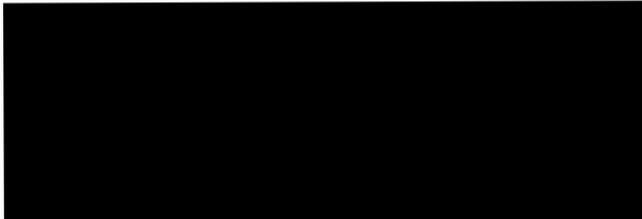


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Services

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FILE: WAC 07 043 51637 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 2008

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 Director, California Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a dental clinic. It was established in 1994, employs eight personnel, and had a gross annual income of \$1.1 million when the petition was filed. It seeks to extend the employment of the beneficiary as a dental research associate. 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 on June 20, 2007, determining that the proffered position was not a specialty occupation. On appeal, counsel submits a brief, a letter from the petitioner, and articles on the subject of dental research.

The record of proceeding before the AAO contains: (1) the Form I-129 filed November 30, 2006 with supporting documentation; (2) the director's February 27, 2007 request for further evidence (RFE); (3) counsel for the petitioner's May 16, 2007 response to the director's RFE; (4) the director's June 20, 2007 denial letter; and (5) counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. The AAO turns first to the duties of the proffered position and the statutory and regulatory requirements of a specialty occupation.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner completed the nontechnical job description of the position on the Form I-129 as: "[r]esearch information pertaining to oral diseases and healing." In the response to the director's RFE, counsel for the petitioner listed the beneficiary's daily duties as:

- Review medical/dental literature concentrating on oral diseases and healing, concentrating on periodontal disease, malocclusion, histological, immunohistochemical and ultrastructural techniques. Update scientific information pertaining to mouth diseases. (30% of time to be taken)
- Research new methods of improving prosthodontic treatment and techniques. Conduct basic and clinical research into salivary disease with respect to clinical management. (20% of time to be taken)
- Perform research pertaining to possible diagnoses of unusual dental disorder cases, as well as suggest possible procedures based on research information. (20% of time to be taken)
- Assist the Dentist in planning and providing specifications for the fabrication of complex fixed and removable dental prostheses. (15% of time to be taken)
- Assist the Dentist in specialized procedures such as the fabrication of plastic and porcelain facings. (15% of time to be taken)

Counsel added that the individual in the proffered position: "must possess knowledge of various complex dental and mouth diseases, as well as their treatments" and "must be able to review medical and/or dental literature, research different treatment options for oral diseases and suggest possible procedures and forms of treatment." Counsel asserted that the proffered position required that the incumbent update scientific information pertaining to mouth diseases and that continued research would advance knowledge and patient care technologies, as well as being essential for ensuring compliance with healthcare standards. Counsel referenced a North Carolina University Dental School brochure which noted that graduate training is a prerequisite for a research center and interpreted this as graduate training being fundamental training for individuals who perform duties in the area of dental research. Counsel included a copy of a government job advertisement for a research program coordinator (dentistry) that required a Ph.D or Master's degree or significant amounts of higher graduate education leading to those degrees. Counsel also submitted information on various topics relating to dental care and a summary of an AAO 1995 unpublished decision finding that an orthodontic research/assistant was a specialty occupation. The record also included the beneficiary's 2005 and 2006 Internal Revenue Service (IRS) Forms 1040 identifying her occupation as a dental assistant.

On June 20, 2007, the director denied the petition, determining that the proffered position is not a specialty occupation. The director noted that the petitioner operated a dental clinic and was not a research center and that a portion of the description of the duties of the proffered position corresponded to the Department of Labor's *Occupational Outlook Handbook's (Handbook)* description of a dental assistant, an occupation that does not require a bachelor's degree in a specific discipline. The director also found that the petitioner had not substantiated the portion of the description that suggested the beneficiary would perform research. The director noted the reports submitted by the petitioner to demonstrate the beneficiary's work product, but found that the record did not establish that the reports were written by the beneficiary and moreover, that the reports did not exemplify in depth research into the specific areas outlined in the description of duties. The director found that the petitioner had not submitted evidence establishing that a degree requirement is common to the petitioner's industry in parallel positions or that the general description of duties depicted unique or complex elements. The director further determined that the petitioner had not offered evidence that it previously employed anyone in the proffered position or offered evidence establishing the complex and specialized nature of the proffered position.

