

U.S. Department of Homeland Security
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Washington, DC 20529

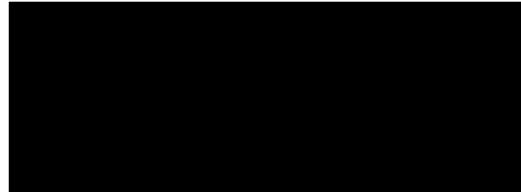


U.S. Citizenship
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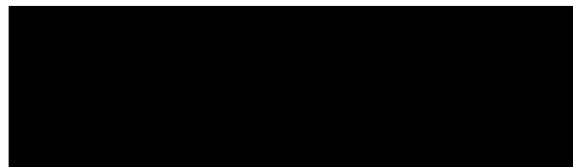


FILE: WAC 05 166 50889 Office: CALIFORNIA SERVICE CENTER Date: SEP 07 2007

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 office, with three employees and \$320,000 in gross annual income. It seeks to extend the employment of the beneficiary as a dental specialist/researcher. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the duties of the proffered position probably constituted the practice of dentistry in the State of California and that the beneficiary does not possess the required State of California dental license.

The record of proceeding before the AAO contains: (1) the Form I-129 filed May 25, 2005 with supporting documentation; (2) the director's November 10, 2005 request for additional evidence (RFE); (3) counsel for the petitioner's January 31, 2006 response to the director's RFE; (4) the director's April 11, 2006 denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The first issue the AAO will address is whether the 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 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.

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.

The petitioner seeks the beneficiary's services as a dental specialist/researcher. Evidence of the beneficiary's duties includes the petitioner's May 10, 2005 letter in support of the petition. The petitioner stated:

We are in need of a full time dental specialist/researcher who possesses the necessary skills and knowledge required to direct the activities of the dental practice in accordance with accepted national standards, administrative policies and OSHA compliance guidelines.

[The beneficiary] will continue [to] direct the activities in accordance with accepted national standards and administrative policies. She will hire additional staff, as needed, and evaluate their work. She will oversee the billings to patients and insurance companies. She will confer with clinical professionals and staff to formulate policies and recommend procedural changes. She will confer with personnel regarding policies and recommend procedural changes to increase daily production. She will coordinate with the various dental laboratories that we utilize to assure that orders are submitted and received in a timely manner. She will set up a procedure between the office and the lab that will assure a smooth flow of work and improve efficiency.

[The beneficiary's] administrative duties relating to assurance of the quality of work and compliance with the national standards should take about 30% of her time.

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

[The beneficiary] will keep up to date on the latest dental research results and utilize the dental library to perform the duties. She will coordinate dental care evaluation and develop criteria and

methods for such evaluation/reports. Her duties relating to analysis of patients' records and assisting the dentist to make proper determinations and diagnosis will occupy about 40% of [the beneficiary's] time.

Additionally, she will work with the dentistry [sic] and analyze the medical significance of infection or disease, providing a prognosis and advise on treatment based upon her research. With the information supplied, she will keep up to date on the latest 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, will take about 30% of [the beneficiary's] time. She will continue then to devise methods to implement the fruit of her research at the office so that we can utilize the newest techniques and developments placing us far ahead of our competition, helping us to expand our client base and thus produce a greater income.

[The beneficiary] will not directly supervise the staff and she is not being hired to be an office manager nor does she provide any patient care activities since she is not a licensed dentist in the [S]tate of California. The position requires a strong medical background in order to understand not only the terminology, but also how to interpret and evaluate the dentist's diagnosis. This knowledge can only be obtained by attending a dental school.

