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U.S. Citizenship
and Immigration
Services

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DR

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FILE: WAC 03 161 50172 Office: CALIFORNIA SERVICE CENTER Date:

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: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) withdrew the decision, remanded the matter to the director for entry of a new decision, and ordered that if the decision was adverse to the petitioner it was to be certified to the AAO for review. On remand, the director denied the petition and certified his decision to the AAO for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a dental clinic 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 nonimmigrant visa petition on the ground that the offered position does not qualify as a specialty occupation. The AAO withdrew the decision, finding that the position qualifies as a specialty occupation, and remanded the matter to the director to determine whether the beneficiary is qualified for the position, which the AAO found to require licensure to practice dentistry in the state of California. The AAO ordered that if the director's decision was adverse to the petitioner it was to be certified to the AAO for review.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's February 11, 2004 request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's May 26, 2004 denial letter; (5) the Form I-290B, with counsel's brief and supporting documentation; (6) the AAO's remand decision; (7) the director's February 14, 2006 RFE; (8) the petitioner's May 2, 2006 response to the RFE; (9) the director's September 25, 2006 denial decision and certification to the AAO for review; and (10) the petitioner's brief in response to the notice of certification. The AAO reviewed the record in its entirety before issuing its decision.

In the April 15, 2003 letter, the petitioner described the duties of the proffered position as follows:

[The beneficiary] will direct the activities of the dental practice in accordance with accepted national standards and administrative policies, and OSHA compliance guidelines. As such, [she will] come up with a dental program in the office and direct activities in accordance with accepted national standards and administrative policies. She will confer with clinical professionals and staff to formulate policies and recommend procedural changes to increase daily production. [The beneficiary's] duties relating to assurance of the quality of work and compliance with the national standards should take about 30% of her time.

Another area of duties that [the beneficiary] will be involved in is assisting the clinic's dentists with the analysis of patients' records. She will examine patients' records to compose dental reports for the ultimate approval of the dentists. She will utilize her medical background to provide complete analysis of the patient's oral and maxillo-facial conditions based upon the dentists' findings, reports, medical history and laboratory results. [The beneficiary] will record these conditions for diagnosis and treatment by the dentists. Her expertise in the area of dental medicine will be utilized in suggesting to the dentists solutions as to patients' conditions. She will maintain complete dental reports and related

documentation of the patients. She will coordinate dental care evaluation and develop criteria and methods for such evaluation/reports. Duties relating to the analysis of patients' records and assisting the dentists to make proper determinations and diagnosis will occupy about 40% of [the beneficiary's] time.

Additionally, she will work with the dentists and analyze the medical significance of infection or disease, providing prognoses and advise on treatment based upon her research. With information supplied, she will keep up to date on the latest medical research results and utilize the medical library to perform the research necessary to evaluate the cases that are given to her. She will utilize medical journals, textbooks[,] and medical research materials to analyze and evaluate the patients' conditions, particularly regarding AIDS and treatment of gingival diseases. The amount of time spent on research will be determined by the extent of the injuries or rarity of the diseases incurred for each case. However, we estimate that the medical and dental research, and composition of reports based on such research, it [sic] will take about 30% of [the beneficiary's] time.

The petitioner requires a degree in dentistry for the proposed position.

The petitioner noted that the beneficiary does not provide patient care activities since she is not a licensed dentist in the state of California.

In response to the director's RFE, counsel for the petitioner repeated the various duties listed above. Counsel also noted that the beneficiary:

[W]ill be involved in assisting the clinic's dentist with the analysis of patient records. She will examine patients' records to compose dental reports for the ultimate approval of the clinic's dentist. [The beneficiary] will utilize her dental background to provide complete analysis of the patients' oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history[,] and laboratory results. [The beneficiary] will record these conditions for diagnosis and treatment by the dentist. [The beneficiary's] expertise in the area of dental medicine will be utilized in suggesting to the clinic's dentist solutions as to patients' conditions. . . .

The director denied the petition finding that the proposed duties reflected those of an office manager and a dental assistant, positions that do not qualify as a specialty occupation. The director stated that he agreed with the petitioner in that the overall responsibility for some of the duties lie with the licensed dentist, and that the dentist would be responsible to ensure that the patients' findings, report, diagnosis and treatment is complete.

In a January 11, 2006 decision, the AAO determined, based on portions of the petitioner's description of the proffered position and statements made by counsel, that the position encompassed duties performed by a dentist, an occupation that is a specialty occupation. The AAO also determined that the record did not contain

evidence that the beneficiary had obtained the appropriate licensure to perform the duties of a dentist and remanded the matter to the director to address this issue.

On remand, the director issued a request for evidence, dated February 14, 2006, which sought evidence from the petitioner that would establish that the beneficiary is qualified to perform the proposed position, which requires licensure to practice dentistry in the state of California; or a statement from the pertinent California licensing agencies that the duties of the proffered position did not require a dental or other license to perform the duties of the proffered position.

In response to the request for evidence, counsel submitted a letter, dated May 2, 2006, stating that the proposed duties do not require licensure to practice dentistry and that the beneficiary would not “be treating patients or otherwise providing direct care to patients.” Counsel submitted information from the Department of Labor’s 2006-2007 edition of *Career Guide to Industries (CGI)* about researchers to establish that licensure is not required for the proposed position. Counsel also submitted prior AAO decisions and employment advertisements from other companies to show that licensure is not required for the proposed position. Counsel stated that the director’s request that the petitioner contact state agencies in California to establish that the proposed position does not require licensure is unnecessary and onerous.

