(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: JUN 19 2013 OFFICE: VERMONT SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, 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.

On the Form I-129 visa petition, the petitioner describes itself as a dental office. In order to employ the beneficiary in what it designates as a Licensed Dental Hygienist position, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in his decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position. To meets 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

> *Specialty occupation* means an occupation which [(1)] 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 [(2)] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a

specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Licensed Dental Hygienist position, and that it corresponds to Standard Occupational Classification (SOC) code and title 29-2021.00, Dental Hygienists. The LCA further states that the proffered position is a Level I position.

With the visa petition, counsel submitted evidence sufficient to show that the beneficiary has a bachelor's degree in dental hygiene awarded by [redacted]. Counsel also provided a letter, dated December 11, 2009, from [redacted] one of the petitioner's dentists. That letter contains the following description of the duties of the proffered position:

- Oral hygiene evaluation and cleaning including: scaling, prophy, and perio examinations;
- Recording and reviewing patient medical histories;
- Sterilization and infection control;
- Charting conditions of decay and disease for diagnosis and treatment by the dentist;
- Applying fluorides and other cavity preventing agents to arrest dental decay;
- Taking and processing x-rays;

- Taking and pouring impressions (models of teeth);
- Assisting the dentist in any areas needed in regard to patient care; and
- Ordering and processing dental supplies.

also stated that the petitioner employs five dental hygienists and that they all have bachelor's degrees in dental hygiene.

On December 29, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted, *inter alia*, (1) diplomas of three people, (2) three letters from two professors and an assistant dean of and (3) counsel's own letter, dated February 12, 2010.

The diplomas provided show that received bachelor's degrees in dental hygiene. They were accompanied by evidence that the petitioner employed from January 1 to January 15, 2010.

The letters from the professors and the dean variously assert that "The current trend is for dental hygiene students to pursue a Bachelor's, Master's, or even PhD in order to meet the growing demands of the profession," that "[the beneficiary's] decision to pursue a four-year degree in dental hygiene is in line with current trends in the field," that "The American Dental Hygienists' Association declared its intent to establish the baccalaureate degree as the minimum entry level for dental hygiene practice in 1986," and that "The bachelor's degree is the educational goal for the prudent dental hygienist and is the emerging trend is BS degree completion." None of those letters asserted that a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into a dental hygienist position.

In her February 12, 2010 letter, counsel asserted that the evidence provided demonstrates that the petitioner normally requires a minimum of a bachelor's degree in a specific specialty or the equivalent for the proffered position and that the petitioner normally requires a bachelor's degree in a specific specialty or the equivalent for its dental hygienist positions.

The director denied the petition on February 25, 2010, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or the equivalent. In that decision, the director stated that the Department of Labor-sponsored *O*Net Online* shows that only one-third of dental hygienists between the ages of 25 and 44 who responded to the Department of Labor's survey have a bachelor's degree or higher.

On appeal, counsel submitted, *inter alia*, (1) four additional diplomas, (2) payroll information, (3) the petitioner's description of the proffered position and of dental assistants, and (4) a brief.

The additional diplomas show that and were awarded bachelor's degrees in dental hygiene.

The petitioner's description of the proffered position includes a description of duties. That description contains duties not mentioned in the previous description, provided by in his December 11, 2009 letter, such as removing excess cement from tooth surfaces after orthodontics and removing sutures and dressings, but is otherwise consistent with the previous description.

In her brief, counsel stated that the petitioner only hires dental hygienists with bachelor's degrees.[1] Counsel stated that insisting on a bachelor's degree is not unreasonable, given that the duties of the position of dental hygienist include examining patients for tooth decay, gum disease, and cancer. Counsel also cited *Matter of Caron International, Inc.*, 19 I&N Dec 791, 794 (Comm. 1988) for the proposition that some occupations may be in transition from nonprofessional to professional status, and that it may be possible for some employers to establish the professional nature of positions by demonstrating that they have consistently required the higher standard of a specific bachelor's degree or advanced degree for a position. Counsel asserted that dental hygienist is such a position. Counsel asserted that the petitioner has demonstrated that the proffered position satisfies the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), as it shows that the petitioner normally requires a bachelor's degree or the equivalent for the proffered position.

