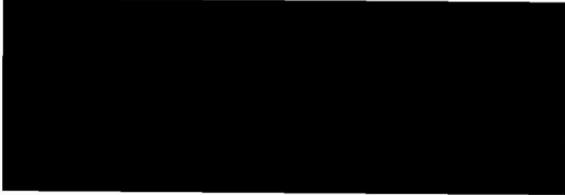




U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 02 201 50820 Office: CALIFORNIA SERVICE CENTER Date: DEC 13 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will be denied.

The petitioner is a dental office. It seeks to employ the beneficiary as a dental specialist/researcher. 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 initially denied the petition on February 3, 2004. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On June 18, 2006, the director denied the petition determining that the petitioner had not shown that the beneficiary possessed the appropriate licensure as required by the proffered position and had not provided an exemption or exception from the requirement. The director certified his decision to the AAO. Counsel for the petitioner provided a statement in response to the notice of certification.

**The record of proceeding before the AAO contains:** (1) the June 5, 2002 Form I-129 with supporting documentation; (2) the director's February 4, 2003 request for further evidence (RFE); (3) counsel for the petitioner's April 23, 2003 response to the director's RFE; (4) the director's February 3, 2004 denial letter; (5) counsel's March 23, 2004 brief and supporting documentation; (6) the AAO's July 7, 2005 remand decision; (7) the director's December 30, 2005 notice of intent to deny (NOID); (8) counsel's January 24, 2006 response to the NOID; (9) the director's June 18, 2006 denial decision and certification to the AAO for review; and (10) counsel's July 14, 2006 statement in response to the notice of certification. The AAO reviewed the record in its entirety before issuing its decision.

In the initial May 30, 2002 description of the duties of the proffered position the petitioner stated:

The Petitioner is in need of a dental specialist/researcher who possesses the necessary skill and knowledge required to administer and direct the activities of the dental practice in accordance with accepted national standards, administrative policies[,] and OSHA compliance guidelines. The Beneficiary will maintain complete dental reports and related documentation of the patients' records. She will examine patients' records to compose complete dental reports for the ultimate approval of the dentist. She will keep up to date on the latest dental research results and utilize the dental library to perform the duties. She will coordinate dental care evaluation and develop criteria and methods for such evaluation/reports. She will confer with the personnel regarding operational policies and recommend procedural changes. The Beneficiary will be responsible for setting up a system of operation and activities to be implemented in the dental office and laboratory that will assure a smooth flow of work, and improve overall efficiency of the business.

The position does not need to have a State License as the position does not involve any direct care and the Beneficiary will not engage in any direct patient care activities. However, the offered position requires a very strong dental back ground [sic] and this type of knowledge may only be obtained by attending a dental school.

In an April 23, 2003 response to the director's RFE, counsel for the petitioner stated:

The petitioner needs to insure that it complies with all the requisite standards in the dental care industry in order to avoid malpractice liability. Also, the petitioner desires to expand the clinic's dental practice by utilizing the newest developments in the medical and dental fields.

In order to meet these needs, the petitioner decided to hire a Dental Specialist/Researcher who had undergone proper formal training in the field of dental medicine. Such employee will utilize her expertise in the field to manage the clinic's affairs in accordance with proper standards. She will analyze the clinic's practices and procedures and will compare them with the established national standards and administrative policies. She will confer with the clinical staff to formulate policies and recommend procedural changes.

In the position of Dental Specialist/Researcher, [the beneficiary] will hire additional staff as needed, and evaluate their work. She will oversee the billing of the petitioner's patients and insurance companies. She will coordinate with the various dental laboratories that the petitioner's clinic utilizes to assure that orders are submitted and received in a timely manner. [The beneficiary] will set up a system to be used by the dental office and laboratory that will assure a smooth flow of work and improve efficiency. This is the extent of the position's administrative duties.

Another area of duties that [the beneficiary] will be involved in is assisting the clinic's dentists with the analysis of patients' records. She will examine patients' records to compose dental reports for the ultimate review and approval of the clinic's dentists. She will utilize her medical background to provide complete analysis of the patient's oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history[,] and laboratory results. [The beneficiary] will record these conditions for diagnosis and treatment by the dentist. [The beneficiary] will maintain complete dental reports and related documentation of the patients. She will coordinate dental care evaluation and develop criteria and methods for such evaluation/reports. Also, [the beneficiary] will utilize medical journals, textbooks[,] and medical research materials to analyze and evaluate the patients' records regarding AIDS and treatment of gingival diseases.