In a January 31, 2006 response to the director's RFE, which had requested information from the California licensing agencies that the position described did not require a dental license, counsel for the petitioner provided his January 25, 2006 letters sent to the Dental Board of California and to the Committee on Dental Auxiliaries of the California Department of Consumer Affairs inquiring whether the duties of the proffered position constituted a position requiring a license. Counsel noted in his January 31, 2006 response that he had not received a response to his inquiries. Counsel indicated that because the California Dental Board and the California Committee on Dental Auxiliaries did not make a finding in response to his inquiry, the firm conducted its own legal research. Counsel concluded that the beneficiary is exempt from the licensing requirements of section 1625 of the California Business and Professions Code, because the duties of the position do not involve the examination, diagnosis, or treatment of diseases or injuries to human teeth. Counsel claimed that the dental researcher/specialist is not responsible for diagnosis or patient care and all work is performed under the supervision of a licensed dentist, thus under 8 C.F.R. § 214.2(h)(4)(v)(C) as the beneficiary may perform the duties of the position under supervision, the H classification may be granted.

Counsel asserted that the dental researcher/specialist is not responsible for patient care because the job consists of administrative duties, dental research, and analysis of patient records performed under the supervision of a licensed dentist. Counsel contended that the beneficiary's duties resemble the duties of a health services manager as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, that include maintaining patient records, planning, organizing, coordinating, and supervising the delivery of healthcare. Counsel also asserted that the instant extension petition involved the same parties and the same underlying facts as the previous filed and approved petition and that CIS had not noted any material change in circumstances and that no material

change had taken place. Counsel referenced an April 23, 2004 interoffice memorandum issued by William R. Yates, Associate Director for Operations (Yates memorandum) indicating: "In matters relating to an extension of nonimmigrant petition validity involving the same parties (petitioner and beneficiary) and the same underlying facts, a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference."¹

On April 11, 2006, the director denied the petition, first observing that each nonimmigrant proceeding is a separate proceeding and that if the previous approval had been given based on the same evidence as in this record, the approval would have been granted in error. The director determined that several of the enumerated duties of the proffered position appeared to involve the practice of dentistry and counsel's argument that the position resembled a health services manager did not address the practice of dentistry as set out in California law. The director concluded that the proffered position is one that probably requires a dental license.

On appeal, counsel reiterates his prior contention that the position's duties resemble the duties of a health service manager as described in the *Handbook*. Counsel asserts that if a license is required to perform the duties described in this matter, than the occupations of dental assistant, medical assistant, and nursing assistant, as well as a health services manager, could not be performed without a license. Counsel contends that as long as the beneficiary "may assist the dentist in making a diagnosis of the patient's medical or dental condition" and the final responsibility for diagnosis and treatment remains with the dentist, a license is not required.

Counsel for the petitioner also provides a May 6, 2006 response, to his January 25, 2006 inquiry, from the Dental Board of California on appeal. One of the Executive Officers of the Dental Board indicates: that a licensure analysis is entirely fact driven and that the Board does not offer advisory opinions; that it is the responsibility of those licensed to ensure their employees do not engage in unlicensed practice; and provided an individual does not undertake duties within the statutory or regulatory definitions of duties of dentists or dental auxiliaries, licensure by the Board is not required. Counsel asserts that the beneficiary's duties are similar to the health services manager who assists the health professional by maintaining patient records and recommending the most effective methods of delivering health care services and that this agrees with the findings of the California Dental Board that a position does not require a license if the individual does not perform the duties of a dentist or dental auxiliary.

The AAO does not agree with the director's or counsel's analysis of the proffered position. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title.² 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

¹ The memorandum noted that prior approved petitions should not be given deference when it had been determined that a material error with regard to the previous petition had occurred, or a substantial change in circumstances had taken place, or new material information adversely impacted the petitioner's or beneficiary's eligibility.

² In this matter, the Dental Board of California does not recognize the title of dental specialist. Counsel provided a February 3, 2006 letter from the Dental Board in California in another matter before the AAO indicating that there is no such title as dental researcher/specialist.

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's description of the proffered position is not that of a health services manager.

When determining whether the employment above described qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Regarding the occupation of medical and health services managers, the *Handbook* reports:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. Medical and health services managers, also referred to as *health care executives or health care administrators*, plan, direct, coordinate, and supervise the delivery of health care. 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.