To make its determination whether the proffered position qualifies as 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 in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

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[1] A portion of counsel's brief concentrated on distinguishing dental hygienists from dental assistants. The AAO is aware that the position in question is designated a Licensed Dental Hygienist position, and that evidence pertinent to dental assistant positions is of no relevance in this case. That evidence will not, therefore, be further addressed.

We will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which is satisfied if the petitioner demonstrates that the normal minimum entry requirement for the proffered position is a bachelor's or higher degree in a specific specialty or its equivalent.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.[2] In the chapter entitled "Dental Hygienists," the *Handbook* provides the following descriptions of the duties of those positions:

> **What Dental Hygienists Do**
>
> Dental hygienists clean teeth, examine patients for signs of oral diseases such as gingivitis, and provide other preventative dental care. They also educate patients on ways to improve and maintain good oral health.
>
> **Duties**
>
> - Dental hygienists typically do the following:
> - Remove tartar, stains, and plaque from teeth
> - Apply sealants and fluorides to help protect teeth
> - Take and develop dental x rays
> - Keep track of patient care and treatment plans
> - Teach patients oral hygiene, such as how to brush and floss correctly
>
> Dental hygienists use many types of tools to do their job. They clean and polish teeth with both hand and powered tools, as well as ultrasonic devices. In some cases, they remove stains with an air polishing device, which sprays a combination of air, water, and baking soda. They polish teeth with a powered tool that works like an automatic toothbrush. Hygienists use x-ray machines to take pictures to check for tooth or jaw problems.
>
> Dental hygienists help patients develop and keep good oral health. For example, they may explain the relationship between diet and oral health. They also may give advice to patients on how to select toothbrushes and other oral-care devices.
>
> Other tasks hygienists may perform vary by state. Some states allow hygienists to place and carve filling materials, temporary fillings, and periodontal dressings.

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[2] The *Handbook,* which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook,* 2012-13 ed., "Dental Hygienists," http://www.bls.gov/ooh/healthcare/dental-hygienists.htm#tab-2 (last visited June 17, 2013).

The duties the petitioner's CEO attributed to the proffered position are entirely consistent with the duties of dental hygienists as described in the *Handbook.* On the balance, the AAO finds that the proffered position is a dental hygienist position as described in the *Handbook.*

The *Handbook* states the following about the educational requirements of dental hygienist positions:

> **How to Become a Dental Hygienist**
>
> Dental hygienists typically need an associate's degree in dental hygiene. Every state requires dental hygienists to be licensed; requirements vary by state.
>
> **Education**
>
> Dental hygienists typically need an associate's degree in dental hygiene to enter the occupation. Certificates, bachelor's degrees, and master's degrees in dental hygiene are also available but are less common among dental hygienists. Private dental offices usually require a minimum of an associate's degree or certificate in dental hygiene. A bachelor's or master's degree is usually required for research, teaching, or clinical practice in public or school health programs.
>
> High school students interested in becoming dental hygienists should take courses in biology, chemistry, and mathematics. Some dental hygiene programs also require applicants to have completed at least one year of college. Specific entrance requirements vary from one school to another.
>
> Most schools offer laboratory, clinical, and classroom instruction. Hygienists study anatomy, physiology, nutrition, radiography, and periodontology, which is the study of gum disease.

Id. at http://www.bls.gov/ooh/healthcare/dental-hygienists.htm#tab-4 (last visited June 17, 2013).

As detailed by the *Handbook*, private dental offices usually just require a minimum of an associate's degree or certificate in dental hygiene. *Id.* It is only research, teaching, or clinical practice positions that may require a bachelor's or master's degree. *Id.*

Yet further, *O*Net Online*, as was noted above, indicated that only one-third of those responding to a recent survey had bachelor's degrees. Whether all of those had a degree in dental hygiene is unknown, but, in any event, that makes clear that a minimum of a bachelor's degree in a specific specialty or the equivalent is not normally required.