In the September 25, 2006 decision, the director concluded that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proposed position. The director certified his decision to the AAO for review.

On certification, counsel states that the beneficiary will not be employed as a dentist that is directly treating patients or having direct contact with patients. According to counsel, the beneficiary will conduct research and assist in assessing diagnoses and treatments. Counsel states that the petitioner’s April 15, 2003 letter does not indicate that the petitioner will employ the beneficiary as a dentist or that the beneficiary will perform the duties of a dentist as described in the *CGI*. Counsel references the description of a researcher in the *CGI* to establish that the proposed position does not require licensure. According to counsel, the *CGI* indicates that researchers do not directly treat patients or subjects. Counsel states that prior AAO decisions held that licensure is not required to perform research duties. Counsel claims that submitted employment advertisements for research assistants reveal that licensure is not required to conduct research on science or medical-related projects. Counsel asserts that because the AAO determined that the instant position is a specialty occupation that issue cannot be revisited under the principle of *res judicata*.

Upon review of the record, the AAO finds that the beneficiary is not qualified to perform the duties of the proposed position, which resembles that of a dentist.

In its prior decision, the AAO found that the proposed position involved the practice of dentistry, thereby requiring licensure, based on the beneficiary’s duties of:

[P]roviding complete analysis of the patients’ oral and maxillo-facial conditions based upon the dentists’ findings, reports, medical history, and laboratory results; suggesting dental

treatment solutions to dentists; providing prognoses; advising on treatment based upon her research; and utilizing medical journals, textbooks, and medical research material to analyze and evaluate the condition of patients, particularly regarding AIDS and gingival diseases.

The AAO reached this conclusion based on the *Handbook's* delineation of a dentist, which is that "Dentists diagnose, prevent, and treat problems with teeth or mouth tissue." In a footnote in the decision, the AAO referenced the California Business and Professions Code found at the Dental Board of California's website, and stated that section 1625 of the code indicates that "a person practices dentistry in California when the person "performs, or offers to perform, an operation or diagnosis of any kind."

Although the petitioner states that the beneficiary will not "provide patient care activities," the petitioner indicates the beneficiary will use her expertise in the area of dental medicine "in suggesting to the dentists solutions as to patients' conditions"; in "[analyzing] the medical significance of infection or disease, providing prognoses and advise on treatment based upon her research"; and in "[utilizing] medical journals, textbooks[,] and medical research materials to analyze and evaluate the patients' conditions. The acts of providing a prognosis, analyzing and evaluating patient cases, and advising on treatment entail the practice of dentistry as the *Handbook* portrays a dentist as diagnosing and treating problems with teeth or mouth tissue; and section 1625 of the California Business and Professions Code states that performing a "diagnosis of any kind" is the practice of dentistry. Thus, the proposed position requires a dental license.

The submitted information from the *CGI*, the prior AAO decisions, and the employment advertisements fail to overcome the conclusion that the proposed position requires licensure to practice dentistry in California. The proposed duties differ from those of biological scientists and medical scientists as these occupations are described in the *CGI* and the *Handbook*. The *Handbook* does not depict biological scientists and medical scientists as involved in the analysis and treatment of individual patients at a dental facility, such as the position offered here. It depicts a biological scientist as involved in advancing knowledge for widespread application such as "to develop new drugs, treatment, and medical diagnostic tests" and a medical scientist as "[conducting] biomedical research and development to advance knowledge of life processes and living organisms, including viruses, bacteria, and other infectious agents." The *Handbook* states that the past research of medical scientists "has resulted in advances in diagnosis, treatment, and prevention of many diseases." Similarly, the *CGI* indicates that the work of biological scientists and medical scientists have widespread application as it states: "From carbon nanotubes to vaccines, workers in the scientific research and development services industry create today the technologies that will change the way people live and work in the future." Thus, the duties of the proposed position, which relate to analyzing and treating the needs of an individual dental patient, are not comparable to those of biological scientists and medical scientists, occupations that are involved in widespread medical advances.

Moreover, the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reports that a Ph.D. degree in a biological science is the minimum education required for most prospective medical scientists, and for biological scientists it states:

A Ph.D. degree usually is necessary for independent research, industrial research, and college teaching, as well as for advancement to administrative positions. A master's degree is sufficient for some jobs in basic research, applied research or product development, management, or inspection; it also may qualify one to work as a research technician or as a teacher in an aquarium. The bachelor's degree is adequate for some nonresearch jobs.

Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation that does not require licensure since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The five job postings are not persuasive in showing that the offered position does not require licensure as the petitioner's nature, a small dental clinic, is dissimilar from the companies in the postings: research institutes (ICON Clinical Research, Inc. and MedStar Research Institute), a hospital (Tufts New England Medical Center), a medical college (Medical College of Georgia), and an educational institution (Loyola University Health System). Furthermore, the duties described in the job postings differ from those of the instant petition. For example, screening and recruiting study participants; administering questionnaires, maintaining, culturing, and harvesting bacteria and protozoa of interest to investigators; organizing the laboratory; training monkeys to perform visual tasks; monitoring health and progress of monkeys; training students and post docs on laboratory procedures; and general lab organization and maintenance. Thus, the proposed duties differ from those of the posted jobs.

Based on the evidence of record, the AAO finds that: (1) the proposed position involves the practice of dentistry and therefore requires licensure to practice dentistry in California; and (2) the beneficiary does not possess licensure to practice dentistry in California.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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 director's September 25, 2006 decision is affirmed. The petition is denied.