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U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 03 025 54329 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2005

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:

[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.

A handwritten signature in black ink that appears to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center 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 clinic, with ten employees. It seeks to employ the beneficiary as a dental specialist/researcher 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 he determined the proffered position did not meet the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's requests for evidence, dated August 12, 2003 and January 15, 2004; (3) counsel's responses to the director's requests for evidence; (3) the director's denial letters, dated September 25, 2003 and March 31, 2004; and (4) a Form I-290B, submitted by counsel on October 7, 2003, and a second Form I-290B filed on April 29, 2004, with additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The instant petition was first denied by the director on September 25, 2003 based on the petitioner's failure to submit requested original documentation. In response to counsel's October 7, 2003 motion to reconsider, the director reopened the case. Following his second review of the record, the director denied the petition based on a determination that the proffered position was not a specialty occupation. Therefore, the issue before the AAO in this proceeding is whether the petitioner's proffered position qualifies as a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. 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 states that it is seeking the beneficiary’s services as a dental specialist/researcher. Evidence of the beneficiary’s duties includes: the Form I-129; a letter of support from the petitioner accompanying the Form I-129; and counsel’s September 12, 2003 and February 27, 2004 responses to the director’s requests for evidence.

At the time of filing, the petitioner stated it was in need of a dental specialist/researcher to “administer and direct the activities of the dental practice in accordance with accepted national standards, administrative policies and OSHA compliance guidelines.” It also indicated that the beneficiary would hire additional staff and evaluate the work of these individuals, oversee the billing of patients and insurance companies, confer with clinical professionals and staff to formulate policies and recommend procedural changes to increase daily production, and coordinate with dental laboratories to ensure the timely processing of orders. It estimated that such administrative duties would consume 30 percent of the beneficiary’s time. The remainder of the beneficiary’s time was to be spent reviewing patient records and preparing dental reports (40 percent of the beneficiary’s time) and conducting research on dental infection and disease (30 percent of the beneficiary’s time).

In his September 12, 2003 response to the director’s initial request for evidence, counsel expanded on this description of the proffered position’s responsibilities, stating that the beneficiary’s duties would also include “the creation and implementation of dental programs” and require the beneficiary to “plan, organize and maintain the petitioner’s dental programs.” He further indicated, for the first time, that the beneficiary would be required to demonstrate dental techniques “to solve dental assistants’ procedural problems.” However, the

purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot, therefore, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As the AAO finds the additional duties introduced by counsel in his September 12, 2003 response to the director to materially alter the nature of the position described by the petitioner at the time of filing, it will not consider them and will, instead, rely on the petitioner's initial description of the position's administrative/management duties for its analysis under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that the director appeared to find the duties of the proffered position to reflect the work of technical writers, specifically medical writers in convalescent hospitals. The AAO does not agree. It does not find the proffered position to be aligned to that of medical technical writer in a convalescent hospital. It, therefore, withdraws the director's findings regarding the nature of the petitioner's employment and will undertake a *de novo* review of the duties of the proffered position and the extent to which such duties impose a degree requirement or its equivalent on the beneficiary. The AAO is not bound by a decision of a director. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd 248 F.3d 1139 (5th Cir. 2001), cert denied, 122 S.Ct. 51 (2001).

To make its determination whether the employment described in relation to the proffered position qualifies as 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO's review of the proffered position has relied on the 2004-2005 edition of the DOL *Handbook*, which has provided discussion regarding the duties of a range of dental professions, as well as the occupation of medical and health services managers, the employment the petitioner contends is most closely aligned to its proffered position. Turning first to the occupation of medical and health services managers, the AAO has taken note of the following discussion at pages 55-56:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. The occupation, medical and health services manager, encompasses all individuals who plan, direct, coordinate, and supervise the delivery of healthcare. 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.

...

Large facilities usually have several assistant administrators to aid the top administrator and to handle daily decisions. Assistant administrators may direct activities in clinical areas such as nursing, surgery, therapy, medical records, or health information

...

Clinical managers have more specific responsibilities than do generalists, and have training or experience in a specific clinical area. 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

The AAO does not find the proffered position to be closely aligned to the employment just described. While the proffered position would require the beneficiary to perform administrative/managerial duties in a health care setting, the description of the duties provided by the petitioner does not establish it as a medical or health services manager responsible for directing the delivery of healthcare. Instead, the administrative duties of the proffered position described by the petitioner at the time of filing – the direction of its dental practice in accordance with national standards, administrative policies and OSHA guidelines, the hiring and evaluation of additional staff, the billing of patients and insurance companies, the collaboration with clinical professionals and staff to formulate policies and recommend procedural changes to increase daily production, and the coordinating with dental laboratories to ensure the timely processing of orders – appear more closely aligned to that of an administrative services or office manager.