The third area in which [the beneficiary] will be involved is extensive research of the new developments in the medical and dental care industries. Such research will focus on topics particularly useful in the petitioner's practice. Also, the petitioner's clinic, through [the beneficiary's] research efforts, will be able to participate in research groups consisting of other dentists involved in research projects. The benefit of participating in research groups is the sharing of ideas, diverse opinions[,] and expertise. [The beneficiary] will represent the petitioner's clinic in research groups. The goal for participating in research groups is publication of articles in the industry's journals. In performing medical research, [the beneficiary] will utilize the dental and medical libraries. Also, she will devise methods to implement the fruit of her research at the petitioner's clinic. The petitioner foresees that its utilizing the newest techniques

and developments in the industry will place it far ahead of its competition, help expand its client base, and produce a greater income. Please refer to the petitioner's research plan (Exhibit A).

While performing her duties in the position of Dental Specialist/Researcher, [the beneficiary] will not be providing any patient care and will not have any contact with patients.

The percentage of time spent performing these duties is estimated as follows: The administrative duties relating to assurance of the quality of work and compliance with the national standards will take about 30% of [the beneficiary's] time. The duties relating to analysis of patients' records and assisting the clinic's dentists in preparing patients' files for determinations and diagnosis will occupy about 40% of [the beneficiary's] time. As to the medical and dental research, and composition of reports based on such research, it will take about 30% of her time.

[The beneficiary] will not directly supervise the clinic's staff, but she will analyze and determine the quality of their work, and employees' compliance with the established procedures and standards. She will be working thirty (30) hours per week.

Counsel added that about 70 percent of the beneficiary's duties require formal training in dental medicine and that 30 percent of her duties resemble the duties performed in the position of a health services manager. The petitioner also included 16 job announcements for positions including the positions of dentist, office administrator, quality improvement manager, and research associate among others.

The director initially denied the petition determining that the proffered position was not a specialty occupation. The director noted that some of the duties of the position resembled those of a dentist but that the beneficiary did not have a license to practice dentistry in California. The director determined that some of the duties of the position were similar to those of a dental assistant or office manager, positions that did not require a baccalaureate degree. The director concluded that the position did not meet the criteria of a specialty occupation.

In a July 7, 2005 decision, the AAO determined, based on portions of the petitioner's description of the proffered position, that the position encompassed duties performed by a dentist, an occupation that is a specialty occupation. The AAO also determined that the record did not contain evidence that the beneficiary had obtained the appropriate licensure to perform the duties of a dentist and remanded the matter to the director to address this issue.

On December 30, 2005, the director issued a notice of intent to deny noting that the beneficiary had not obtained a dental license to practice dentistry in the State of California and had not proven an exemption or exception from the requirement.

Counsel provided a response on January 24, 2006. Counsel enclosed copies of correspondence sent to the Dental Board of California and the Committee on Dental Auxiliaries of the California Department of Consumer Affairs inquiring whether the duties of the proffered position constituted a position requiring a license. Counsel noted that both agencies had failed to respond to counsel's inquiry.

Counsel indicated that because the California Dental Board and the California Committee on Dental Auxiliaries did not respond to the inquiries, the firm conducted its own legal research. Counsel concluded that the beneficiary is exempt from the licensing requirements of section 1625 of the California Business and Professions Code, because the duties of the position do not involve the examination, diagnosis, or treatment of diseases or injuries to human teeth. Counsel claimed that the dental researcher/specialist is not responsible for diagnosis or patient care and all work is performed under the supervision of a licensed dentist, thus under 8 C.F.R. § 214.2(h)(4)(v)(C) as the beneficiary may perform the duties of the position under supervision, the H classification may be granted.

Counsel also asserted that the dental researcher/specialist is not responsible for patient care because the job consists of administrative duties, maintenance of patient records, and dental research performed under the supervision of a licensed dentist. Counsel indicated that the beneficiary's duties resembling the duties of a health services manager include maintaining patient records, planning, organizing, coordinating, and supervising the delivery of healthcare. Counsel asserted that although 70 percent of the beneficiary's duties required formal training in the field of dentistry, the duties do not require patient care or diagnosis but rather specialized research in the field of dental medicine. Counsel provided copies of the petitioner's May 30, 2002 letter submitted in support of the petition and counsel's April 23, 2003 letter in response to the director's RFE to reiterate the duties of the position.