On appeal, counsel for the petitioner emphasizes that the petitioner did not seek to employ the beneficiary as a dental assistant because a dental assistant would lack the necessary knowledge of the mouth, periodontal diseases, and possible cures for diseases and would lack the ability to understand medical and dental literature and scientific data. Counsel asserts that although the petitioner is a general dentistry practice, it still needs to keep up-to-date on new research and developments in the dental field to provide quality care for its patients. Counsel explains that the beneficiary will spend only 20 percent of her time on clinical and basic research and the rest of the time the dental research associate will review and research new diagnostic methods and treatment options and compile information for the office staff to be fully educated on the new treatment options. Counsel notes that the petitioner has employed the beneficiary in this position, a position that was previously found to be a specialty occupation. In an August 14, 2007 letter submitted on appeal, the petitioner reiterates counsel's assertions.

Counsel provides copies of two job advertisements to demonstrate that the industry requires dental researchers to have a bachelor's degree in dentistry including: (1) an excerpt from the classified section of the JADA, for a dental research assistant that indicates the individual will be responsible for research, diagnosing dental disorders,

"[i]n charge with import/export operations, implementations and accounts supervision," and translation of Portuguese instructions among other duties and requires a bachelor's degree in dental or other health related field and two years of experience; and (2) an advertisement from an Internet job site for a dental research analyst who will assist the dentist in research of current and advanced trends and techniques in diagnosing dental cases such as orthodontics and in which the employer desires a bachelor's of science degree in dental medicine. The record on appeal also includes the previously submitted reports on: (1) Local Anesthetic: Septocaine; (2) Diagnodent-Laser cavity detector; (3) Odyssey Diode Laser, Manufacturer (Ivoclar-Vivadent); (4) CEREC: CAD/CAM Dentistry; and (5) Deep Bleaching. The record on appeal also contains the excerpt from the North Carolina University Dental School brochure noting, in part, that graduate training is a prerequisite for a research center.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. A review of the *Handbook*, in pertinent part, indicates the following regarding dental assistants:

Dental assistants perform a variety of patient care, office, and laboratory duties. They work chairside as dentists examine and treat patients. They make patients as comfortable as possible in the dental chair, prepare them for treatment, and obtain their dental records. Assistants hand instruments and materials to dentists.... Assistants also sterilize and disinfect instruments and equipment, prepare trays of instruments for dental procedures, and instruct patients on postoperative and general oral health care.

Some dental assistants prepare materials for impressions and restorations, take dental x rays, and process x-ray film as directed by a dentist. They also may remove sutures, apply topical anesthetics to gums or cavity-preventive agents to teeth, remove excess cement used in the filling process, and place rubber dams on the teeth to isolate them for individual treatment.

Those with laboratory duties make casts of the teeth and mouth from impressions, clean and polish removable appliances, and make temporary crowns. Dental assistants with office duties schedule and confirm appointments, receive patients, keep treatment records, send bills, receive payments, and order dental supplies and materials.

The petitioner's indication that the individual in the proffered position would: "[a]ssist the Dentist in planning and providing specifications for the fabrication of complex fixed and removable dental prostheses;" and "[a]ssist the Dentist in specialized procedures such as the fabrication of plastic and porcelain facings" are the duties of a dental assistant. The *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the following regarding the educational requirements for dental assistants:

Most assistants learn their skills on the job, although an increasing number are trained in dental-assisting programs offered by community and junior colleges, trade schools, technical institutes, or the Armed Forces....

Thus, these duties as described do not comprise the duties of a specialty occupation.

