assist dentists in their treatment of a variety of patients.'" Counsel claims that original counsel inserted this statement without petitioner's knowledge and consent. Counsel asserts that it is the ineffective assistance of prior counsel when describing the beneficiary's proposed duties that constitutes extraordinary circumstances for reopening this immigration matter, as the defective December 27, 2004 letter offered in support of the petition is not attributable to the petitioner.

Counsel in this matter has not submitted any documentary evidence substantiating his assertion that [REDACTED] found only the petitioner's described duty of "assist[ing] dentists in their treatment of a variety of patients," as a duty that would require a dental license in the State of California. 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). Moreover, counsel has not presented any affidavits or other documentary evidence sworn to by the petitioner explaining its error in including this statement in the December 27, 2004 letter it signed in support of the petition. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Further, any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). New counsel has not provided any of this evidence. The petitioner has not demonstrated it received ineffective assistance of counsel when filing the petition. The record

lacks any substantiating evidence that the petitioner's inclusion of the " duty of "assist[ing] dentists in their treatment of a variety of patients," was unintended or an oversight.

The AAO acknowledges counsel's claim on appeal that the petitioner's research assistant will primarily: review professional medical journals and other publications; organize research and compile findings; elicit and discuss patient histories; and identify and recommend treatments. The AAO notes that counsel also states that the beneficiary does not have direct contact with patients and will not be treating or otherwise providing direct care to patients. However, eliciting patient histories suggests that the beneficiary will have direct contact with patients and identifying and recommending treatments indicates that the beneficiary will be involved in treating and providing care to patients. The record does not include evidence verifying that the petitioner requires the individual in the proffered position to perform only research duties. 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).

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 treatment of various disorders of the teeth. Again, the beneficiary's assistance to dentists in their treatment of patients and identifying appropriate treatment solutions are acts that require a dental license. This portion of the beneficiary's duties aligns with the duties of a dentist, a specialty occupation that requires a license.

The AAO affirms its previous decision that the duties of the proffered position comprise the practice of dentistry in the State of California and requires a license. The record does not contain evidence that the beneficiary has a dental license or is otherwise 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 February 5, 2007 denial of the petition.

The petition will be denied. 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.