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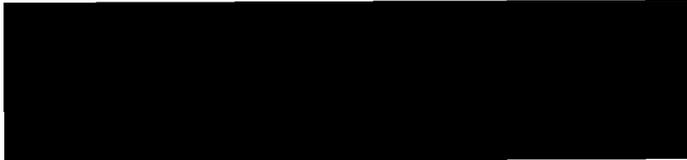
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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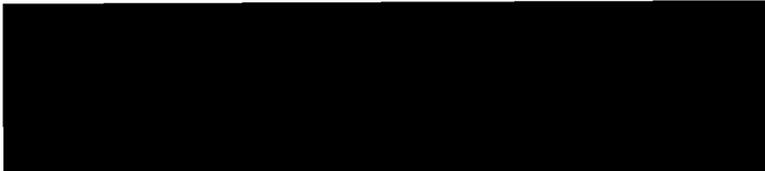
FILE: EAC 08 140 53834 Office: VERMONT SERVICE CENTER Date:

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 describes itself as a dental clinic and indicates that it currently employs 11 persons. It seeks to employ the beneficiary as a dental assistant trainer. 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 proffered position qualifies as a specialty occupation.

On appeal, counsel states, in part, that the proffered position is that of a dental assistant trainer, not a dental assistant. Counsel also states that U.S. Citizenship and Immigration Services (USCIS) has previously determined that a dental assistant trainer is a specialty occupation and is now contradicting itself. On the I-290B, signed by counsel on June 11, 2008, counsel checked the block indicating that he would submit a brief and/or evidence to the AAO within 30 days. To date, however, no additional evidence has been received by this office. The record therefore is considered complete.

When filing the I-129 petition, the petitioner described itself in its March 14, 2008 letter of support as a dental clinic that had expanded its operation and thus was “in need of a qualified individual to properly train and supervise its Dental Assistant staff.” The petitioner’s description of the proposed duties is paraphrased as follows:

- Train the petitioner’s dental assistants and assist its dentists in the examination, treatment and care of its patients;
- Organize, develop, or obtain training procedure manuals, guides, and course materials;
- Offer specific training programs to help dental assistants maintain or improve job skills;
- Monitor, evaluate, and record training activities and program effectiveness;
- Attend meetings and seminars to obtain information for use in training programs;
- Coordinate recruitment and placement of training program participants;
- Evaluate training materials prepared by instructors; and
- Develop alternative training methods if needed.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued a request for evidence (RFE) on April 28, 2008. In the request, the director asked the petitioner to submit additional evidence to demonstrate that the proffered position qualifies as a specialty occupation. The director then notified the petitioner that according to the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, there is no degree requirement for a dental assistant position.

In his May 7, 2008 letter submitted in response to the director's RFE, counsel states that the proffered position is that of a dental assistant trainer, not a dental assistant. Counsel also submitted a letter dated May 2, 2008 from the petitioner's president/owner, who stated, in part, that the proffered position is a specialized position that requires a degree in dentistry. As supporting documentation, the petitioner's president/owner submitted a job description for the proffered dental assistant trainer position.

On May 13, 2008, the director denied the petition. The director found that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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;
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 are 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 (5th 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 proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, 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.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by USCIS when determining these criteria include: whether the DOL's *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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The petitioner fails to establish the first criterion because the *Handbook*, 2010-11 edition, reports:

Many assistants learn their skills on the job, although an increasing number are trained in dental-assisting programs offered by community and junior colleges, trade schools, technical institutes, or the Armed Forces.

The *Handbook* also reports that some dental assistants become office managers, dental-assisting instructors, dental product sales representatives, or insurance claims processors for dental insurance companies.

Neither counsel nor the petitioner has explained or provided documentary evidence to establish how the beneficiary's work as a dental assistant trainer would require at least a bachelor's degree level of knowledge in a specific specialty.

There is also no evidence in the record to establish the second criterion: that a specific degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner fails to establish the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the petitioner's president and owner, who is a dentist, previously performed the duty of training the petitioner's dental assistants. [REDACTED] the owner and president of the dental clinic, would presumably have increased responsibilities in performing the duties of a dentist and running the dental clinic, in addition to performing the duties of training the dental assistants. The petitioner has not established that the position of [REDACTED] is similar to that of the proffered dental assistant trainer position. Further, USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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 regard, the petitioner fails to establish that the dental assistant trainer position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* indicates that many dental assistants/dental assistant instructors learn their skills on the job, although an increasing number are trained in dental-assisting programs offered by community and junior colleges, trade schools, technical institutes, or the Armed Forces. Thus, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on the ground that the proffered position does not qualify as a specialty occupation.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision is affirmed. The petition is denied.