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U.S. Citizenship  
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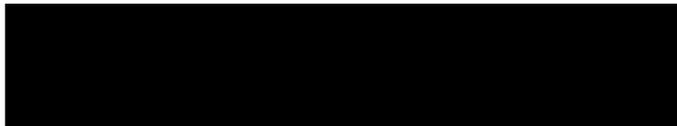
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FILE: WAC 02 058 53942 Office: CALIFORNIA SERVICE CENTER Date: MAY 21 2007

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.

*for*  
*Michael T. Kelly*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California 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 avers it operates a nursing home, has 45 employees, and a gross annual income of \$250,000. It seeks to employ the beneficiary as a food and nutrition planner. Accordingly, the petitioner 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 record of proceeding before the AAO contains: (1) the December 4, 2001 Form I-129 and supporting documentation; (2) the director's April 8, 2002 request for evidence (RFE); (3) prior counsel's May 6, 2002 response to the director's RFE; (3) the director's June 25, 2002 denial letter; (4) copies of the Form I-290B signed by new counsel and July 18, 2002 brief that do not contain a date stamp; (5) new counsel's July 22, 2002 Form G-28, Notice of Entry of Appearance as Attorney or Representative; (6) a June 30, 2002 letter from counsel notifying the director that the Form I-290B had been signed by counsel on July 24, 2002 and had been received by the Citizenship and Immigration Services (CIS) on July 25, 2002 and an attached tracking notification; (7) the director's September 23, 2002 notice of rejected appeal, stating the Form I-290B had been received July 31, 2002, thus was untimely and that the director would not treat the appeal as a motion to reopen or reconsider; and (8) a September 30, 2002 motion to reconsider asserting that the initial appeal had been timely filed. The AAO reviewed the record in its entirety before reaching its decision.

Preliminarily, the AAO finds that counsel timely submitted the initial Form I-290B on July 25, 2002. The record does not contain Form(s) I-290B showing a CIS date stamp confirming the date the Form I-290B was filed. Counsel has provided tracking information showing a package was delivered to CIS on July 25, 2002. In addition, the record contains information that the director sent a timely filed Form I-290B to counsel requesting that the Form I-290B be signed by the petitioner. The copies of the Form I-290B in the record show that the counsel of record had signed the Form I-290B on behalf of the petitioner. The AAO finds the information in the record sufficient to support counsel's contention that the appeal was timely filed. The AAO will consider the merits of the petition.

On June 25, 2002, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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;
- (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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply 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 (5<sup>th</sup> 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.

The petitioner states that it is seeking the beneficiary's services as a food and nutrition planner. In an October 15, 2001 letter appended to the petition, the petitioner stated that the beneficiary would be: "directly responsible for planning, directing and executing the food and nutrition services of the Center specifically in the following areas: volume food production, infection control/sanitation, resident nutrition care, menu development and modification, meal assembly, meal portion control, inventory management, and maintenance of food service equipment."

The petitioner added the tasks of the food and nutrition planner are:

- 1) Using the techniques and principles of advanced nutrition, food preparation and menu-planning, Beneficiary will design and implement a nutritionally balanced food service system that will individually address the nutritional requirements of the residents, including but not limited to breakfast, lunch and dinner.
- 2) In consultation with the Hospital Administrator, will prepare the daily menu and meal assembly of the residents, taking into consideration any special dietetic requirements prescribed by the physician of the facility.
- 3) Will strictly implement rules and regulations in the kitchen or other food preparation areas to ensure that meals are prepared in accordance to applicable state, federal and regulatory agencies that oversee infection control and food handling preparation.
- 4) Apply technical knowledge of purchasing management in the catering and hospitality industry to manage food inventory, portion and cost control.
- 5) Responsible for food, equipment and supply ordering, using seasonal products and new food trends, while incorporating the nutritional and clinical requirements of the residents in menu development.

In response to the director's RFE requesting additional evidence that the duties of the proffered position met one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner provided copies of six job announcements for the positions of: (1) food services manager for an assisted living facility requiring a bachelor's degree in food technology, food nutrition, hotel and restaurant management; (2) manager of nutritional services for a long-term care facility requiring a bachelor's degree in dietetics or hotel and hospitality management; (3) food and nutrition services manager for a healthcare services provider requiring a bachelor's degree in food service management or dietetics; (4) supervisor of hospital food and nutrition for a community hospital requiring a bachelor's degree in an unspecified field; (5) food and beverage director for an assisted living community preferring a college degree and requiring financial management experience; and (6) food and nutrition planner for a community hospital requiring a bachelor's degree in food and nutrition, hotel and catering management or related fields.