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of technical knowledge in dental hygiene, but do not establish any particular level of formal education as minimally necessary to attain such knowledge.

Further, the petitioner has designated the proffered position as a Level I position on the submitted LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. *See* U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), *available at* http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf. The classification of the proffered position as a Level I position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty or its equivalent, especially since the *Handbook* suggests that some dental hygienist positions do not require such a degree.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is such a common degree requirement, factors often considered by USCIS 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner's industry, or any other, normally requires dental hygienists to possess a minimum of a bachelor's degree in a specific specialty or the equivalent. The record contains no evidence pertinent to a professional association of dental hygienists that requires a minimum of a bachelor's degree in a specific specialty or the equivalent as a condition of entry.

Counsel did provide the three letters, described above, from two professors and an assistant dean at School of Dental Hygiene, the beneficiary's alma mater. Those letters were apparently provided to support the proposition that the proffered position, dental hygienist, is

in transition from nonprofessional to professional status. Those letters, however, do not convince the AAO that the dental hygiene occupation requires a minimum of a bachelor's degree in a specific specialty or the equivalent, nor even that such a transition is underway.

One of the letters, as was noted above, states that, "The current trend is for dental hygiene students to pursue a Bachelor's, Master's, or even PhD in order to meet the growing demands of the profession," and that the beneficiary's attainment of a bachelor's degree in dental hygiene is in line with that trend.

The most recent information from the DOL, however, indicates that two-thirds of responding dental hygienists in the age group questioned have no such degree. Although a trend toward bachelor's degrees is asserted, the record contains no attempt to reconcile that assertion with the findings of the DOL.

Another letter states that the American Dental Hygienists' Association announced, in 1986, its intent to establish a bachelor's degree as the minimum entry requirement for dental hygienist positions. That association may so intend. The DOL reported very recently, however, that only one-third of the responding dental hygienists had a bachelor's or higher degree. Despite announcing its intention decades ago, the association has not apparently made much headway in promoting a bachelor's degree as the minimum for the position.

The third letter flatly states, "Dental hygiene is an emerging specialty occupation requiring the bachelor's degree." However, it was accompanied by no statistical evidence, nor any other evidence, to corroborate that asserted trend. It indicates that associate degree programs require 2,666 hours of instruction, whereas bachelor's degree programs require 3,093 hours, and that "The bachelor's degree is the educational goal for the prudent dental hygienist and is [sic] the emerging trend is BS degree completion."

The AAO does not dispute that a bachelor's degree in dental hygiene is superior to an associate's degree. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). The letters provided have not demonstrated that a bachelor's degree in dental hygiene is common to the petitioner's industry in positions parallel to the proffered position in similar dental practices, nor even that the requirement of a minimum of a bachelor's degree in dental hygiene or the equivalent is an emerging trend.

Finally, as was noted above, the petitioner has designated the proffered position as a Level I position on the LCA, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. In order to attempt to show that parallel positions require a minimum of a bachelor's degree in dental hygiene or its equivalent, the petitioner would be obliged to demonstrate that other Level I dental hygienist positions, entry-level positions requiring only a

basic understanding of the duties of a dental hygienist, require a minimum of a bachelor's degree in dental hygiene or its equivalent, the proposition of which is not supported by the *Handbook*.

For all of the reasons explained above, the petitioner has not satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which is satisfied if the petitioner establishes that, notwithstanding that other dental hygienist positions in the private dental office industry may not require a minimum of a bachelor's degree in a specific specialty, or the equivalent, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such credentials.

The descriptions of the duties of the proffered position, however, evince no unusual degree of complexity or uniqueness that would require a minimum of a bachelor's degree or the equivalent. Oral hygiene evaluation and cleaning, recording and reviewing patient medical histories, sterilization and infection control, charting conditions of decay and disease for diagnosis and treatment by the dentist, etc., contain no indication of complexity or uniqueness such that they could not be performed by a dental hygienist without a bachelor's degree. The *Handbook* suggests that those duties are routinely performed by dental hygienists with an associate's degree.

