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FILE: WAC 03 043 55375 Office: CALIFORNIA SERVICE CENTER Date: NOV 28 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 prosthodontic dental service manager. 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 denied the petition on March 4, 2004. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On October 2, 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.

The record of proceeding before the AAO contains: (1) the November 21, 2002 Form I-129 with supporting documentation; (2) the director's June 11, 2003 notice of intent to deny (NOID); (3) previous counsel's July 7, 2003 response to the director's NOID; (4) the director's March 4, 2004 denial letter; (5) the Form I-290B, with current counsel's brief and supporting documentation; (6) the AAO's June 1, 2005 remand decision; (7) the director's February 24, 2006 request for further evidence (RFE); (8) counsel's April 6, 2006 response to the RFE; (9) the director's October 2, 2006 denial decision and certification to the AAO for review. The AAO reviewed the record in its entirety before issuing its decision.

In a November 4, 2002 letter in support of the petition, the petitioner stated: [I]n this specialty occupation of Prosthodontic Dental Service Manager, [the beneficiary] will utilize his academic training and years of experience and expertise in the field of Prosthodontics, to oversee our entire prosthodontic dental service operations.

The petitioner added that the beneficiary's duties would include the following:

1. To transfer face-bow measurements and mount casts on a fully or semi-adjustable dental articulator, and survey casts in preparation for the attending prosthodontist, who later will use such to determine the type of precision attachments and design of the metal framework to be used in the case.
2. To assist the prosthodontist in case planning, from conventional crown and bridge to pre-prosthetic surgical treatment options, in restoring dental occlusions.
3. To communicate with prosthetic dental laboratory technicians the specifications outlined by the prosthodontist to ensure precision of work products.
4. To act as educational ambassador, assisting the prosthodontist answering patient's questions and concerns in the treatment planning phase, reassuring patient in the provisional phase after treatment has been started and the patient [is] wearing provisional restoration awaiting the final restorations in process, and instructing patient of the post-insertion phase on proper home care and oral hygiene as well as following up on such patient on a long term basis.

5. To be in charge of purchasing and maintaining prosthodontic supplies such as precision attachments, prosthetic hanau articulating devise and necessary laboratory equipments and supplies such as micro-etching machine, porcelain glazing oven, dental soldering equipment.

The petitioner stated that the beneficiary would be "performing purely assisting, patient education and managerial functions. No direct clinical work will be performed by, nor shall be expected of [the beneficiary]." The petitioner added that the position is a specialty occupation because it required the worker:

[T]o have the basic academic training in Dental Medicine especially in the field of Prosthodontics. The training in this specialty is usually obtained through a doctoral degree program in Dental Medicine. Without the theoretical knowledge and skills obtained from standard dental program courses such as Prosthodontic, dentistry, Operative or Restorative dentistry, Pedodontics, Orthodontics, Oral Physiology, Oral Pathology, Oral Medicine, Clinical dentistry etc., the worker will not be able to understand and collaborate [with] the Prosthodontists' case and treatment planning, maintain the specialized equipments, educate the patients, review and assure the laboratory products' quality and order the appropriate supplies for the Prosthodontists' use.

On June 11, 2003, the director issued a NOID indicating that the description of duties suggested that the proffered position was that of a dental assistant. In a July 7, 2003 response, counsel for the petitioner indicated that prosthodontics is a recognized specialty in the field of dentistry and that it requires an additional three-years of training and licensing. Counsel indicated that a prosthodontist treats the more difficult dental problems and that the prosthodontic dental service manager "will assist and work very closely with the Prosthodontist." Counsel also listed the prosthodontic dental service manager's detailed tasks, including in part, "know how to get precise graphic guide for centric jaw relation, protrusive and laterotrusive records; orient the casts to the articulator space;" "do an analytical surveying of diagnostic casts to evaluate the occlusal schemes of natural teeth;" "understand the diagnosis based on identification of an unnatural condition, determination of the cause, based on data obtained from dental and medical histories, extraoral and intraoral examination . . . and analysis of articulated diagnostic casts;" and "be able to collaborate with the prosthodontist on designing the most appropriate prosthodontic treatment procedures."

The petitioner also provided a July 7, 2003 letter stating that it had previously hired a prosthodontic dental technologist and that the individual hired had a doctoral degree in dental medicine. The petitioner noted that since the individual had left the clinic it needed someone with a doctoral degree in dental medicine and several years of experience in the field, to oversee the entire prosthetic and laboratory operations of the practice. The record also contains a July 3, 2003 letter from another dental office indicating that it employed a dental services director who held a bachelor's degree in dental medicine in the Philippines and had extensive experience in different facets of dentistry, two key qualifications the dental office emphasized when hiring for the position of dental services director.

On March 4, 2004, the director denied the petition determining that the described duties resembled the duties of a dental assistant or dental technician and that the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not indicate that a baccalaureate degree in a specialized area is required for the occupation of a

dental assistant or dental technician. The director noted that the fact that the beneficiary holds a bachelor's degree is insufficient to establish that the duties of the position are the duties of a specialty occupation. The director concluded that the petitioner had failed to meet the regulatory requirements and the proffered position did not require knowledge associated with the attainment of a baccalaureate degree.

In a June 1, 2005 decision, the AAO determined, based on portions of the petitioner's description of the proffered position and statements made by counsel, 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 February 24, 2006, the director requested evidence that the beneficiary had obtained a dental license to practice dentistry in the State of California or a statement from the pertinent California licensing agencies that the duties of the proffered position did not require a dental or other license to perform the duties of the proffered position in this matter.

