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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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Services

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FILE: EAC 08 140 51549 Office: VERMONT SERVICE CENTER Date: NOV 03 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an orthodontist's office with one employee that seeks to employ the beneficiary as a patient coordinator and educator. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 because the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel submits a brief and the petitioner submits additional evidence.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner stated on the Form I-129 that it was established in 2005 and employs only one person, the orthodontist. It is seeking to employ the beneficiary as its patient coordinator and educator and lists the following job duties associated with the proffered position:

- Develop and implement organizational policies and procedures for patient coordination;
- Direct and evaluate work activities of dental personnel employed by the petitioner;
- Create and implement educational pre-operation and post-operation program for minor children who are candidates for bone reconstruction and problems;
- Create and implement educational program for minor patients with braces including but not limited to care of the braces, nutritional requirements and maintenance;
- Create and implement educational pre-operation and post-operation program for adult patients;
- Create and implement educational orthodontic program for adult patients;
- Develop and maintain computerized record management for each patient;
- Monitor the use of diagnostic services and staff to ensure effective use of resources and assess the need for additional staff, equipment and services; and
- Maintain awareness of advances in orthodontics and treatment equipment and research and provide cost effective options.

The petitioner stated that it required the holder of its proffered position to have "at least a Bachelor's degree or its equivalent and have work experience in the physician's offices," and opined further that "it is our company's policy and customary practice to require of the incumbent a "Bachelor's degree or its equivalent, to perform the professional duties of [the proffered position]."

The director found the initial evidence insufficient, and issued an RFE on April 24, 2008. The director asked the petitioner to submit evidence that highlights the nature and organizational structure of its operations because it appeared that the beneficiary would be performing non-specialty occupation duties.

In response to the RFE, counsel stated, in part, that the petitioner required the incumbent to have an educational background in education because as an orthodontics practice, it performed a higher degree of patient care than a general dental office. In a separate letter, the petitioner stated that it is both customary in the dental industry as well as its policy to require a bachelor's degree for the proffered position. Regarding its organizational structure, the petitioner stated that the beneficiary would be required to manage its other staff members, who include secretarial and staff assistants, which would make the proffered position supervisory and managerial in nature. The petitioner emphasized, however, that the majority of the beneficiary's time would be spent developing and implementing policies and procedures for patient coordination. Counsel likened the proffered position to that of a medical and health service manager as outlined in the Department of Labor's (DOL) *O\*Net Online* (O\*Net), and highlighted a portion from O\*Net that stated: "A bachelor's degree is the minimum formal education required for these occupations."

When denying the petition, the director did not concur with counsel that the proffered position was similar to a medical and health service manager. The director stated that the duties listed in the O\*Net for medical and health service managers had no similarity to the duties of the proffered position. The director concluded that, according to the listed duties, the beneficiary would need knowledge of dentistry only and not a bachelor's degree.

On appeal, counsel states that the director erred in denying the petition, and argues that the proposed position qualifies for classification as a specialty occupation under all four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). In support of counsel's arguments, the petitioner submits an expert opinion letter, letters from other orthodontic offices, a copy of the petitioner's lease, a financial summary for the petitioner, and copies of the medical and health service manager position description from DOL's *Occupational Outlook Handbook* (*Handbook*).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a

position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In determining whether a proposed position qualifies as a specialty occupation, United States Citizenship and Immigration Services (USCIS) looks beyond the title of the position. It determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the minimum of a baccalaureate degree in a specific specialty for entry into the occupation, as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In order to ascertain whether the duties of the proposed position support the petitioner's characterization of the position as a medical or health service manager, the AAO turns to the 2008-2009 edition of the *Handbook* for its discussion of that field. With regard to the duties of medical and health services managers, the *Handbook* states, in pertinent part, the following:

Health care is a business and, like every 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. These workers are either specialists in charge of a specific clinical department or generalists who manage an entire facility or system.<sup>1</sup>

The *Handbook's* reference to a medical and health service manager being a "generalist" who manages an entire facility or system could relate to the job that the petitioner describes - the petitioner has claimed that the beneficiary would supervise and manage staff as well as develop office policies, procedures and educational materials. The record, however, contains unexplained inconsistencies that call into question the veracity of the job description that the petitioner has put forth as relating to the proffered position. The petitioner stated on the Form I-129 and in its accompanying letter of support that it had one employee; the orthodontist. In contrast, when responding to the director's RFE, the petitioner stated that twenty percent of the beneficiary's time would be devoted to supervising and managing its secretarial and administrative staff. The petitioner did not explain how it went from being a sole practitioner to

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<sup>1</sup> *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed October 19, 2009).

an employer of multiple personnel from the time of the petition's initial filing until its response to the director's RFE. The petitioner did not submit any wage or income information to substantiate its claim of having more than one employee. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Based on the discrepant information, the AAO questions whether the job duties that the petitioner claims will be performed by the beneficiary are realistic given the lack of clarity in the record regarding the petitioner's organizational structure. Nevertheless, the AAO will analyze the proffered position as if the listed duties would be performed, as stated, by the beneficiary.

