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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



*D2*

Date: **JUL 17 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,  
  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the service center director, 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 provider of pediatric dental services. It seeks to employ the beneficiary as a dental assistant for a period of three years. 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, finding that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief in support of this contention.

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*.

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

*Specialty occupation* means an occupation which requires [(1)] 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 [(2)] 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 also 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 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 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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

Counsel for the petitioner indicated that the petitioner was formed in 1998, employed seven people, and had a gross annual income of approximately \$1 million. Counsel further claimed that the petitioner would like to employ the beneficiary as a dental assistant, and indicated that she had obtained a Doctor of Dental Medicine from the Centro Escolar University in the Philippines as well

as professional experience in the field. In addition to the support letter, counsel submitted a certified Labor Condition Application (LCA), copies of the petitioner's tax returns for 2007 and 2008, and the beneficiary's resume and educational transcripts.

The only description of duties offered for the proffered position was set forth in Section I of the H Classification Supplement to the petition, which stated that the beneficiary would "perform all pediatric dental assistant work in order to achieve the best possible treatment for primarily pediatric patients."

On August 6, 2010, the director issued an RFE, which requested a more detailed description of the work to be performed by the beneficiary as well as information pertaining to the petitioner's business. The director requested information pertaining to the beneficiary's specific job duties and the percentage of time devoted to such duties, as well as an organizational chart demonstrating the composition of the petitioner's company. The director also requested evidence such as documentation showing that similar businesses in the petitioner's industry imposed the same educational requirements for dental assistants.

In response, counsel for the petitioner submitted a letter dated September 7, 2010 that addressed the director's queries. Counsel explained that the petitioner was in "strong need" of "specialized personnel" due to the limited resources in Guam. Rather than providing a specific description of the duties the beneficiary would perform in the proffered position, counsel simply paraphrased the description of dental assistants and dental auxiliary/hygienist set forth in the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*. Counsel concluded by stating that the petitioner, a pediatric dentistry practice, required an individual who not only would assist the owner in simple duties such as handing instruments to the dentist and cleaning and polishing appliances, but also to perform more specialized clinical tasks. For the first time, the petitioner claimed (through counsel) that the beneficiary would initially be performing the tasks of a dental assistant but would later move on to perform more complex duties associated with that of a dental hygienist or dental auxiliary.

Counsel reiterated the petitioner's need for a dental assistant/auxiliary/hygienist, noting that this type of specialized personnel were not readily available on the island of Guam. Counsel concluded that, based on the beneficiary's education, equated by an educational evaluation to be the equivalent of a U.S. doctor of dental medicine, she was readily qualified to perform the duties of the proffered position.

On September 22, 2010, the director denied the petition. Specifically, the director concluded that the record did not establish that the proffered position met any of the four supplemental criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director found that the proffered position, which the director noted was changed to that of a dental hygienist in response to the RFE, did not satisfy any of the four supplemental criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel contends that the director's findings were erroneous.

As noted by the director in the denial, counsel for the petitioner sought to change the title of the proffered position from dental assistant to dental hygienist (with minimal dental assistant duties) in response to the RFE. The director accepted this change and adjudicated the petition as if the proffered position was a dental hygienist. This material alteration to the position title and duties of the proffered position, as well as the director's acceptance of this alteration, are erroneous.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. See 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. See generally *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The director denied the petition based on a finding that the proffered position was not a specialty occupation, since the *Handbook* did not indicate that at least a bachelor's degree in a specific specialty was required to perform the duties of the position. Although the director accepted the petitioner's amendment of the position title and duties to that of dental hygienist, the newly-claimed responsibilities and position title submitted in response to the RFE should have been rejected. Therefore, while the director was incorrect in permitting material changes to the position's title and duties in response to the request for evidence, the director also analyzed the job description/title, i.e., dental assistant, submitted with the initial petition in determining whether the proffered position was a specialty occupation, thereby rendering the director's error harmless in this matter.

The initial petition, letter of support, and certified Labor Condition Application (LCA) submitted in support of the petition all indicated that the proffered position was that of a dental assistant. Therefore, for purposes of this appeal, the AAO will only analyze the proffered position as that of dental assistant. If the petitioner would like the changed position to be considered, it must file a new petition. An appeal is not a proper basis to amend or file a new petition.

In reviewing the record, the AAO observes that 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.

To make its determination as to whether the employment described above qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty.

The petitioner initially described the position as that of a dental assistant. The AAO therefore turns to the 2012-2013 online edition of the *Handbook* for its discussion of dental assistants. As stated by the *Handbook*, the occupation of dental assistant is described as follows:

Dental assistants have many tasks, ranging from patient care to record keeping, in a dental office. Their duties vary by state and by the dentists' offices where they work.