The structure and financing of health care are changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated health care delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work and an increased focus on preventive care. They will be called on to improve efficiency in health care facilities and the quality of health care provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of related services - for example those ranging from inpatient care to outpatient followup care.

* * *

Clinical managers have training or experience in a specific clinical area and, accordingly, have more specific responsibilities than do generalists. 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, leaving policy decisions to the physicians themselves, larger groups usually employ a full-time administrator to help formulate business strategies and coordinate day-to-day business.

The *Handbook* notes that a small group of 10 to 15 physicians may employ one administrator to oversee personnel matters, billing and collection, budgeting, planning, equipment outlays and patient flow, while a large practice of 40 to 50 physicians might have a chief administrator and several assistants to handle each area. The AAO does not find the proffered position to be closely aligned to the employment just described.

The AAO's review of the duties of the proffered position finds that the petitioner has not provided a meaningful description of many of the tasks associated with the proffered position. For example, "direct the activities of the dental practice in accordance with accepted national standards, administrative policies and OSHA compliance guidelines," is a broad statement that does not convey an understanding of the beneficiary's daily tasks. It is not possible to discern from such a general statement that the proffered position comprises the tasks of a specialty occupation. Likewise, "confer[ing] with clinical professionals and staff to formulate policies and recommend procedural changes," and "confer[ing] with personnel regarding policies and recommend[ing] procedural changes to increase daily production" are insufficiently detailed statements to enable CIS to assess the actual tasks of the position. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

The AAO notes that the petitioner has also included tasks such as maintaining dental reports and examining patients' records to compose dental reports for the dentist as duties of the proffered position. However, once again the tasks outlined are ill-defined and do not establish that they require the theoretical and practical application of a body of highly specialized knowledge. The AAO observes that the *Handbook* reports that dental assistants: "obtain [patients'] dental records," and "keep treatment records," duties that appear similar to the petitioner's description of the proffered position's tasks. The *Handbook* does not indicate that the tasks of a dental assistant require the attainment of a four-year degree.

Moreover, the nature of some of the tasks described suggest that the incumbent in this position may be performing tasks that are the tasks of a dentist, a position that must be licensed in the State of California.³ The AAO notes that the petitioner emphasizes that the position does not involve the direct care of patients, however, the description of the proffered position includes responsibilities such as: "utilizing her medical background to provide complete analysis of the patient's oral and maxillo-facial conditions based on the dentist's findings, reports, medical history and laboratory results;" "work[ing] with the dentistry [sic] and analyz[ing] the medical significance of infection or disease, providing a prognosis and advise on treatment based upon her research;" and utilizing her expertise in the area of dental medicine to suggest solutions to the dentists regarding patients' conditions. In addition, the petitioner indicates: "the position requires a strong medical background in order to understand not only the terminology, but also how to interpret and evaluate the dentist's diagnosis. The knowledge can only be obtained by attending a dental school." Further, the beneficiary's duties involving medical and dental research, composing reports based on the research, and devising methods to implement the research does not provide sufficient detail to enable the AAO to determine that the duties are not those of a dentist involved in evaluating and recommending treatment for patients.

The AAO acknowledges it is the extent of the beneficiary's involvement in these tasks that reveals whether the beneficiary is practicing dentistry. However, it is not clear from the statements made that the beneficiary's actual

³ California Business and Professions Code Section 1625.

involvement will be limited to research and not extend to diagnosis or assisting in diagnosis. The AAO observes that the petitioner indicates the beneficiary's duties relating to analysis of patients' records and assisting the dentist to make proper determinations and diagnosis will occupy about 40 percent of the beneficiary's time. This statement is inherently contrary to counsel's claim that the beneficiary is not performing the duties of a dentist or a dental auxiliary. Section 1625 of the California Business and Professions Code states that the practice of dentistry includes anyone who normally performs, or *causes to be performed by a dentist*, the examination, diagnosis of any kind, and treatment of various disorders of the teeth. As the position in this matter requires that the incumbent evaluate patient's conditions and suggest solutions, as well as, evaluate the dentist's diagnoses, the position appears to be that of a dentist. Such a position requires a license to practice dentistry in the State of California.⁴