The AAO turns to the *Handbook's* description of the credentials required to gain entry into a medical and health services manager position:

***Education and training.*** Medical and health services managers must be familiar with management principles and practices. A master's degree in health services administration, long-term care administration, health sciences, public health, public administration, or business administration is the standard credential for most generalist positions in this field. However, a bachelor's degree is adequate for some entry-level positions in smaller facilities, at the departmental level within health care organizations, and in health information management. Physicians' offices and some other facilities hire those with on-the-job experience instead of formal education.<sup>2</sup>

The *Handbook's* discussion does not establish that a baccalaureate degree in a specific field, or its equivalent, would be the normal minimum entry requirement for a position like the one that the petitioner is offering. The AAO notes that, as an orthodontics office, the petitioner would be considered similar to a physician's office. As mentioned in the *Handbook*, medical and health service managers in physicians' offices typically possess on-the-job experience rather than a degree in a specific specialty. The AAO notes further that when discussing that a bachelor's degree may be an adequate educational credential to work in a smaller facility, the *Handbook* does not state that such degree must be in a specific specialty. Thus, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

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<sup>2</sup> *Id.*

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS include whether the *Handbook* reports that 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)).

As noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification. Nor has the petitioner submitted evidence that the industry's professional associations have made a degree a minimum requirement for entry.

In order to determine whether the degree requirement is common to the industry in parallel positions among similar organizations, the AAO has reviewed the letters from the petitioner's competitors as well as the expert opinion letter from [REDACTED] and finds them unpersuasive.

The three dentists who write letters in support of the petition all state that they require their patient coordinator and educator to possess a bachelor's degree; however, none of them asserts that the degree must be in a specific specialty, which is a required element for classification as an H-1B specialty occupation. Also noted is that at least one of the dentists operates a practice of five dentists, all of whom use one patient coordinator, while the organizational structure of the other two dentists' offices are unknown. Therefore, there is no evidence that the offices of these dentists are "similar" to the petitioner in scale of operations, business efforts, and expenditures. Simply 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)).

The AAO now turns to the expert opinion letter written by [REDACTED] at the University of Maryland, Robert H. Smith School of Business. [REDACTED] states that, based upon the duties listed by the petitioner, the position of patient coordinator and educator would be filled by a graduate with "a minimum of a Bachelor's Degree in Health Services or a related area, or the equivalent." Although [REDACTED] states that he came to the conclusions "[a]fter reviewing the responsibilities required by the offered position and the employer's business process," the record does not contain copies of the petitioner's "business process" on which [REDACTED] relied. 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)). Thus,

without evidence of the factual foundation on which ██████████ premised his conclusions, ██████████ opinion carries little weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).<sup>3</sup> For all of these reasons, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve supervising staff, maintaining records systems, and developing organizational procedures. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner. The petitioner, therefore, has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. While the petitioner states that it has a policy to hire only bachelor degreed individuals for this proffered position, the petitioner has no past hiring practices, as the beneficiary would be its first patient educator and coordinator. Therefore, the petitioner's stated "policy" is merely an employer preference, rather than a past practice of a hiring standard. Thus, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not a normal minimum entry requirement. The petitioner has failed to differentiate the duties of the proposed position from those described in the *Handbook* in any meaningful way and, as such, has failed to indicate the specialization and complexity required by this criterion. The evidence of record does not distinguish the duties of the proposed position as more specialized and complex than those of a position in a small office that could be filled by an individual who possesses on-the-job experience rather than a bachelor's degree in a specific field. As a result,

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<sup>3</sup> Although ██████████ states that the position requires someone with a bachelor's degree in health services or a related field, the beneficiary possesses a bachelor's degree in education. ██████████ evaluated the beneficiary's education and work experience to be equivalent to a bachelor's degree in health services, and stated that he has the authority to grant college-level credit for experience, training and/or courses; however, ██████████ did not provide any evidence from University of Maryland officials regarding his authority to grant such credit.

the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

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 sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.