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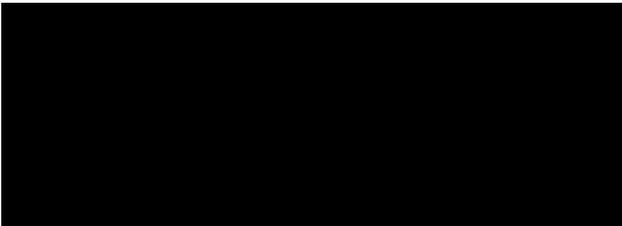
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FILE: WAC 04 059 51782 Office: CALIFORNIA SERVICE CENTER Date: AUG 16 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 practice and a dental laboratory. It seeks to hire the beneficiary as a research associate. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with petitioner brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 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. 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 states that it is seeking the beneficiary's services as a research associate. Evidence of the beneficiary's duties includes: the Form I-129; a November 14, 2003 letter from the petitioner; and the petitioner's February 20, 2004 response to the director's request for evidence.

At the time of filing, the petitioner stated that the beneficiary would be required to conduct research in the area of dentistry; study nature, cause and development of specific diseases associated with mouth (20% of time); compile data from secondary sources on pre-specified dental diseases and treatment plans (20% of time); analyze data to determine the results of treatment plans (20% of time) prepare graphs and other illustrations to demonstrate results (20% of time); study current literature in the area (10% of time); prepare papers for presentation at professional conferences and in professional journals (10% of time). The petitioner indicated that the proffered position requires at minimum a bachelor's degree in dental science or dental medicine.

The director issued a request for evidence, requesting in part, a more detailed description of the work to be done. The director requested a copy of the facility license, information about the petitioner, copies of federal income taxes, quarterly wage reports, and a list of employees.

In response, the petitioner provided the same job description and noted that the position primarily involves research from data collected from various patients and secondarily from library sources, including dental journals. The petitioner noted that the position does not involve lab work including the collection of specimens and analysis of specimens and that the job duties are not carried out in a lab setting. The petitioner referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and noted that the position is similar to that of other biological or health scientists. The petitioner submitted a copy of its business tax certificate and a copy of its federal income tax returns for the year 2002 which indicated gross receipt or sales of \$369,673, compensation of officers at \$120,208 and salaries and wages of \$34,174. The petitioner noted that it is unable to provide Form DE-6 or a list of current employees based on advice of counsel and "in deference to California privacy laws."

In his denial, the director noted that the petitioner stated that the proffered job was similar to Research Associate, as listed in the Department of Labor's *Dictionary of Occupational Titles (DOT)* under 109.067-014. The director found that this description pertains to a research associate working in a museum, which is not related. The director also addresses the petitioner's contention that the proffered position is similar to the *Handbook's* occupation of biological scientist. The director noted that the *Handbook* indicates that a

doctorate level of training is required and a baccalaureate level of training is not a normal industry-wide minimum requirement for entry into the occupation. The director noted that the petitioner did not provide a more detailed job description in response to the request for evidence and that the petitioner declined to provide a list of employees or any forms DE-6 or quarterly wage reports. The director found that upon review of the proposed duties and stated level of responsibility, the duties do not indicate or meet the complexity or authority stated in the *Handbook* for a biological scientist. The director determined that the proffered position does not meet any of the preceding listed criteria for classification as a specialty occupation.

On appeal, the petitioner contends that a Master's degree is only required for independent research and that the proffered position is an assistant research position. On appeal, the petitioner provides a more detailed job description and a copy of the dentist's license. The petitioner contends that the director has not interpreted the *Handbook* fairly. The petitioner asserts that the proffered position is that of a junior research associate who will work under the supervision of an individual with a more advanced degree. The petitioner asserts that the requirements of a research position in a medical field or dentistry are different from those that involve basic scientific research. The petitioner contends that independent research positions in the field of dentistry and medicine are characterized by a requirement of a professional doctor's degree in dentistry or medicine. The petitioner does not cite any authority for this assertion. 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)).

Additionally, the petitioner submitted an augmented job description and states that quarterly wage reports are not germane to the issue of whether or not a position is a specialty occupation. The petitioner refers to two previously submitted photographs and states that they "clearly show an investment in research equipment made on the part of the laboratory for research purposes." The AAO notes that one photograph shows a desk next to the entrance that appears to be of a reception area and desk and the second photo contains a counter with a sink, a fluoride treatment machine and toothbrushes. The petitioner does not explain where the research equipment is. The AAO notes that in response to the request for evidence the petitioner stated "[t]he position does not involve lab work including the collection of specimens an analysis of specimens. The job duties are, therefore not carried out in a lab setting." The petitioner has made conflicting statements as to the alleged nature of the position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement 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. Factors often considered by CIS when determining these criteria 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 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are presented in such vague and generic terms, however, that it is impossible to determine precisely what tasks the beneficiary would perform on a daily basis. For example, the beneficiary will conduct research in the field of dentistry, specifically to study the nature, cause and development of specific diseases associated with the mouth. The petitioner indicated that the beneficiary would analyze the data with the use of statistical tools. The tasks to be carried out in performing these duties are not specifically detailed so that it is impossible to determine the complexity of the tasks to be performed. The duties could involve a looking up a complete definition of a condition, or involve tasks of much greater complexity. The petitioner indicated that the position involves research from data collected from various patients. The petitioner has not described the type or frequency of data collected from patients. Furthermore, as noted above, it is not clear if the duties will be carried out in a lab setting.

The *Handbook* reveals that medical scientists research human diseases in order to improve human health. The *Handbook* indicates that medical scientists study biological systems to understand the causes of diseases and other health problems and to develop treatments. Additionally, the *Handbook* notes that a Ph.D. degree in biological science is the minimum education required for most prospective medical scientists. . . . some medical scientists obtain a medical degree instead of a Ph.D., but may not be licensed physicians because they have not taken the State licensing examination or completed a residency program, typically because they prefer research to clinical practice.

The proffered position does not resemble a medical scientist as described by the *Handbook*. The petitioner has not indicated that it performs research into the causes of diseases and to develop comprehensive treatments, or that it works in the area of medical sciences. The petitioner indicated that it is a dental practice. The petitioner does not document the duties in relation to its business. The petitioner has not provided evidence of the research to be conducted in relation to its dental practice. It is incumbent upon the petitioner to describe the duties of the proffered position in sufficient detail to permit an analysis of the position and to determine the nature and complexity of the duties to be performed. This, the petitioner failed to do. As such, it cannot be determined that: a baccalaureate or higher degree is normally the minimum requirement for entry into the position; the duties of the position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty; or the position's duties are so specialized and complex that knowledge required to perform them is usually associated with attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), and (4).

The petitioner has not established the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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