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U.S. Citizenship
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Services

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FILE: WAC 03 125 50558 Office: CALIFORNIA SERVICE CENTER Date: FEB 08 2005

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, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 dentist who heads a dental clinic with 19 employees. He seeks to hire the beneficiary as a dental specialist/researcher. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation and that the beneficiary was not qualified to perform the duties of 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 a brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The initial 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, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the 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 dental specialist/researcher. Evidence of the beneficiary’s duties includes: the Form I-129; a February 20, 2003 support letter from the petitioner accompanying the Form I-129; and previous counsel’s response to the director’s request for evidence.

At the time of filing, the petitioner provided a description of his proffered position that was expanded upon by previous counsel in response to the director’s request for evidence. Based on the statements of the petitioner and counsel, the duties of the position involve:

- Directing the activities of the dental practice in line with national standards, administrative policies and OSHA guidelines, including the development of policies and recommendations for procedural changes;
- Coordinating the submission and receipt of orders to and from the laboratories used by the dental practice;
- Medically analyzing patient records and preparing dental reports for subsequent diagnosis and treatment, including recommendations for patient care;
- Coordinating dental care evaluation, and developing criteria and methods for conducting such evaluation;
- Coordinating complex dental care involving periodontic and prosthodontic rehabilitation;
- Overseeing the billing of patients and insurance companies;
- Conducting research on cases involving infection or disease; and

- Overseeing/supervising conventional dental procedures, certain surgical procedures, the placement of orthodontic appliances, the preparation and fitting of ortho bands, the selection of headgear, arch wires, elastics and ligatures, and other equipment, procedures such as tooth preparation, impressions, occlusal recordings, filling of full, overdenture, and partial denture fabrication, and the set up of the armamentarium for oral, nitrous oxide analgesia, intramuscular, and intravenous conscious sedation.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (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.Min. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the duties of the proffered position to combine aspects of a number of occupations, including medical and health services manager, office administrator, dental assistant, dental laboratory technician, and dentist. He ultimately determined that a significant number of the duties were not at the level of a specialty occupation and that the record did not indicate that the proffered position could not be performed by an experienced individual with educational training short of a baccalaureate degree. Following its own review of these occupational titles in the 2004-2005 edition of the *Handbook* and the petitioner's description of its proffered position, the AAO does not concur with the director's analysis. Instead, it finds the description of the proffered position, as set forth in counsel's response to the director's request for evidence, to include duties that only dentists may perform in California, the location of the petitioner's business.

In reaching this conclusion, the AAO has relied on the language of the California Business and Professions Code related to the practice of dentistry. Section 1625 of these regulations states that a person practices dentistry when he or she does any one or more of the following:

- (a) By card, circular, pamphlet, newspaper or in any other way advertises himself or represents himself to be a dentist;
- (b) Performs or offers to perform, an operation or diagnosis of any kind, or treats diseases or lesions of the human teeth, alveolar process, gums, jaws, or associated structure, or corrects malposed positions thereof;
- (c) In any way indicates that he will perform by himself or his agents or servants any operation upon the human teeth, alveolar process, gums, jaws, or associated structure,

or in any way indicates that he will construct, alter, repair, or sell any bridge, crown, denture or other prosthetic appliance or orthodontic appliance;

- (d) Makes or offers to make, an examination of, with the intent to perform or cause to be performed any operation on the human teeth, alveolar process, gums, jaws, or associated structures; and
- (e) Manages or conducts as manager, proprietor, conductor, lessor, or otherwise a place where dental operations are performed.

In response to the director's request for evidence, previous counsel stated that the beneficiary would supervise or oversee a range of dental procedures while performing the duties of a dental specialist/researcher. Specifically identified were the oversight of conventional procedures such as root canal fillings, the supervision of surgical procedures such as apicoectomies and retrofills, the oversight of complex fixed and removable restorative procedures including tooth preparation, impressions, and occlusal recordings, filling of full, overdenture, and partial denture fabrication, the coordination of dental care involving periodontic and prosthodontic rehabilitation and the supervision of the set up of armamentarium for oral, nitrous oxide analgesia, intramuscular, and intravenous conscious sedation.

On appeal, counsel states that the beneficiary would not act as a dentist and references Section 1626(e) of the California Business and Professions Code as allowing certain dental procedures to be performed under the supervision of a licensed dentist. However, such statements are not persuasive in light of the supervisory role that was described by previous counsel in his October 29, 2003 response to the director. At that time, previous counsel's description of the proffered position's duties clearly indicated that, rather than being supervised, the beneficiary would be responsible for supervising the work of others. As a result, the AAO concludes that, at least in the performance of such responsibilities as the oversight of surgical procedures, the beneficiary would act as a dentist, as described in Section 1625 of the California Business and Professions Code. Accordingly, the AAO will conduct its analysis of the remainder of proffered position's duties in light of this determination.

