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U.S. Citizenship and Immigration Services

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[redacted]

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File: WAC 02 204 53328 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the matter will be remanded for further consideration.

The petitioner is a dental clinic that seeks to employ the beneficiary as a dental office consultant. 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 denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

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 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.

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

The petitioner is seeking the beneficiary's services as a dental office consultant. Evidence of the beneficiary's duties includes: the I-129 petition and the petitioner's response to the director's request for evidence. According to the May 31, 2002 letter of support accompanying the I-129 petition, the beneficiary would perform duties that entail, in part: analyzing the clinic's operating procedures and devising the most efficient methods of accomplishing work; consulting with the staff and advising them on the latest technological options for treating their patients; training the staff in emergency procedures; reviewing the documentation on the medical charts regarding medically compromised patients; interpreting OSHA regulations and ensuring that the patients and staff are protected; and advising the dentists on new procedures, materials and instruments.

The director found that the proffered position was not a specialty occupation.

On appeal, counsel states that the director misinterpreted the Department of Labor's *Occupational Outlook Handbook (Handbook)* and considered the incorrect position titles in determining that a degree is not required for the proffered position. In addition, counsel asserts that the director ignored the evidence submitted in response to the request for evidence regarding the petitioner's hiring practices.

Upon review of the record, the petitioner has established that at least one the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) applies to the proffered position. Therefore, the proffered position is a specialty occupation.

The AAO turns to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The director determined that the position description encompassed skills from three occupations: office manager/administrator; dental assistant; and licensed dentist. In reviewing the *Handbook,* the AAO determines that the proffered position does not include skills that would routinely be performed by a dental assistant. A dental assistant provides direct care to a patient, sterilizing equipment, processing x-rays, and may perform administrative duties, as well. None of these duties, or duties similar to them, are included in the proffered position description.

The director then states that the duties of an office manager/administrator include overseeing the work of the organization to ensure that it is on schedule and meeting quality standards. The proffered position includes assessing the work in the office and determining methods to make the office more efficient. While there are similarities in these descriptions, the duties of the proffered position are clearly more specialized than those of an office manager.

Finally, the director states that the position includes some duties that are so complex that only a licensed dentist could perform them, and therefore the position would require an individual with a D.D.S. degree or its equivalent. The director then asserted that the beneficiary is not qualified to perform these duties, as she is not licensed as a dentist in California.

In making the above statement, the director has determined that the position is, in fact, a specialty occupation, despite his statement to the contrary. The denial of the petition was based on the position not being a specialty occupation, not on whether or not the beneficiary was qualified to perform the occupation.

Counsel states on appeal that the director erred in determining that the proffered position is a combination of the previously referenced occupations, and that instead it should be equated to a management analyst position. The AAO agrees that some of the primary functions of the proffered position are similar to those of a management analyst, but it does not fall wholly into that classification. As the director determined, some of the skills are those of a dentist. The AAO notes that it is not clear that the beneficiary would need to be a licensed dentist to perform the duties of the proffered position. Nonetheless, the petitioner has established, and the director has stated, that the position is a specialty occupation.

As the director did not discuss whether the beneficiary is qualified to perform a specialty occupation (beyond the above-stated reference), the matter will be remanded to the director for further consideration. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform this specialty occupation, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 9, 2002 decision is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.