

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

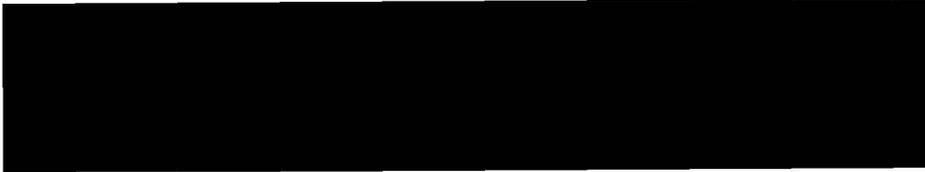
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

APR 02 2007



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



02

APR 02 2007

FILE: WAC 05 072 50984 Office: CALIFORNIA SERVICE CENTER Date:

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 medical research assistant. 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 June 10, 2005. The petitioner filed an appeal and the AAO remanded the matter to the director for entry of a new decision. On February 5, 2007, 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 her decision to the AAO. Neither the petitioner nor counsel for the petitioner provided additional statements or evidence in response to the notice of certification.

The record of proceeding before the AAO contains: (1) the January 13, 2005 Form I-129 with supporting documentation; (2) the director's March 1, 2005 request for further evidence (RFE); (3) counsel for the petitioner's May 23, 2005 response to the director's RFE; (4) the director's June 10, 2005 denial letter; (5) counsel's brief and documentation in support of the appeal; (6) the AAO's September 28, 2006 remand decision; (7) the director's October 18, 2006 RFE; (8) counsel's January 9, 2007 response to the RFE and request for additional time to respond to the RFE; and (9) the director's February 5, 2007 denial decision and certification to the AAO for review. The AAO reviewed the record in its entirety before issuing its decision.

In a letter appended to the petition, the petitioner, through its counsel, stated:

In the position of Medical Research Assistant with the petitioner, [the beneficiary] will review major professional medical journals, reference works, research publications, and statistical records to provide diagnostic, therapeutic, and preventive health care services under the direction of dentists. She will research general health issues as well as specific developments in dentistry for application to patients. In the advancement of her research activities, [the beneficiary] will also assist dentists in their treatment of a variety of patients.

For particular problematic cases, [the beneficiary] will elicit detailed patient histories through interview and examination, and subsequently research medical literature to find innovative and appropriate treatment solutions based upon patient age and medical conditions. [The beneficiary] will also analyze statistical data to prepare reports and recommendations. She will write reports or present research to dentists in formats such as abstracts, bibliographies, graphs, and presentations for inclusion in patient charts and records.

In a May 23, 2005 response to the director's RFE, counsel for the petitioner stated: "Because this is a professional occupation, the person filing [sic] the position of Medical Research Assistant must possess at least a Doctor of Dental Medicine degree. [The beneficiary] is ideal for this position." Counsel added:

[The beneficiary] will be employed on a full-time basis at a minimum of 40 hours per week. Her time and duties will include weekly reviews of major professional medical journals, reference works, research publications, and statistical records in order to keep the office abreast of the latest medical, therapeutic and preventive health care developments.

[The beneficiary] will research general health issues as well as specific developments in dentistry for actual application to patients. She will also assist dentists in their treatment of a variety of patients using her own experiences as well as sharing the results of her research and investigation.

For particular problematic cases, [the beneficiary] will elicit detailed patient histories through interview and examination, and subsequently research medical literature to find innovative and appropriate treatment solutions based upon patient age and medical conditions.

[The beneficiary] will also analyze statistical data to prepare reports and recommendations. She will write reports or present research to dentists in formats such as abstracts, bibliographies, graphs, and presentations for inclusion in patient charts and record.

The director initially denied the petition determining that the proffered position was not a specialty occupation. In a September 28, 2006 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 October 18, 2006, the director issued an RFE noting that the description of the offered position included the duties of a dentist. The director noted that the petitioner must provide evidence that the beneficiary had obtained a dental license or if the petitioner believed that the beneficiary would be performing duties that did not require a license, evidence from the Dental Board of California and the Committee on Dental Auxiliaries indicating that the performance of the duties of the proffered position as described did not require a license.

In a letter dated January 9, 2007, counsel for the petitioner provided a November 20, 2006 letter authored by the Executive Officer of the Committee on Dental Auxiliaries. The author of the letter specifically noted that diagnosis and treatment planning were among the nine functions that a dental assistant is not allowed to perform under Section 1085 of Title 16 of the California Code of Regulations. Counsel indicated that a request had been sent to the Dental Board of California but that no response had yet been received. Counsel requested additional time to respond to the RFE to obtain information from the Dental Board.

On February 5, 2007, 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 also determined that pursuant to 8 C.F.R. § 103.2(b)(8), she could not extend the time to permit the petitioner to respond to the RFE. The director concluded that based on

the evidence of record, the petition could not be approved. The director certified her decision to the AAO for review.

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 licensure¹ of the beneficiary to perform the occupation. The AAO 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;

¹ The AAO notes that California Business and Professions Code Section 1625 states in pertinent part: 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.

- (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.

As previously determined, the duties of the position as described include the practice of dentistry. The petitioner initially indicated: "[i]n the advancement of her research activities, [the beneficiary] will also assist dentists in their treatment of a variety of patients" and "[the beneficiary] will elicit detailed patient histories through interview and examination, and subsequently research medical literature to find innovative and appropriate treatment solutions based upon patient age and medical conditions." In response to the RFE, the petitioner indicated: "[s]he will also assist dentists in their treatment of a variety of patients using her own experiences as well as sharing the results of her research and investigation."

The AAO observes that when determining 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 research assistant but of a position that includes the practice of dentistry. The AAO notes that the petitioner required the successful incumbent to possess at least a Doctor of Dental Medicine degree, confirming the petitioner's belief that the position would include the practice of dentistry.

As footnoted above, 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 assistance to dentists in their treatment of patients and identifying appropriate treatment solutions are acts that require a dental license. This portion of the beneficiary's duties aligns with the duties of a dentist, a specialty occupation that requires a license.

The AAO affirms its previous decision that the duties of the proffered position comprise the practice of dentistry in the State of California and requires a license. The record does not contain evidence that the beneficiary has a dental license or is otherwise 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 February 5, 2007 denial of the petition.

The AAO also concurs with the director's interpretation of the regulation at 8 C.F.R. § 103.2(b)(8), and observes that the petitioner failed to provide a letter or documentation from the Dental Board of California indicating that the duties of the proffered position as described would not require a license to perform in the State of California.

The petition will be denied and the director's certification affirmed for the above stated reason. 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 February 5, 2007 decision is affirmed. The petition is denied.