



U.S. Citizenship
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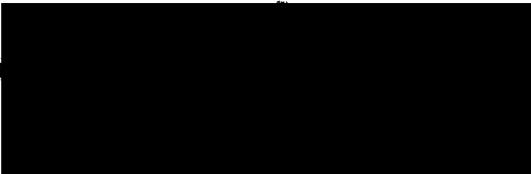
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FILE: WAC 03 164 54015 Office: CALIFORNIA SERVICE CENTER Date: OCT 03 2005

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 office with four employees and seeks to employ the beneficiary as a dental technologist. 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 counsel's 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 dental technologist. Evidence of the beneficiary’s duties includes: the Form I-129; an April 21, 2003 letter of support from the petitioner; and counsel’s August 8, 2003 response to the director’s request for evidence, which included a more detailed description of the duties of the proffered position.

At the time of filing, the petitioner stated that the duties of the proffered position entail performing a variety of testing and performing any or all of the following: tooth and gums sensitivity, enzyme reaction tests, chemistry procedures, oral organism identification/typing and microscopic use; ensuring the instruments being used are working to procedure standard; cleaning and calibrating instruments needed; documenting as required; ensuring quality control for testing is within established standards for that test; documenting as necessary to ensure accuracy of testing; ensuring all steps of the testing process are performed correctly; analyzing laboratory results; writing laboratory reports and making recommendations to physicians as to possible remedies available to patient based on testing results; ensuring that the results verified are accurate and meet standards for repeat treating; performing physical, dental and psychological assessment of patient including pertinent medical and dental history and physical; performing microscopic examination of gum tissue specimen using various types of microscopes to detect presence of gum disease such as fungal infection, malignant jaw tumors, and salivary gland disease; consulting with dentist regarding procedures as necessary, notifying periodontist immediately of any severely abnormal findings; performing cell culture and associated methodology to detect squamous cell carcinomas, giant cell tumors and other osseous lesions; properly inform patient of the risks and benefits of the procedure and answer any questions or concerns they have.

The petitioner provided the estimated amount of time to be spent on each duty as:

- Conducting laboratory and microscopic tests – 55%
- Analyzing, researching, interpreting and writing lab results – 30%
- Conferring with physician – 10%
- Calibration of lab instruments – 5%

The director requested additional information about the proffered position, specifically, a more detailed explanation of the duties. Additionally, the director requested evidence that the petitioner and its competitors normally require a degree for the position of dental technologists.

In response, counsel stated that the beneficiary has a high level of responsibility, as she will ensure that the tests are conducted properly, that scientific standards are met, and that the quality control for testing is established. Counsel explained that the dentist will rely on the test results conducted by the beneficiary in deciding treatment to be administered to the patients. Counsel submitted certification letters from dental offices. Counsel referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*)'s section on medical or clinical technologist in support of her contention that a bachelor's degree is required for the proffered position. Additionally, counsel referred to the Department of Labor's *O*NET* as indicating that a bachelor's degree is required for the position.

In his denial, the director found the duties of the proffered position to be a combination of a dental assistant, dental hygienist and a laboratory technician. The director referred to the *Handbook* and noted that the usual requirement for an entry-level position as a medical or clinical laboratory technologist is a bachelor's degree with a major in medical technology or in one of the life sciences. The director also referred to the training for dental hygienists as described by the *Handbook*: "an associate degree is sufficient for practice in a private dental office." The director found that the information does not indicate that a baccalaureate level of training is a normal industry-wide minimum requirement for entry into the occupation. The director concluded that the proffered position does not meet any of the preceding criteria for classification as a specialty occupation.

On appeal counsel contends that the director erred in concluding that the duties of the proffered position are those of a dental assistant or dental hygienist. Counsel asserts that the duties of the proffered position, a dental technologist, require a bachelor's degree and refers to the previously submitted internet job posting as evidence. Counsel asserts "the duties of a Dental Technologist in the Dictionary of Occupational Title require a bachelor's degree."