Further, as was also noted above, the LCA submitted in support of the visa petition is approved for a Level I dental hygienist, an indication that the proffered position is an entry-level position for an employee who has only a basic understanding of the duties of a dental hygienist. This does not support the proposition that the proffered position is so complex or unique that it can only be performed by a person with a specific bachelor's degree, especially since the *Handbook* suggests that some dental hygienist positions do not require such a degree.

For all of the reasons explained above, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Next, the AAO will address the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which is satisfied if the petitioner demonstrates that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position. [3]

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[3] While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the

In response to the RFE, counsel provided the diplomas of three people and pay statements of three people. Although the names on the diplomas and those on the pay statements are somewhat different, counsel appears to be asserting that they are the same people. Counsel also appears to assert that the petitioner employed those people as dental hygienists.

On appeal, counsel submitted diplomas of four other people. The petitioner neither asserts nor provides evidence that the list of its employees is an exhaustive list of every dental hygienist it has ever hired. While it is not expected to provide a complete employment history, it is not known if there have been other dental hygienists employed in recent years and what their qualifications are. Furthermore, a comparison of the wages paid to the identified dental hygienists to the wage offered to the beneficiary indicate that the positions held by the other dental hygienists are more complex and require more experience relative to the experience required for the proffered entry-level position. For example, according to counsel, is currently paid $55.85 per hour by the petitioner. Such a wage is substantially higher than a Level 4 wage which is $35.99 per hour. *See* Foreign Labor Certification Data Center, Online Wage Library, http://www.flcdatacenter.com/OesQuickResults.aspx?code=29-2021&area=47260&year=10&source=1 (last visited June 17, 2013). Another employee, current wage is $43 per hour, which is also substantially higher than the Level 1 wage offered to the beneficiary ($28 per hour). *See id.*

As such, the petitioner has not demonstrated that it normally requires a minimum of a bachelor's degree in a specific specialty or its equivalent for the proffered position. The petitioner has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or the equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position (such as applying fluorides and other cavity preventing agents to arrest dental decay, taking and processing x-rays, taking and pouring impressions, assisting the dentist, and ordering and processing dental supplies) contain no indication of a nature so specialized and complex that they are usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of dental hygienist positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

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occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

Further, as was noted above, the petitioner filed the instant visa petition for a Level I dental hygienist position, a position for a beginning level employee with only a basic understanding of the duties of a dental hygienist. This does not support the proposition that the nature of the specific duties of the proffered position is so specialized and complex that their performance is usually associated with the attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent, directly related to dental hygiene, especially as the *Handbook* indicates that some dental hygienist positions require no such degree.

For the reasons discussed above, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The AAO notes that in the instant case, another issue precludes the approval of the petition. Specifically, an authorized official of the petitioner has not signed and dated the LCA's Declaration of Employer (section K), as that section requires in order to obtain (1) the petitioner's attestation that the statements in the LCA are true and correct, that the petitioner "agree[s] to comply with the [LCA] Statements as set forth in the Labor Condition Application - General Instructions Form ETA 9035CP and with the Department of Labor regulations (20 CFR part 655, Subparts H and I)," and (2) the petitioner's agreement to make the LCA, its supporting documentation, and other records available to DOL.

It is noted that on the first page of the LCA, the petitioner affirmatively checked the box confirming that that it "understood and agreed" to take the listed actions within the specified times and circumstances. The listed actions are the following:

- Print and sign a hardcopy of the electronically filed and certified LCA;
- Maintain a signed hardcopy of this LCA in my public access files;
- Submit a signed hardcopy of the LCA to the United States Citizenship and Immigration Services (USCIS) in support of the I-129, on the date of the submission of the I-129;
- Provide a signed hardcopy of this LCA to each H-1B nonimmigrant who is employed pursuant to the LCA.

