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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 070 52224 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.

Marie Johnson

for 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 appeal will be dismissed. The petition will be denied.

The petitioner is a dental service that seeks to employ the beneficiary as a dental specialist/researcher. 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 position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a dental specialist/researcher. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 7, 2001 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: administering and directing the activities of the dental practice; conferring with clinical staff to formulate policies and recommend procedural changes; overseeing conventional procedures such as root canals; supervising surgical procedures such as apicoectomies and retrofills; instructing patients on the proper care and use of appliances; overseeing complex fixed and removable restorative procedures including tooth preparation, impressions, occlusal recording; filling of full, overdenture and partial denture fabrication; coordinating complex dental care involving periodontic and prosthodontic rehabilitation; supervising the set up of the armamentarium for oral, nitrous oxide analgesia, intramuscular, and intravenous conscious sedation; hiring additional staff and evaluating their work; overseeing the billing of patients and insurance companies; maintaining complete dental reports and related documentation of the patients; examining patients' records to compose complete dental reports for the dentist's approval; and keeping current on the latest dental research.

The director found that the proffered position was not a specialty occupation because the job is most like that of a dental assistant. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the proffered position most resembles that of a health services manager, a field that requires a degree. Counsel also states that the proffered position meets all four of the criteria for establishing a position as a specialty occupation.

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 proffered position is not a specialty occupation.

The AAO turns first 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 AAO does not concur with the director that the position parallels that of a dental assistant, although some of the duties are similar to those of a dental assistant. The AAO also does not concur with counsel that the proffered position is that of a health services manager, although a portion of the

beneficiary's time would be spent on duties that fall into that category (25 per cent of the beneficiary's time would be spent "administering and directing the activities of the dental office and lab to ensure compliance with necessary guidelines, and hiring additional staff and conferring with personnel to increase daily production). Another 15 per cent of the time would be spent in overseeing billing of patients and insurance companies, which is an administrative or support role. The balance of the time, fully 40 per cent, would be spent "overseeing the various dental and surgical procedures," duties which most closely resemble those of a dentist.

The position of health services manager would generally be considered to be a specialty occupation, depending on the specific duties; in this case, however, the beneficiary would only be performing those duties 25 per cent of the time. The duties of a dental assistant or billing technician are not specialty occupations, and the beneficiary would be performing those duties 35 per cent of the time. Clearly, the position of a dentist is a specialty occupation. The petitioner's original letter of support states that the beneficiary will have no patient contact, but the response to the request for evidence indicates that the beneficiary would be performing work such as supervising surgical procedures and overseeing complex restorative processes for 40 per cent of the time. While the director did not raise this issue, it appears that the beneficiary would be performing the duties of a dentist for a significant portion of his working hours, even though doing so would require the beneficiary to possess a license.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for quality assurance coordinators, dentists, and clinical researchers. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements for quality assurance coordinators were submitted to correspond to the administrative duties of the proffered position. Neither of these two postings are for positions or industries similar to the petitioner, nor do they require a degree in a specific specialty. The advertisements for dentists all require a degree from an accredited dental school and a state license, which counsel states that the beneficiary does not need since he will have no patient contact (although, as noted above, it appears that is not true). The listings for clinical research positions bear no resemblance to the proffered position. Thus, the advertisements have little relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. The petitioner indicated in an April 9, 2002 letter that it has never hired anyone for the proffered position before. On appeal, the petitioner states that it is her policy that all applicants for the position must have at least a bachelor's degree. Since it appears that this is a newly created position, the petitioner cannot claim that she "normally requires" a degree, and it is not possible for her to meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, as noted above, it appears that despite counsel's and the petitioner's assertions, the beneficiary will be engaged in the practice of dentistry for 40 per cent of his time. On appeal, counsel states that the beneficiary would not be engaging in direct patient contact and that, instead, he would only be managing the dental practice, engaging in research and providing input to the dentists. Despite this statement, the information provided both in the response to the director's request for evidence and on appeal makes it clear that the beneficiary would have significant input regarding the treatment of patients. According to the response to the director's request for evidence, fully 40 per cent of the beneficiary's time would be spent on activities that have a direct impact on the care patients would receive. It appears that the beneficiary would actually be providing treatment to the patients, but even if he were not, his decisions and actions could shape that treatment. The AAO does not concur with counsel that this position falls outside the licensing requirements for dentists.

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.