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U.S. Citizenship
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Services

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FILE: WAC 03 193 50115 Office: CALIFORNIA SERVICE CENTER Date: **APR 22 2005**

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:

SELF-REPRESENTED

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 appeal will be dismissed. The petition will be denied.

The petitioner is an employee leasing service company that seeks to employ the beneficiary as a dental health service administrator. 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, the petitioner submits a letter.

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 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 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 health service administrator. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 11, 2003 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: developing, implementing and maintaining policies and procedures related to dental health services; planning, directing, coordinating and supervising the delivery of dental health services to patients at dental clinics; preparing a dental health service management report; providing assistance to the controller in the preparation of the company's annual budget; supervising the company's accountant and marketing analyst; and evaluating and providing orientation to new employees. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in any medical, dental or healthcare-related field.

The director found that the proffered position was not a specialty occupation because the petitioner did not submit evidence regarding the specific placement of the beneficiary, with a description of the proposed duties from the company where the beneficiary would be working. The director stated that the petitioner did not establish that a specialty occupation exists where the beneficiary would work.

On appeal, the petitioner states that it is the actual employer of the beneficiary, and that it had previously submitted both a staffing agreement with its client that contains the position description, and an employment contract with the beneficiary, establishing an employer-employee relationship.

While the petitioner is correct in stating that it had previously submitted a staffing agreement, it does not establish that the position is 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.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While the *Handbook* states that the general requirement for a health services manager is a master's degree, and a bachelor's degree is adequate for some entry-level positions in smaller organizations, it also states, "Physician's offices and some other facilities may substitute on-the-job experience for formal education." The petitioner provided no information about its client's business or worksite, so there is no evidence in the record to establish that it is a type of business that would require formal education rather than experience to fill the proffered position. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for this type of health services manager.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record 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. There is no evidence in the record regarding the petitioner’s client’s past hiring practices. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency’s clients.

Although the record contains a staffing agreement between the petitioner and its client, the site where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. The description is identical to the general one provided in the letter of support; therefore, the petitioner has not demonstrated that the work that the beneficiary will perform for the client is a dental health services manager or that it will qualify as a specialty occupation.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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, while the staffing agreement notes that the petitioner will be considered the beneficiary’s employer “for all purposes,” and that it would pay the beneficiary’s compensation and be responsible for withholding all federal and state taxes, section 3.2 states, “Client shall have full and complete direction and supervision over all employees.” The language of the agreement is clear as to who would maintain control over and supervise the beneficiary. The petitioner would be compensating the beneficiary, but for all intents and purposes, it appears that the client would be the actual employer. A United States employer must have an employer-employee relationship with respect to its employees, as indicated by the fact that it may supervise or otherwise control the work of any such employee. 8 C.F.R. § 214.2(h)(4)(ii).

In addition, the AAO notes that the beneficiary is not qualified to perform an occupation that requires a license. California Business and Professions Code, Section 1625(b) states that a person practices dentistry within the meaning of the chapter if he or she “[p]erforms, or offers to perform an operation or diagnosis of any kind,” and Section 1625(e) states that a person is considered to be practicing dentistry is he or she “[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.¹

¹ www.leginfo.ca.gov, accessed 3/16/05.

The duties of the proffered position include planning, directing, coordinating and supervising the delivery of dental health services, duties that clearly involve patient care, and would fall under the definition of performing a diagnosis. In addition, the duties include developing, implementing and maintaining policies and procedures, which would fall under duties of managing a dental office. As a result, a license would be required, since the duties are included in the California Code's definition of practicing dentistry.

For these additional reasons, the petition may not be approved.

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.