The majority of the position's duties are not clearly defined and the AAO cannot discern whether the tasks are the tasks of a dentist, a dental auxiliary, or a registered dental auxiliary. The record does not contain sufficient information or evidence to support counsel or the petitioner's assertion that the proffered position is that of a health and services manager. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not provide sufficient information regarding the actual duties of the position to demonstrate that it is a specialty occupation on the basis of a degree requirement under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), may qualify it under one of the three remaining criteria.

The petitioner has not submitted evidence to establish that that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner also fails to provide a meaningful description to establish that the proffered position is so complex or unique that only an individual with a degree can perform the position. As discussed above, the only detail of the duties of the proffered position suggest that the individual performing the duties may be a dental assistant, a position that is commonly performed by non-degreed individuals.⁵ The remaining information is insufficiently described and detailed to form a conclusion that the duties are the duties of a health services manager rather than that of a dentist or other dental auxiliary. The petitioner has not provided sufficient evidence to satisfy either prong of the criterion 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and, therefore, is unable to establish the proffered position as a specialty occupation on the basis of an industry-wide degree requirement or to distinguish it from similar, but non-degreed employment based on its unique nature or complexity.

⁴ The record does not contain evidence that the beneficiary is licensed to practice dentistry in the State of California.

⁵ The AAO notes again that counsel's description of some of the duties of the position suggests that the position may require the services of a licensed dentist, a position that is a specialty occupation requiring a license to perform in the State of California.

The petitioner has also failed to establish that it normally requires a degree or its equivalent for the position. The petitioner has not provided evidence of other employees in the proffered position who have attained a baccalaureate degree or its equivalent. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has again reviewed the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of someone trained as a dental auxiliary, or are sufficiently detailed to substantiate that the duties are associated with the duties of a health services manager or a dentist. The AAO acknowledges the foreign training of the beneficiary, but emphasizes that the description of the duties of the proffered position are generalized and when portions are defined suggest that the beneficiary will be performing the duties of a dental auxiliary or will be practicing dentistry as someone who performs, or causes to be performed by a dentist, the examination, diagnosis of any kind, and treatment of various disorders of the teeth. Having considered the few ascertainable duties of the proffered position, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by a dental auxiliary.⁶ The petitioner's reliance on the skill and education of this particular beneficiary does not elevate the described duties to those of a specialty occupation. The petitioner has not provided a definitive description of duties or other evidence that establishes that the position includes duties that are so specialized or complex that the position requires an individual with a baccalaureate or higher degree. 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)(4).

The AAO acknowledges counsel's assertion on appeal that there has been no change in the duties of the position since the previously approved petition. However, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). As the director observed, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When 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). This record of proceeding does not indicate whether the director reviewed the totality of the prior record and the rationale for the prior decision. The AAO finds, however, that if that record contained the same description of the proffered position as counsel indicates was submitted with this petition, the CIS would have committed error in approving the previously filed petition. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

⁶ The AAO notes once again that the general references in the proffered position indicating the beneficiary will manage the dental practice, evaluate patients' conditions, recommend treatment, and evaluate the dentist's diagnoses, suggest that the position may be that of a dentist, a specialty occupation that requires licensure in the State of California. As the record does not include evidence that the beneficiary has obtained a dental license in California, the petition could not be approved on the basis of performance of these duties as they appear to include the duties of a dentist and the beneficiary has not been licensed to perform the occupation.

Beyond the director's decision, the AAO observes that the record contains evidence that the University of the East, located in Manila, Philippines issued the beneficiary a doctor of dental medicine in December 2000. The record, however, does not contain a credentials evaluation of the beneficiary's foreign education. Thus, the record does not contain evidence that the beneficiary is qualified to perform any position that requires a four-year degree. For this additional reason the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons. As always, 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.