On June 18, 2006, the director denied the petition determining that the AAO had already considered the description of duties submitted by the petitioner and had determined that the duties comprised the duties of a dentist. The director determined that the petitioner had not established that the beneficiary had the appropriate licensure to practice dentistry in the State of California and the petitioner had not provided an exemption or exception to the requirement of licensure. The director certified his decision to the AAO for review.

In a July 14, 2006 letter in response to the director's certification of the matter, counsel noted that the California Dental Board and the Board of Dental Auxiliaries would not proffer a legal opinion on whether the position of dental specialist/researcher required a license. Counsel claims that planning and supervising the delivery of health care relates to all the duties of the position and that these are the duties of a health services manager. Counsel asserts that the duties of the proffered position are administrative and clinical research duties not directly related to patient care and that to determine otherwise would require a conclusion that all dental assistants, nursing assistants, and health services managers must be licensed to practice medicine, dentistry, or nursing. Counsel contends that if the licensed professional remains responsible for the diagnosis and treatment a license is not required.

The AAO reviews the director's decision on certification. The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation and if the proffered position is a specialty occupation whether the State of California requires the licensure<sup>1</sup> of the beneficiary to perform the occupation. The AAO

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<sup>1</sup> The AAO notes that the California Dental Board and the California Committee on Dental Auxiliaries responded to counsel's request for a review of the duties of a dental specialist/researcher in another matter (WAC 02 238 53253). Some of the duties in the other matter are similar to the duties in this matter. Moreover, counsel offered the same arguments in that case as presented in the instant matter, contending that the position resembled that of a

turns first to the duties of the proffered position and the statutory and regulatory requirements of a specialty occupation.

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;

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health services manager that did not require licensure. An executive officer of the Committee on Dental Auxiliaries declined to assess whether the duties described included the duties of an unlicensed dental assistant, a registered dental assistant, a registered dental assistant in extended functions, or a registered dental hygienist but elected instead to provide a copy of the regulations governing each of the referenced positions and noted that if the duty is not listed in the applicable regulation governing the position, the auxiliary may not perform the duty. A senior investigator for the California Dental Board noted: "In the clinical field of dentistry there are no such titles as Dental Researcher/Specialist. The duties you describe fall under the duties of a dentist or other auxiliary duties." Moreover, the AAO notes that California Business and Professions Code Section 1625(e) defines the practice of dentistry to include any person who "[m]anages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed." The record does not reflect that the beneficiary is a licensed dentist in the State of California or that the petitioner requires a license in dentistry. If the petitioner, however, is seeking a manager for the dental practice, it appears that California law would require licensure as a dentist.

- (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.

The AAO does not agree with counsel's analysis of the proffered position. To determine whether a particular job qualifies as a specialty occupation, CIS does not 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 (5<sup>th</sup> 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. In this matter, the petitioner's description of the proffered position is not that of a medical and health services manager.

The AAO takes note of the following discussion in the *Handbook* regarding medical and health services managers:

Healthcare is a business and, like every other business, it needs good management to keep it running smoothly. Medical and health services managers, also referred to as *health care executives or health care administrators*, plan, direct, coordinate, and supervise the delivery of health care. Medical and health services managers include specialists and generalists. Specialists are in charge of specific clinical departments or services, while generalists manage or help to manage an entire facility or system.

The structure and financing of health care are changing rapidly. Future medical and health services managers must be prepared to deal with evolving integrated health care delivery systems, technological innovations, an increasingly complex regulatory environment, restructuring of work and an increased focus on preventive care. They will be called on to improve efficiency in health care facilities and the quality of health care provided. Increasingly, medical and health services managers will work in organizations in which they must optimize efficiency of a variety of related services - for example those ranging from inpatient care to outpatient followup care.

The *Handbook's* discussion regarding the duties of administrative services managers provides:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services . . . . These workers manage the many services that allow organizations to operate efficiently.

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In small organizations, a single administrative services manager may oversee all support services . . . . As the size of the firm increases, administrative services managers are more likely to specialize in specific support activities. For example, some administrative services managers work primarily as office managers . . . .

