



U.S. Citizenship  
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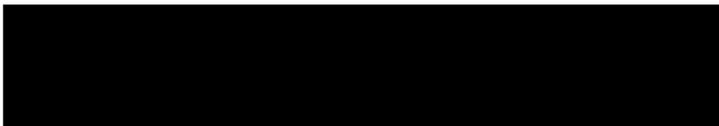
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FILE: WAC 02 185 52736 Office: CALIFORNIA SERVICE CENTER Date: FEB 20 2007

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 her 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 denied the petition on February 12, 2004. The petitioner filed an appeal and the AAO withdrew the director's decision and remanded the matter to the director for entry of a new decision. In the September 28, 2006 remand decision, the AAO determined that the duties detailed by the petitioner clearly indicated that the proffered position involved the practice of dentistry, which requires a license. The AAO remanded the matter with the instruction to the director to determine whether the beneficiary is qualified to perform the duties of a licensed dentist and to obtain such additional information as she deems necessary in rendering her decision. The AAO also instructed the director to certify the matter to the AAO if her subsequent decision was adverse to the petitioner.

The record contains the director's November 7, 2006 request for further evidence (RFE) requesting, among other evidence, that the petitioner provide the beneficiary's dental license or other license authorizing the beneficiary to practice dentistry in California.

In counsel's letter dated May 20, 2005,<sup>1</sup> counsel referenced an enclosed letter dated October 24, 2006 informing the beneficiary that he had passed the California Dental Licensure Examination and had completed all the requirements necessary for licensure in the State of California with the exception of providing a social security number. The report of the beneficiary's dental licensure examination grades indicates the examination date as September 21, 2006. Counsel for the petitioner also enclosed a revised Form ETA 9035E, Labor Condition Application (LCA) that had been certified November 13, 2006. Counsel requested that the petition be processed and adjudicated based on this information.

On December 6, 2006, the director denied the petition determining that the petitioner had not submitted evidence establishing that the beneficiary had a license to practice dentistry in California at the time the petition was filed May 15, 2002 or that the beneficiary qualified for an exemption or exception from the requirement of a license. The director certified her adverse decision to the AAO as instructed.

Counsel submits a brief asserting that the beneficiary qualifies for H-1B status because he is eligible to practice his profession upon admission into the United States and that he is immediately eligible to obtain a dental license when he enters the United States. In the alternative, counsel contends that the beneficiary's duties of a dental specialist/researcher do not require a license as the beneficiary will not perform clinical duties such as diagnosis or patient care and that the position of dental specialist/researcher is a specialty occupation.

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<sup>1</sup> The date of the letter appears to be a typographical error as the letter clearly references an October 24, 2006 letter indicating that the beneficiary had completed the requirements necessary to obtain a dental license in California.

Upon review of the record on certification, the petitioner has not provided evidence that the beneficiary was licensed to perform the duties of a dentist in the State of California when the petition was filed May 15, 2002. The evidence shows that the beneficiary was not eligible to be licensed to practice dentistry until October 2006. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). When the petition was filed the beneficiary was not eligible to obtain a dental license because he had not passed the necessary examinations to obtain a license in the State of California. The AAO does not find that the director is requiring the beneficiary to obtain a social security number before he is admitted into the United States. The director is requiring that the beneficiary be eligible for licensure when the petition was filed in 2002, which he was not.

The AAO acknowledges counsel's assertion that the beneficiary's duties resemble those of a health services manager and that the beneficiary will not perform clinical duties such as diagnosis or patient care. However, a review of the petitioner's description of the duties of the proffered position does not support counsel's assertion. The petitioner stated in its May 1, 2002 letter in support of the petition, in pertinent part, that:

[The beneficiary] will conduct the necessary research to determine the cause and[/]or effect of the diseases that the patient is exhibiting or prepare a complete analysis of the patient[']s infection or disorder.

In counsel's February 3, 2003 letter in response to the director's request for further evidence, counsel indicated:

Another area of the duties that [the beneficiary] will be involved in is assisting the clinic's dentists with the analysis of patients' records. He will examine patients' records to compose dental reports for the ultimate approval of the clinic's dentists. He will utilize his 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's] expertise in the area of dental medication will be utilized in suggesting to the dentist solutions as to patients' conditions.

Counsel further stated that the beneficiary would spend 40 percent of his time on duties relating to analysis of patients' records and assisting the clinic's dentists to make proper determinations and diagnosis. Counsel also noted that "[o]nly a person who has been formally trained in dental medicine can analyze a dentist's work and make recommendations as to improvement in diagnosis or treatment."

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 dental reports for the ultimate approval of the dentist," "[assist] the clinic's dentists with the analysis of patients' records," utilize his expertise in the area of dental medicine in suggesting to the dentist solutions as to patients' conditions, and "utilize his 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." 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 his 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.<sup>2</sup>

In addition, the petitioner stated in its May 1, 2002 letter in support of the petition that the beneficiary "will administer and direct the activities of the dental office in accordance with accepted national standards, administrative policies and OSHA compliance guidelines," and "will as needed, hire additional staff, fire and evaluate their work." Counsel added in the February 3, 2003 response to the director's RFE that the beneficiary "will hire additional staff as needed, and evaluate their work," "will coordinate dental care evaluation and develop criteria and methods for such evaluation/reports." Further, that the beneficiary:

[W]ill utilize his expertise in the field to manage the clinic's affairs in accordance with proper standards. He will analyze the clinic's practices and procedures and will compare them with the established national standards and administrative policies. He will confer with the clinical staff to formulate policies and recommend procedural changes.

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In the instant case, the position of Dental Specialist requires a strong dental background in order to attend to the complex duties involved. [The beneficiary] will be required to administer a dental program and formulate dental policies, standards and procedural changes in accordance with accepted national standards and administrative policies. He will also be required to confer with clinical staff to formulate policies. Such duties clearly exceed those of a normal Health Services Manager and require the knowledge and experience of a dental practitioner.

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<sup>2</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 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."

The AAO observes that the 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 is seeking the beneficiary's services to manage the petitioner's dental practice, as the above description of duties suggests, it appears that California law would also require licensure as a dentist.

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 prior statements in the record regarding the division of the duties of the position. Likewise counsel's assertion on certification that the duties of the proffered position are assisting the health professional and recommending effective methods of delivering health care services while the licensed professional remains responsible for patient diagnosis and treatment contradicts previous statements made on the beneficiary's behalf. 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 petitioner has not established that the beneficiary was eligible to perform the duties of the proffered position in California when the petition was filed or that the proffered position is a position that does not require a dental license. Accordingly, the AAO will not disturb the director's December 6, 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 December 6, 2006 denial of the petition is affirmed and the petition is denied.