

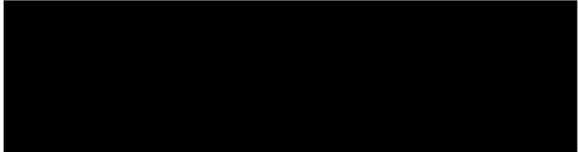
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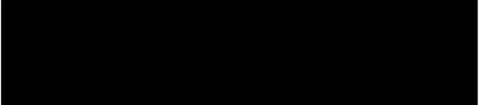
U.S. Citizenship
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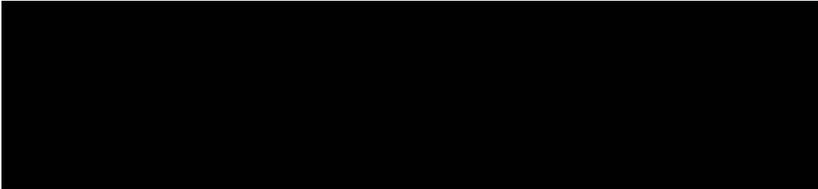


FILE: WAC 04 108 50442 Office: CALIFORNIA SERVICE CENTER Date: **MAR 14 2008**

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. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The petition will be denied.

The petitioner is a dental office, and employed five to seven personnel and had \$600,000 in gross annual income when the petition was filed. It seeks to extend the employment of the beneficiary as a dental specialist. 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 proffered position is not a specialty occupation. Although the AAO reached its decision on a different basis than that of the director, the AAO dismissed the appeal finding that the record did not establish the proffered position as a specialty occupation.

Prior to reaching its decision, the AAO reviewed the record of proceeding containing: (1) the Form I-129 filed March 5, 2004 and supporting documentation; (2) the director's July 29, 2004 request for further evidence (RFE); (3) counsel for the petitioner's September 29, 2004 response to the director's RFE; (4) the director's March 14, 2005 denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO considered all the evidence submitted in the record of proceeding before rendering its October 30, 2006 decision.

The petitioner, through counsel, now presents argument in support of a motion to reconsider. Counsel asserts that the duties of the position closely resemble the occupation of a health services manager and observes that the petitioner believes that the complexities and specialized duties of the position and the nature of the petitioner's business requires the services of an individual with knowledge generally associated with the attainment of a bachelor's or higher degree specifically in the field of dentistry. Counsel emphasizes that the beneficiary has been and would continue to perform non-clinical duties including determination of optimum patient care and research of recent technological/scientific advancement, quality maintenance, and improvement. Counsel notes that the beneficiary's work would be accomplished by an in-depth study of the patients' charts and recent literature on diagnosis and prognosis. Counsel contends that the AAO has recognized the occupation of medical research assistant, orthodontic research assistant, and health care manager as specialty occupations. Counsel cites several unpublished decisions in support of her contention.

Counsel asserts that when determining whether an occupation is a profession, Citizenship and Immigration Services (CIS) looks to whether there is a general requirement of specialized study for the post, coupled with whether the position has complex and discretionary duties. Counsel also notes the regulatory language indicating that a position may qualify as a specialty occupation if the employer requires a bachelor's degree. Counsel concludes that although CIS is given substantial deference in interpreting its own regulatory guidelines, its interpretation is not controlling where it is plainly erroneous. Counsel cites the regulation and two district court decisions in support of these assertions.

Counsel also submits a letter authored by two of the petitioner's dentists indicating that the proffered position is not that of a dental assistant. The dentists indicate: that the individual in the proffered position oversees many procedures in many dental modalities and specialties; reviews the charts and intended treatments for many patients to determine patient distribution; reviews the quality of x-rays taken by dental assistants and orders re-takes when necessary; counsels patients on material upgrades, explaining differences and advantages of the

materials; and plans different procedures, coordinating with the laboratory on the steps and technical aspects of their delivery. The petitioner, through two of its dentists, asserts that a dental assistant cannot perform these duties; but claims that these duties comprise the duties of patient counseling, dental hygienist, lab technician, office manager and coordinator, staff trainer, and adviser to the dentists on how to run a smooth operation and that the totality of these duties requires more than any of these positions can provide without specialized knowledge and experience in the field.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Neither counsel nor the petitioner has submitted new facts supported by affidavits or other documentary evidence on motion. Thus, the regulations mandate the dismissal of the motion to reopen.

The AAO finds that the petitioner has re-stated the beneficiary's duties, but has not added any new facts regarding the responsibilities undertaken by the individual in the proffered position. As the AAO determined in its October 30, 2006 decision, the lengthy description suggested that the beneficiary would be performing the duties of a dental assistant, a registered dental assistant, a dental hygienist, and suggested that some of the duties might include the duties of a dentist. The AAO's decision was based on the lack of clarity of many of the beneficiary's listed duties and on those duties that were ascertainable, whether the State of California would require the licensing or registration of the individual performing the ascertainable duties. Neither the petitioner's letter on motion nor counsel's brief provide new facts that substantiate that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by dental assistants, dental hygienists, or administrative services managers. 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 listed the duties of a dental assistant, a dental hygienist, and an administrative services manager to describe the tasks the beneficiary will perform in the proffered position. The record does not include a definitive description of duties or provide other evidence that establishes that the position is that of a health services manager or that the duties are so specialized or complex that the position requires an individual with a baccalaureate or higher degree.

Moreover, the petitioner's letter provided on motion is not an affidavit as it was not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who having confirmed the declarant's identity, administered the requisite oath or affirmation. *See Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, does the letter contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Turning to the regulation at 8 C.F.R. § 103.5(a)(3), the regulation states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed,

also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel has not submitted any pertinent precedent decisions to establish that the AAO's decision was based on an incorrect application of law or Service policy based on the evidence of record at the time of the initial decision. Counsel has referenced several unpublished decisions. However, counsel does not furnish evidence to establish that the facts of the instant petition are analogous to the facts in the unpublished decisions. In addition, 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.

The AAO acknowledges the district court decisions cited for the proposition that CIS interpretation of the regulatory guidelines is not controlling when it is plainly erroneous. The AAO agrees with the district court decisions but does not find either decision pertinent to the matter at hand. In this matter, neither counsel nor the petitioner has provided evidence that the AAO's prior decision was clearly erroneous. Counsel and the petitioner provide the same evidence previously provided and reviewed by the AAO and simply conclude that their version is the correct one. The AAO listed, in detail, the duties of the proffered position as described by the petitioner and found that many of the ascertainable duties required licensure or registration or did not require a four-year degree. The AAO found that some of the duties suggested that the beneficiary would possibly be performing the duties of a dentist, a specialty occupation that requires licensure in the State of California. The AAO did not find sufficient coherent, credible evidence that the beneficiary would be performing the duties of a health services manager. Neither the petitioner nor counsel has provided independent evidence sufficient to establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. The district court decisions notwithstanding, counsel has not stated reasons for reconsideration supported by pertinent precedent decisions.

The record on motion fails to satisfy the requirements of a motion to reconsider.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

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