The DOL *Handbook's* description of the occupation of dentist states the following with regard to the occupation's range of responsibilities:

Dentists diagnose, prevent, and treat problems with teeth or mouth tissue. They remove decay, fill cavities, examine x rays, place protective plastic sealants on children's teeth, straighten teeth, and repair fractured teeth. They also perform corrective surgery on gums and supporting bones to treat gum diseases. Dentists extract teeth and make models and measurements for dentures to replace missing teeth. They provide instruction on diet, brushing, flossing, the use of fluorides, and other aspects of dental care. They also administer anesthetics and write prescriptions for antibiotics and other medications....

Dentists in private practice oversee a variety of administrative tasks, including bookkeeping and buying equipment and supplies. They may employ and supervise dental hygienists, dental assistants, dental laboratory technicians, and receptionists....

Most dentists are general practitioners, handling a variety of dental needs....

The AAO finds this description of the occupation of dentist, particularly its discussion of the administrative responsibilities of dentists in private practice, to parallel that provided by the petitioner for its proffered position. The *Handbook* clearly describes an occupation, which in private practice, combines both medical and administrative responsibilities. As a result, the administrative duties of the proffered position -- directing the activities of the petitioner's dental practice, coordinating orders to and from laboratories, overseeing the billing of patients and insurance companies -- do not reflect employment separate from the beneficiary's medically-related duties. Rather, they represent aspects of the occupation of dentist that arise when an individual runs his or her own dental business. In light of the *Handbook's* discussion, the AAO finds the proffered position, with its combination of medical and administrative duties, to reflect that of a dentist in private practice. Accordingly, the AAO withdraws the director's findings regarding the nature of the proffered position and will now consider the *Handbook's* discussion of the educational requirements for the practice of dentistry.

The *Handbook* states the following regarding the training of persons seeking employment as dentists:

All 50 States and the District of Columbia require dentists to be licensed. To qualify for a license in most States, a candidate must graduate from one of the 55 dental schools accredited by the ADA's Commission on Dental Accreditation in 2002 and also must pass written and practical examinations....

Dental schools require a minimum of 2 years college-level predental education, regardless of the major chosen.... most dental students have at least a bachelor's degree....

Most dental schools award the degree of Doctor of Dental Surgery (DDS). The rest award an equivalent degree, Doctor of Dental Medicine (DMD).

As a medical degree in dentistry is the standard educational requirement for anyone seeking employment as a dentist, the AAO finds the petitioner's proffered position, which is that of a dentist, to meet the requirements under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the particular position. Accordingly, the AAO concludes that the proffered position of dental specialist/researcher is a specialty occupation.

The AAO now turns to the issue of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position of dental specialist/researcher.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the

Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In response to the director's request for evidence, counsel provided an academic evaluation from Morningside Evaluations and Consulting to establish that the beneficiary, who does not possess a U.S. degree, has a foreign degree that is the equivalent of a U.S. baccalaureate or higher degree required for employment in the proffered position. The evaluation found the beneficiary to have the equivalent of a doctor of dentistry degree from an accredited institution of higher education in the United States. After reviewing the evaluation, as well as the beneficiary's transcript from the Centro Escolar University in The Philippines, the AAO accepts Morningside's determination that the beneficiary has the equivalent of a U.S. doctor of dentistry degree.

However, pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), an alien seeking an H-1B visa to work in an occupation that requires a state or local license must have that license prior to the approval of the petition. As already noted, all 50 states and the District of Columbia require individuals engaged in the practice of dentistry to be licensed. As the proffered position would employ the beneficiary as a dentist, she must, therefore, be licensed as a dentist to be found eligible to perform the duties of the petitioner's proffered position.

A review of the record, however, finds no evidence to establish that the beneficiary has been awarded a license to practice dentistry by the State of California. Further, counsel's statements on appeal asserting that the beneficiary does not require a license also lead the AAO to conclude that she does not have the appropriate credentials to practice dentistry in the United States. With no evidence to establish that the

beneficiary has a license to work as a dentist, the AAO must conclude that the beneficiary is unqualified to perform the duties of the proffered position.

The basis for the AAO's determination that the beneficiary is unqualified to perform the duties of a specialty occupation differs from the reasoning on which the director's based his decision. However, the AAO reviews appeals on a *de novo* basis. An application or petition that fails to meet the technical requirements of the law may be denied by the AAO even if the grounds on which its decision is based were not identified in the initial decision issued by the director. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989); *see also 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).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation per 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, although the AAO has withdrawn the director's findings regarding the nature of the proffered position, it shall not disturb the director's denial.

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.