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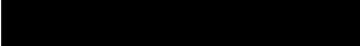
U.S. Citizenship
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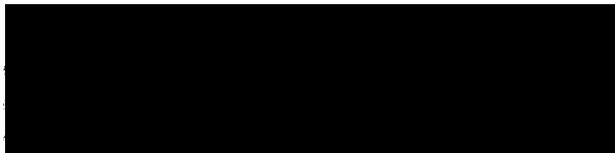
D-2

FILE: WAC 04 800 61888 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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.

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

Robert P. Wiemann, Chief
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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a dental laboratory, with eight employees. It seeks to employ the beneficiary as a dental materials test engineer. The director denied the petition because he determined the petitioner had failed to establish its proffered position as 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; (4) the director's denial letter; and (4) Form I-290B, with counsel's brief and additional documentation. 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, 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 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 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 seeks the beneficiary’s services as a dental materials test engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s September 29, 2004 letter in support of the Form I-129; and counsel’s January 26, 2005 response to the director’s request for evidence. This evidence indicates that the duties of the proffered position would require the beneficiary to:

- Plan and develop testing processes for materials used in the creation of prosthetic teeth and other oral dental pedodontic implants and appliances, applying knowledge of dental laboratory materials, and engineering and testing methodologies;
- Conduct comprehensive engineering test activities with regard to the physical and chemical properties of the newly developed ceramic materials, including generational gypsum products and impression materials;
- Conduct comprehensive testing and analysis of physical, mechanical, and chemical properties of dental metals and alloys;
- Engage in testing the product utility in order to provide maximum function and exceptional esthetics to be consistent with the natural dentition of the patient;
- Ensure practical and cost-effective applicability of the new materials to the dental setting by creating dental pedodontic implants and appliances models;
- Develop standards for using the newly available dental materials and alloys, based on the result of the comprehensive tests and test models; and
- Monitor implementation of the standards by testing the finished products that are produced by the laboratory using the new materials.

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 (DOL) *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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the above duties to most closely resemble those of dental laboratory technicians who "fill prescriptions from dentists for crowns, bridges, dentures, and other dental prosthetics."¹ The AAO does not agree. While the petitioner does indicate that the beneficiary would create dental implant and appliance models, these duties appear to be incidental to his materials testing responsibilities rather than to define his employment.

The duties of the proffered position are also not those of a materials engineer, as asserted by counsel in his January 26, 2005 response to the director's request for evidence. While the beneficiary would be involved in the testing of dental materials, he would not be required to develop such materials, a characteristic of the work performed by materials engineers.² Neither is the proffered position that of a materials scientist, employment that also deals with a wide range of products. Materials scientists, like materials engineers, develop new products and enhance existing ones.³

Upon consideration of the totality of the evidence, the testing duties described in the record do not neatly align with any occupational title addressed by the *Handbook*. Nor do they comprise a position that is identifiable with an industry-wide educational standard or, alternately, a position that is distinguishable, by its unique nature or greater complexity, from similar but non-degreed employment. Accordingly, the proffered position is not established as a specialty occupation under the first two criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and(4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

While the evidence of record does not demonstrate that the petitioner has a history of recruiting and hiring degreed individuals for the position, it does satisfy the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The testing duties to be assigned to the beneficiary appear sufficiently specialized and complex that their performance would require knowledge usually associated with the attainment of a baccalaureate degree in materials science, medical technology or a related field. Therefore, the petitioner has established the proffered position as a specialty occupation and the AAO withdraws the director's finding to the contrary.

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, page 619.

² *Ibid.*, page 135.

³ *Ibid.*, page 162.

The petition may not be approved, however, as the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation.

To qualify to perform the duties of a specialty occupation, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) requires a beneficiary 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 the instant case, the petitioner has submitted documentation to establish that the beneficiary holds a foreign degree that is the equivalent of a U.S. baccalaureate or higher degree required by the proffered position, including his graduation certificates from the Shun-Osaka School of Dental Technology and The Osaka Ceramic Training Center in Japan, his transcripts from these institutions and an evaluation from the American Universities Admission Program (AUAP) Credential Evaluation Services in Sarasota, Florida. The evaluation finds the beneficiary to hold the equivalent of a bachelor of science degree in dental laboratory sciences. The record also contains letters certifying the beneficiary's employment in a series of dental laboratories, including the petitioner's, for much of the period from April 1999 to August 2004.

The AAO will not, however, accept the AUAP evaluation as proof of the beneficiary's degree equivalency. It has learned that as of January 25, 2006, the AUAP is the defendant in a trademark infringement lawsuit brought by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) that seeks to prevent the AUAP from representing itself as AACRAO-affiliated. In its suit, the AACRAO indicates that it has determined that AUAP evaluations are "factually incomplete, contain discrepancies, and are generally carelessly produced."⁴ The AAO also notes that a February 10, 2005 suit-related article published online by the University of Houston reports that none of the groups with which the AUAP indicates an affiliation on its website claim it as a member.⁵ In light of the concerns raised in the AACRAO lawsuit,

⁴ See www.credentialwatch.org/legal/auap/complaint.

⁵ See www.uh.edu/ednews/2006/insidehe/200602/20060210diplomamill.

the AAO will not consider the AUAP evaluation. U.S. Citizenship and Immigration Services (CIS) uses an evaluation by a credentials evaluation service of a beneficiary's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Therefore, for reasons related in the preceding discussion, the AAO will withdraw the director's decision and remand the instant case to the director for a decision as to whether the beneficiary qualifies to perform the duties of a specialty occupation. The director may request such evidence as may be necessary to assist in reaching that determination. The director shall then issue a new decision based on the evidence of record, as it relates to the statutory and regulatory requirements for H-1B nonimmigrant visa eligibility.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of February 4, 2005 is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.