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 first 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*, 712 F. Supp. 1095, 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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel states that the duties of the proffered position are performed by a dental technologist which counsel contends is similar to the occupation of a medical and clinical laboratory technologist as described in the *Handbook*. The *Handbook* discloses that many of duties of the proffered position are performed by either clinical and medical laboratory technologists or clinical and medical laboratory technicians. Like the beneficiary, who will conduct laboratory and microscopic tests, the *Handbook* reports:

Clinical laboratory technologists generally have a bachelor's degree in medical technology or in one of the life sciences, or they have a combination of formal training and work experience. They perform complex chemical, biological, hematological, immunologic, microscopic, and bacteriological tests. Technologists microscopically examine blood, tissue, and other body substances. They make cultures of body fluid and tissue samples, to determine the presence of bacteria, fungi, parasites, or other microorganisms. Clinical laboratory technologists analyze samples for chemical content or a chemical reaction and determine blood glucose and cholesterol levels. They also type and cross match blood samples for transfusions.

The *Handbook* also notes that clinical laboratory technologists evaluate test results, develop and modify procedures, and establish and monitor programs, to ensure the accuracy of tests. Some clinical laboratory technologists supervise clinical laboratory technicians.

The *Handbook* differentiates between a clinical laboratory technologist and a clinical laboratory technician. The *Handbook* reveals that clinical laboratory technicians perform less complex tests and laboratory procedures than technologists perform. Technicians may prepare specimens and operate automated analyzers, for example, or they may perform manual tests in accordance with detailed instructions. Like technologists, they may work in several areas of the clinical laboratory or specialize in just one.

The *Handbook* indicates that the usual requirement for an entry-level position as a clinical laboratory technologist is a bachelor's degree with a major in medical technology or in one of the life sciences; although it is possible to qualify through a combination of education, on-the-job, and specialized training. Universities and hospitals offer medical technology programs. . . . the Clinical Laboratory Improvement Act requires technologists who perform highly complex tests to have at least an associate degree. . . . Medical and clinical laboratory technicians generally have either an associate degree from a community or junior college or a certificate from a hospital, a vocational or technical school, or one of the U.S. Armed Forces. A few technicians learn their skills on the job. The *Handbook* reveals that some states require laboratory personnel to be licensed or registered.¹

¹ The State of California Business and Professional Code at Sections 120-1214, 1240-1246.5 and 1280-1291 indicates that the State regulates clinical labs and clinical laboratory personnel. As defined in the code "clinical laboratory" means any place used, or any establishment or institution organized or operated, for the

As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. The petitioner is a dental practice with four employees and a gross annual income of \$400,000 as it indicated on the Form I-129. The petitioner has not provided information about its laboratory and the laboratory equipment that the beneficiary will use in order to conduct the tests indicated in the position description. The petitioner has not provided information about the “complex chemical, dental, biological and microscopic tests” that the beneficiary would perform. The petitioner has not provided evidence that supports its contention that its dental practice contains a lab in which to conduct the tests. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary’s services.

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)(1), and (4).

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner submitted one internet ad for a dental lab technologist for a company called Periodontal Affiliates. The petitioner has not established that the advertising company is a similar organization. Additionally, the petitioner had submitted five letters from different dental offices that attest that they have employed a dental laboratory technologist or a dental technologist and that they have required that the incumbent have a bachelor’s degree in dentistry. The petitioner has not established that all the dentist offices are similar to its organization and that they have a clinical lab. The internet ad and letters are insufficient to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations

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.

Therefore, for the reasons related in the preceding discussion, 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.

Beyond the decision of the director, the record does not reflect that the beneficiary is licensed to perform the duties of a medical laboratory technologist or a medical laboratory technician as required under California law and is thus ineligible for H-1B classification. For this additional reason, the petition may not be approved.

performance of clinical laboratory tests or examinations or examinations or the practical application of clinical laboratory sciences. California Business and Professional Code, Section 1206(7).

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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.