The petitioner indicates the beneficiary will administer a dental program in the office and direct activities in accordance with accepted national standards and administrative policies, formulate policies and recommend procedural changes, and confer with personnel regarding policies and recommend procedural changes to increase daily production. When the petitioner provides more detail regarding the general statements above, the duties tend to resemble those of an office manager. For example, the beneficiary is responsible for hiring additional staff and evaluating their work, overseeing the billing of patients and insurance companies, and coordinating with dental laboratories and insuring a smooth flow of work. The petitioner indicates that the beneficiary will be spending 30 percent of her time on these administrative type duties. The petitioner does not submit sufficient information to establish that the beneficiary's 30 percent of time devoted to administrative tasks, is time spent performing the duties of a health services manager. 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)).

A review of the proffered position, comparing the position's duties against those described for a range of dental professions and the California regulations pertaining to the duties that may be performed by the various dental and dental auxiliary positions, reveals that the majority of the proffered position's duties comprise the duties of a dentist. The AAO acknowledges that the petitioner specifically states that the beneficiary does not provide patient care activities and does not have contact with the patients, however, the petitioner's list of duties encompass duties under the general heading of providing patient care. Moreover, the AAO questions the petitioner's requirement of very strong dental background that may only be obtained by attending dental school if the position does not comprise aspects of the practice of dentistry.

The *Handbook* reports: "Dentists diagnose, prevent, and treat problems with teeth or mouth tissue." Although the beneficiary in this matter may not directly treat patients, the petitioner indicates the beneficiary will "examine patients' records to compose complete dental reports for the ultimate approval of the dentist," "coordinate dental care evaluation and develop criteria and methods for such evaluation/reports," "[assist] the clinic's dentists with the analysis of patients' records," "utilize her medical background to provide complete analysis of the patient's oral and maxillo-facial conditions based upon the dentist's findings, reports, medical history[,] and laboratory results," and "utilize medical journals, textbooks[,] and medical research materials to analyze and evaluate the patients' records regarding AIDS and treatment of gingival diseases." It is the act of analyzing patient records and conditions and developing treatments and reports that encompass the duties of a dentist who diagnoses and treats

problems with teeth or mouth tissue. Section 1625 of the California Business and Professions Code states that the practice of dentistry includes anyone who normally performs, or causes to be performed by a dentist, the examination, diagnosis of any kind, and treatment of various disorders of the teeth. Again, the beneficiary's review and advice on treatment, evaluations, and diagnoses in a given case are acts that require a dental license. The petitioner indicates that the beneficiary in this position will spend 40 percent of her time on these duties. This portion of the beneficiary's duties aligns with the duties of a dentist, a specialty occupation that requires a license. Further, the petitioner would like the beneficiary to "utilize her expertise in the Field [of dentistry] to manage the clinic's affairs." As noted in footnote 1, Section 1625(e) of the California Business and Professions Code establishes that a person who manages a dental practice is practicing dentistry.

The AAO determines that in this matter the record includes duties that comprise the practice of dentistry in the State of California. Although the practice of dentistry is a specialty occupation, it is an occupation that requires a license. In addition, the AAO observes that the job announcements submitted to establish that the duties of the proffered position are parallel to other positions requiring a baccalaureate or higher degree include advertisements for dentists. The submission of job announcements for the position of dentist suggests that the petitioner recognizes that the duties of the proffered position encompass duties of a dentist. The AAO acknowledges counsel's attempt on certification to dismiss any duties that might be considered those of dentist by claiming that if a licensed professional remains responsible for the diagnosis and treatment, a license is not required. However, counsel does not substantiate how the beneficiary may perform the duties of the proffered position without a license, even if the beneficiary performs the duties under supervision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's claim on certification that planning and supervising the delivery of health care relates to all the duties of the position and that these are the duties of a health services manager contradicts the earlier statements regarding the division of the duties of the position. Likewise counsel's assertion that the duties of the proffered position are restricted to administrative and clinical research duties is contrary to previous statements. 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).

The record does not contain evidence that the beneficiary is qualified to perform the duties of the occupation. For reasons related in the preceding discussion, the petitioner has not established that the beneficiary is eligible to perform the duties of the proffered position in California. Accordingly, the AAO will not disturb the director's June 18, 2006 denial of the petition.

The petition will be denied and the director's certification affirmed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, 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 met that burden.

**ORDER:** The director's June 18, 2006 decision is affirmed. The petition is denied.