As described at page 21 of the *Handbook*, administrative services managers:

[p]erform 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

In reaching its conclusions, the AAO notes that counsel has indicated that the petitioner already employs an office manager and that the beneficiary would not, therefore, be tasked with general managerial duties. The AAO accepts the distinction made by counsel. However, while the administrative/management duties of the proffered position, which would require 30 percent of the beneficiary's time, may be distinct from those of the petitioner's office manager, they are, nevertheless, closely aligned to those performed by administrative services or office managers to support the operations of a range of businesses and organizations.

At the time of filing, the petitioner also indicated that 70 percent of the beneficiary's time would be spent reviewing patient records and developing dental reports based on those records, as well as conducting research on dental infection and disease. In his September 12, 2003 response to the director's request for evidence, counsel emphasized the research aspects of the beneficiary's work, indicating that the beneficiary would be required to review major professional dental journals, as well as highly-technical dental literature. While the AAO has found no specific discussion of such duties in the dental occupations it has reviewed, such responsibilities appear to fall within those research activities routinely performed by dental clinics as part of patient treatment programs. As such, they do not constitute the type of analysis or original research that would place this work beyond the abilities of dental hygienists who work closely with dentists in the identification of dental problems and disease. In reaching this conclusion, the AAO has noted the description of the clinical training provided dental hygienists, discussed by the *Handbook* at page 316:

Schools offer laboratory, clinical, and classroom instruction in subjects such as anatomy, physiology, chemistry, microbiology, pharmacology, nutrition, radiography, histology (the study of tissue structure), periodontology (the study of gum diseases), pathology, dental materials, clinical dental hygiene and social and behavioral sciences.

Accordingly, the AAO concludes that the proffered position of dental specialist/researcher requires the combined skills and knowledge of an administrative services or office manager and a dental hygienist. It now 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.

The *Handbook*, at page 22, states the following regarding the educational requirements for 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 large organizations, however, administrative services managers normally are hired from outside and each position has formal education and experience requirements

The educational requirements for dental hygienists are discussed at page 316::

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

[M]ost 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

On appeal, counsel contends that the *Handbook*, the *Dictionary of Occupational Titles (DOT)* and the *Occupational Information Network (O*Net)*, which has replaced it, all support a finding that the proffered position imposes a degree requirement. He points first to the *Handbook's* discussion of the degree requirement for the occupation of medical and health services managers, then notes that both the *DOT* and the *O*Net* have reached similar conclusions.

However, the proffered position has not been established as a medical or health services manager. Accordingly, the *Handbook's* discussion of the degree requirement for this occupation is not relevant to this proceeding, nor are the Specific Vocational Preparation (SVP) rating of 8 assigned to the occupational title of dental services director by the *DOT* or the JobZone rating of 4 assigned to the occupation of medical and health services managers by the *O*Net*. Moreover, the AAO does not find either the *DOT* or the *O*Net* to be persuasive sources of information with regard to occupations. Both provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. A JobZone 4 rating does not indicate that a bachelor's degree in a specific specialty is required.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish the petitioner's degree requirement as an industry norm, counsel, on appeal, again offers evidence initially submitted in his September 12, 2003 response to the director's request for evidence – letters from three California dental practices and copies of on-line information regarding seven dental practices/programs elsewhere in the United States. The submitted materials do not, however, satisfy the requirement of the criterion's first prong, which stipulates that the degree requirement be established in parallel positions among similar organizations.

The letters come from California dental practices that appear to be similar to the petitioner, but do not describe the duties performed by the dental specialists they employ. As a result, they do not establish that the positions for which they require a degree in dentistry are parallel to the proffered position. The materials related to the seven practices/programs with dental services directors/managers either do not describe the

practice/program or offer a description of dissimilar operations. These same materials also fail to identify the specific duties performed by the dental services directors or managers.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In his September 12, 2003 response to the director's request for evidence, counsel appeared to indicate that the proffered position was newly created in response to the expansion of the petitioner's business and the AAO finds no evidence in the record to indicate that the petitioner has previously employed a dental specialist/researcher. Accordingly, it concludes that the proffered position cannot be established as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In assessing whether the petitioner has met its burden with regard to the fourth criterion – the nature of the specific duties is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree – the AAO has again reviewed the duties of the proffered position. This review has taken note of counsel's statements regarding the position's complex and degree-specific tasks. However, the AAO finds no evidence in the record to establish that the administrative responsibilities of the proffered position are particularly specialized or complex, or that they require greater knowledge or skill than that normally needed by administrative services managers. Further, it does not find the proffered position's research duties to require expertise beyond the capabilities of dental hygienists who are not required to have a baccalaureate or higher degree to practice their profession. As a result, 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).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO, although it has withdrawn the director's findings regarding the nature of the proffered position, shall not disturb his denial of the petition.

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.