In addition, in the section "Signature Notification and Complaints" (Section N, page 5), the following notice is provided:

> The signature and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be completed when submitted non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from the Department of Labor before it can be submitted to USCIS for processing.

DOL and DHS regulations require that the beneficiary's employer or a representative of the employer submit a copy of the signed, certified Form ETA 9035/ETA 9035E to USCIS in support of the Form I-129 petition.

The DOL regulation at 20 C.F.R. § 655.705(c) states, in pertinent part, the following:

> (1) The employer shall submit a completed labor condition application (LCA) on Form ETA 9035E or Form ETA 9035 in the manner prescribed in § 655.720. By completing and submitting the LCA, and by signing the LCA, the employer makes certain representations and agrees to several attestations regarding its responsibilities, including the wages, working conditions, and benefits to be provided to the H-1B nonimmigrants (8 U.S.C. 1182(n)(l)); these attestations are specifically identified and incorporated by reference in the LCA, as well as being set forth in full on Form ETA 9035CP. . . . The employer reaffirms its acceptance of all of the attestation obligations by submitting the LCA to the U.S. Citizenship and Immigration Services (formerly the Immigration and Naturalization Service or INS) in support of the Petition for Nonimmigrant Worker, Form I-129, for an H-1B nonimmigrant. See 8 CFR 214.2(h)(4)(iii)(B)(2), which specifies the employer will comply with the terms of the LCA for the duration of the H-1B nonimmigrant's authorized period of stay.
>
> * * *
>
> (3) The employer then may submit a copy of the certified, signed LCA to DHS with a completed petition (Form I-129) requesting H-1B classification.

Furthermore, the regulation at 20 C.F.R. § 655.730(c), in pertinent part, states the following:

> (2) *Undertaking of the Employer.* In submitting the LCA, and by affixing the signature of the employer or its authorized agent or representative on Form ETA 9035E or Form ETA 9035, the employer (or its authorized agent or representative on behalf of the employer) attests the statements in the LCA are true and promises to comply with the labor condition statements (attestations) specifically identified in Forms ETA 9035E and ETA 9035, as well as set forth in full in the Form ETA 9035CP.
>
> (3) *Signed Originals, Public Access, and Use of Certified LCAs.* . . . For H-1B visas only, the employer must submit a copy of the signed, certified Form ETA 9035 or ETA 9035E to the U.S. Citizenship and Immigration Services (USCIS, formerly INS) in

> support of the Form I-129 petition, thereby reaffirming the employer's acceptance of all of the attestation obligations in accordance with 8 CFR 214.2(h)(4)(iii)(B)(2).

As noted in the DOL regulations cited above, 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), states that the petitioner will provide "[a] statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay."

The regulation at 8 C.F.R. § 103.2(a)(2), concerning the requirement of a signature on applications and petitions of which the LCA is a part according to 8 C.F.R. § 103.2(b)(1), states the following:

> An applicant or petitioner must sign his or her benefit request. However, a parent or legal guardian may sign for a person who is less than 14 years old. A legal guardian may sign for a mentally incompetent person. By signing the benefit request, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the benefit request, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct. Unless otherwise specified in this chapter, an acceptable signature on a benefit request that is being filed with the USCIS is one that is either handwritten or, for benefit requests filed electronically as permitted by the instructions to the form, in electronic format.

Based on DOL and DHS filing requirements, the LCA that is filed with USCIS in support of an H-1B petition must be certified by DOL, signed by the beneficiary's employer, and submitted to USCIS on the date the Form I-129 is filed. Here, the petitioner submitted a copy of the certified, but unsigned, Form ETA 9035/9035E. Thus, the petitioner failed to comply with the regulatory requirements for H-1B visa classification as set forth at 8 C.F.R. § 103.2(a)(2), 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), 8 C.F.R. § 655.730(c)(2) and (3). Accordingly, the petition must be denied on this additional basis.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether it will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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