The AAO also takes note of the petitioner's indication that the individual in the proffered position will review medical/dental literature – concentrating on oral diseases and healing; research new methods to improve treatment and techniques; and research possible diagnoses of unusual dental disorder cases. As the director found, the materials submitted in response to the director's specific request for evidence of these duties, did not show that the beneficiary had prepared the materials and moreover did not establish that gathering the materials would require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in a specific specialty. The materials submitted to demonstrate the research portion of the proffered position do not include an independent analysis of survey results but rather are excerpts from Internet websites on the particular subjects. In addition, the reports on the efficiency and use of particular dental devices consist of the manufacturer and marketer's informational material on the Internet. The petitioner has also provided an instruction packet on deep bleaching teeth that provides basic instruction for the patient using this method of tooth whitening. The instructions do not appear to include information obtained through an in depth review of medical/dental literature or evidence a greater understanding of dental methodology than that acquired in training as a dental assistant.

The AAO has reviewed the petitioner's description of duties for the proffered position as well as the reports submitted and finds that the petitioner has not established that the proffered position is a position that requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty.

A review of the duties of the proffered position and the materials submitted to demonstrate the "research" required of the position do not support a determination that the proffered position would normally require a bachelor's degree in a specific discipline as a minimum for entry into the position in the United States. In that the *Handbook* finds no baccalaureate or higher degree, or its equivalent, to be required for employment as a dental assistant and the information in the record does not substantiate that the research portion of the position requires a bachelor's degree in a specific discipline, the AAO concludes that the proffered position does not qualify as 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)(I).

The AAO next turns to a consideration of whether the proffered position qualifies as a specialty occupation under the second criterion that is whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when considering this criterion include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner in this matter has submitted three job announcements to establish that a degree requirement is common to the industry in parallel positions among similar organizations. However, these listings do not indicate that the businesses publishing the advertisements are similar to the petitioner's dental office, in size, number of employees, level of revenue, or type of business. The AAO observes that the description of duties for the

government position for a research program coordinator is not a parallel to the petitioner's description of the proffered position and neither does the advertisement listed in the classified section of the JADA describe a position that encompasses similar duties to the proffered position. The advertisement listed on an Internet job site for a dental research analyst provides an overview of the duties of the position and does not contain sufficient information to enable the AAO to conclude that the position advertised is similar to the proffered position. Similarly, the advertisements from the two private businesses do not contain sufficient information regarding the nature of the business to discern whether these businesses are similar to the petitioner's dental office and the federal government is not similar to the petitioner's private business. Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has also reviewed the North Carolina University Dental School brochure. The AAO observes that the brochure references graduate training for employment with a research center, a business unlike that of the petitioner. The information contained in the brochure does not assist in establishing an industry standard for a dental assistant/researcher position in a dental office.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. As discussed above, a portion of the duties described by the petitioner track the duties of a dental assistant. The duties associated with research are general in nature and the information submitted to establish the beneficiary's performance of these research duties is not established as the beneficiary's actual work. Further, the information submitted appears to be copied from the Internet without the analysis and discussion of an individual trained at the bachelor's level to perform medical/dental research.

The petitioner has not satisfied either prong of the criterion at 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 uniqueness or complexity.

The petitioner has also failed to establish that it normally requires a degree or its equivalent for the position. Although the petitioner employed the beneficiary, an individual with a foreign degree in odontology, in an H-1B classification prior to submitting this extension request, that employment cannot be used to establish that the petitioner normally requires a degreed individual for the position of dental research associate. The AAO observes that 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). In addition, the AAO notes that 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 prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the CIS would have erred 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).

Furthermore, the AAO finds that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, than any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. 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.

Turning to the fourth criterion and whether the evidence submitted establishes that 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, the AAO finds that it does not. 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 assistant and who gathers informational materials from various medical/dental sources.

While the AAO finds that the petitioner may rely on the beneficiary to a greater extent than normally expected, due to the beneficiary's foreign training in odontology, the specific duties of the proffered position are not so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Having considered the defined 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 dental assistants. The petitioner's reliance on the skill and education of this particular beneficiary does not elevate the described duties to that of a specialty occupation. The petitioner has listed the duties of a dental assistant and provided a general overview of researching duties. The petitioner has not established that the researching skills necessary to perform the proffered position are so specialized or complex that the position requires an individual with a baccalaureate or higher degree in a specific discipline. 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 notes counsel's submission of a summary of an AAO unpublished decision. Counsel has not furnished sufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied for the above stated reason. 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 director's June 18, 2006 decision is affirmed. The petition is denied.