#### Duties

Dental assistants typically do the following:

- Work with patients to make them comfortable in the dental chair and to prepare them for treatments and procedures
- Sterilize dental instruments
- Prepare the work area for patient treatment by setting out instruments and materials
- Help dentists by handing them instruments during procedures
- Keep patients' mouths dry by using suction hoses or other equipment
- Instruct patients in proper dental hygiene
- Process x rays and do lab tasks under the direction of a dentist
- Keep records of dental treatments
- Schedule patient appointments
- Work with patients on billing and payment

Assistants who do lab tasks, such as making casts of a patient's teeth, work under the direction of a dentist. They might prepare materials for a cast of teeth or create temporary crowns.

All dental assistants do tasks such as helping dentists with procedures and keeping patient records, but there are four regulated tasks that assistants may also be able to do, depending on the state where they work.

- Coronal polishing
- Sealant application
- Fluoride application
- Topical anesthetics application

Coronal polishing, which means removing soft deposits such as plaque, gives teeth a cleaner appearance. In sealant application, dental assistants paint a thin, plastic substance over teeth that seals out food particles and acid-producing bacteria to keep teeth from developing cavities. Fluoride application, in which fluoride is put directly on the teeth, is another anti-cavity measure. For topical anesthetics application, some dental assistants may be qualified to apply topical anesthetic to an area of the patient's mouth, temporarily numbing the area.

Not all states allow dental assistants to do these tasks. Each state regulates the scope of practice for dental assistants and may require them to take specific exams or meet other requirements before allowing them to do these procedures.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2012-13 ed.*, <http://www.bls.gov/ooh/healthcare/dental-assistants.htm#tab-2> (last visited July 10, 2012).<sup>1</sup> The stated duties of the proffered position appear akin to those of the proffered position as initially described, since the petitioner indicated that the beneficiary would perform "dental assistant work."

A review of the *Handbook's* education and training requirements for this occupation, however, indicates that it does not categorically require a bachelor's degree in a specific specialty or its equivalent for entry into the position. According to the *Handbook*:

There are several possible paths to becoming a dental assistant. Some states require assistants to *graduate from an accredited program and possibly pass a state exam*. In other states, there are no formal educational requirements. Most states regulate what dental assistants may do, but that varies by state.

*Id.* at <http://www.bls.gov/ooh/healthcare/dental-assistants.htm#tab-4> (last visited July 10, 2012). The *Handbook*, therefore, does not indicate that the occupation of dental assistant requires at least a bachelor's degree or higher in a specific specialty for entry into the field. In fact, the *Handbook* indicates that some states have no formal education requirements at all for entry into this occupational category. Accordingly, as the *Handbook* indicates that working as a dental assistant does not normally require at least a bachelor's degree in a specific specialty or its equivalent for entry into the occupation, it does not support the proffered position as being a specialty occupation.

For the reasons set forth above, the petitioner has failed to establish that it has satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Although the director requested evidence that would satisfy the two alternative prongs of this criterion, the petitioner failed to submit any document or other evidence that addresses these criteria. The petitioner has thus failed to establish the proffered position as satisfying either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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<sup>1</sup> Since the issuance of the director's decision, an updated version of the *Handbook* has become available.

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. As noted by the director, the petitioner submitted no evidence demonstrating that it previously employed a dental assistant or that it required such an employee to hold a bachelor's degree or higher in a specific specialty. Although established in 1998, the petitioner submitted no evidence outlining its hiring practices or history. Therefore, since the petitioner failed to demonstrate that it has previously hired specialty degreed individuals to fill the *proffered position in the past, the petitioner has not satisfied this criterion.*

Although the petitioner claims that the proffered position requires the incumbent to possess at least a bachelor's degree or higher in the field of dentistry, this claim is not persuasive. While a petitioner may believe or otherwise assert that a proffered position requires a specialty degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree in a specific specialty could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree in that specific specialty. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than dental assistant positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. The petitioner, through counsel, simply provides its own unsupported opinions with regard to the qualifications necessary for an individual to perform the duties of the proffered position. Moreover, the description of the duties of the proffered position does not specifically identify any tasks that are so specialized or complex that only a degreed individual could perform them. In fact, the duties of the proffered position are described so vaguely throughout the record that it is difficult to ascertain the exact nature of the beneficiary's tasks. The fact that the beneficiary gained experience working as a dentist and that her educational background has more than prepared her for the duties of the proffered position does not establish that this position is inherently more specialized or complex than other similar but non-specialty-degreed employment. It simply represents an attempt by the petitioner to underemploy the beneficiary in a low-paying position for which she is over-qualified.

Consequently, to the extent that they are depicted in the record, the duties have not been demonstrated as being so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Moreover, the petitioner has designated the proffered position as a Level II

occupation on the submitted Labor Condition Application (LCA), indicating that it is a dental assistant position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *See* Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). Therefore, it is simply not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

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.