On April 6, 2006, counsel provided a response to the director's RFE. Counsel provided copies of correspondence sent to the Dental Board of California and to the Committee on Dental Auxiliaries of the California Department of Affairs on March 17, 2006 and March 30, 2006, inquiring whether the performance of the duties of the proffered position required a license. Counsel noted that as of April 6, 2006, the firm had not received responses from these two governing bodies.

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 prosthodontic dental service manager is not responsible for diagnosis or patient care and all work is performed under the supervision of a licensed dentist. Thus, counsel states 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 added that the beneficiary's duties resembled the duties of a health services manager that includes maintaining patient records, planning, organizing, coordinating, and supervising the delivery of healthcare and is not a position that requires licensing. Counsel noted the AAO's reference to the beneficiary's management of a place where dental operations are performed and assistance to the dentist in analyzing patient records but observed that the responsibility for diagnosis and treatment remains the prerogative of the dentist. Counsel asserted that if a license in dentistry is required for the proffered position, a license would be required for a dental assistant, medical assistant, nursing assistant, and a health services manager because their duties include assisting doctors, dentists, and nurses by maintaining patient records and discussing appropriate courses of treatment.

On October 2, 2006, the director denied the petition determining that the petitioner had been given the opportunity to present evidence that the beneficiary had a temporary license and was thus eligible to perform the specialty occupation or that the State of California did not require a license to perform the duties of the proffered position

but had not submitted substantive evidence to establish either supposition. The director certified his decision to the AAO for review. Counsel for the petitioner did not submit additional evidence or a brief on certification.

The AAO has reviewed the director's decision on certification.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation and if the proffered position is a specialty occupation whether the State of California requires the licensure of the beneficiary to perform the 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.

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 (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. In this matter, the petitioner's description of the proffered position is not that of a medical and health services manager.

The California Business and Professions Code Section 1625 states:

Dentistry is the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malpositions of the human teeth, alveolar process, gums, jaws, or associated structures; and such diagnosis or treatment may include all necessary related procedures as well as the use of drugs, anesthetic agents, and physical evaluation. Without limiting the foregoing, a person practices dentistry within the meaning of this chapter who does any one or more of the following:

- (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 structures, or corrects malposed positions thereof.
- (e) Manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.

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 petitioner in this matter has described an occupation that encompasses the duties of a dentist, a dentist auxiliary, a dental technician, and a manager of a dental office where operations are performed. The AAO observes that the petitioner specifically states that the beneficiary will: "utilize his academic training and years of experience and expertise in the field of Prosthodontics, to oversee our entire prosthodontic dental service operation;" "assist the prosthodontist in case planning;" "assist and work very closely with the Prosthodontist" and "performing purely assisting, patient education and managerial functions." The AAO notes that the petitioner indicates that the beneficiary will not directly perform clinical work, however, according to the California Statute, assisting the dentist in diagnosis and managing the dental office are duties that require a dentist license. In addition, the petitioner's acknowledgement that the individual in the proffered position needs special training to understand and collaborate with the Prosthodontists' case and treatment planning, and to "be able to collaborate with the prosthodontist on designing the most appropriate prosthodontic treatment procedures" further substantiates that the beneficiary will be performing the duties of a dentist under California law. It is the acts of

analyzing and evaluating patient cases, advising on treatment, and managing the place where dental operations are performed that encompass the tasks of a dentist. The skills that the petitioner is relying upon to assist in providing patient care are the very skills that require the individual providing the assistance, advice, and management to have a dental license. The AAO reiterates its prior determination that in this matter the duties of the proffered position require the individual performing the duties to have a license to practice dentistry.

Moreover, the petitioner has included duties within the occupation that indicate the beneficiary will be performing the duties of a dental hygienist, a dental technician, or a registered dental assistant. Performing many of the duties of a dental auxiliary also requires registration or licensing pursuant to the California Statute governing these occupations.

Counsel's conclusion that the beneficiary is exempt from the licensing requirements of Section 1625 of the California Business and Professions Code because the beneficiary is not involved in the examination, diagnosis, or treatment of diseases or injuries to human teeth is inconsistent with petitioner's description of the beneficiary's duties. 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). Likewise, counsel's assertion that a licensed dentist will supervise the beneficiary's work is inconsistent with the previous descriptions of the occupation's duties and responsibilities. The petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, counsel's contention that the beneficiary's duties are similar to the duties of a health services manager, an occupation that does not require a license, is not persuasive. First, the AAO observes that the California Business and Professions Code Section 1625(e) indicates that an individual who manages a dental office where operations are performed is practicing dentistry. Neither counsel nor the petitioner has submitted evidence or law that the beneficiary's oversight and management responsibility falls outside this definition. 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)). Second, the petitioner's reliance on the beneficiary's training and the petitioner's requirement that the individual in the proffered position collaborates with the dentist on treatment and planning moves the position to a position encompassing the practice of dentistry, a higher level than that of a health services manager and one that requires a license. Lastly, the AAO acknowledges counsel's assertion that if a license in dentistry is required for the proffered position, a license would be required for a dental assistant, medical assistant, nursing assistant, and a health services manager; however, the licensing requirements for those occupations are not before the AAO in this proceeding.

The record contains sufficient evidence to establish that the proffered position includes the duties of a dentist, a specialty occupation. The record, however, 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 October 2, 2006 denial of the petition.

The petition will be denied and the appeal dismissed 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 October 2, 2006 decision is affirmed. The petition is denied.