On June 25, 2002, the director denied the petition determining that the petitioner's description of the duties of the position corresponded most closely with that of a food service manager as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director noted that the *Handbook* reported that although food service and restaurant chains preferred to hire people with a degree, it is not a normal industry-wide minimum requirement for entry into the occupation. The director noted the submission of job announcements and the similarity of duties and facilities advertising but determined that the advertised positions' "requirements are quite different." The director also determined that the petitioner had not provided evidence that it normally required a degree for the proffered position and that the evidence did not demonstrate that the job required a baccalaureate degree to perform the duties described. The director concluded that the petitioner had not established that the job satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner asserts the director mischaracterized the proffered position in that the proffered position more closely resembles that of a dietician and nutritionist, an occupation that requires a four-year degree. Counsel also asserts that even if the position more closely resembles that of a food service manager, a food service manager is "normally" required to have a degree. Counsel also references the

Department of Labor's *O\*NET* and the JobZone rating of 4 and Specific Vocational Preparation (SVP) of 7-8 for dietitians, nutritionists, and food service managers and asserts that the ratings indicate at least a baccalaureate degree is required to perform the position.

Counsel indicates that a food nutrition planner is responsible for promoting the health of patients as well as controlling their diseases through diet and that the food service manager will evaluate the patients' needs, plan an appropriate menu, oversee the preparation of the food, and take charge of ordering the needed food and supplies. Counsel contends that although some of these tasks could be performed without a baccalaureate degree, it is the combination of tasks and the high level of responsibility involved that makes the proffered position so complex and unique that only someone with a degree can perform the tasks. Counsel also notes that the director did not explain or otherwise support his determination that the requirements of the proffered position were different from the six job announcements submitted, although the positions had similar duties and were from similar facilities.

Counsel also reiterates that although the petitioner is a newly established company and has not previously employed anyone in the proffered position, it is company policy to hire an individual with a bachelor's degree for the position of food and nutrition planner. Counsel asserts that the duties of the proffered position are far more complex and demanding than the duties listed in the *Handbook* and requires more responsibility, skill, and knowledge than those of a normal dietitian, nutritionist, and food service manager.

Counsel's assertions are not persuasive. The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* states the following with regard to the employment of food service managers.

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. . . . In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities.

\* \* \*

In most full-service restaurants and institutional food service facilities, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for all food preparation activities including running kitchen operations, planning menus, and maintaining quality standards for food service. . . . In smaller restaurants, formal titles may be less important, and one person may undertake the work of one or more food service positions.

\* \* \*

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies. . . . Managers also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control. Managers or executive chefs receive deliveries and check the contents against order

records. They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met.

\* \* \*

Managers also monitor the actions of their employees and patrons on a continual basis to ensure the personal safety of everyone. They make sure that health and safety standards and local liquor regulations are obeyed.

The petitioner indicated that the proffered position would include directing and executing the food and nutrition services of the center in conjunction with volume food production, infection control/sanitation, resident nutrition care, menu development and modification, meal assembly, meal portion control, inventory management, and maintenance of food service equipment. These duties of the proffered position encompass several types of general duties described in the *Handbook's* overview of the duties of a food service manager.

Likewise, the last three items in petitioner's list of duties of the proffered position correspond to portions of the *Handbook's* generally stated information regarding a food service manager. For example, implementing rules and regulations in the kitchen to comply with state, federal, and other regulatory agencies is similar to making sure health and safety standards are met. Managing food inventory, portion and cost control is similar to overseeing inventory, ordering food, equipment, and supplies, and estimating food needs. The responsibility for food, equipment, supply ordering and using seasonal products and identifying food trends is also similar to ordering food and maintaining equipment, and inspection of food quality.

As the director observed, regarding the educational requirements of food service managers, the *Handbook* reports:

Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest and aptitude.

The *Handbook* does not identify a particular avenue for entry into the field of food service management but rather identifies different methods, such as two and four-year programs, graduates with degrees in other fields but who have an interest and experience. The *Handbook* does not report that a baccalaureate degree in a specific discipline is a requirement to enter into a food service managerial position.

The *Handbook* states the following regarding the occupation of dietitians and nutritionists:

Dietitians and nutritionists plan food and nutrition programs and supervise the preparation of and serving of meals. They help to prevent and treat illnesses by promoting healthy eating habits and recommending dietary modifications, such as the use of less salt for those with high blood pressure or the reduction of fat and sugar intake for those who are overweight.

*Management dietitians* oversee large-scale meal planning and preparation in health care facilities, company cafeterias, prisons, and schools. They hire, train, and direct other dietitians and food service workers; budget for and purchase food, equipment, and supplies; enforce sanitary and safety regulations; and prepare records and reports.

The petitioner's general reference to designing and implementing a nutritionally balanced food service system and preparing a daily menu that considers special dietetic requirements suggests that the successful incumbent must have some understanding of diet and nutrition. In addition, according to the *Handbook*, management dietitians must also budget for and purchase food and have some responsibility for equipment and supplies and sanitary and safety regulations, as do food service managers and the individual that will be hired for the proffered position. The record in this matter does not provide sufficient definitive information regarding the proffered position to substantiate that the duties are primarily the duties of a dietitian or nutritionist. It is not possible to conclude from the petitioner's general description of the duties of the position, that the duties encompass a body of highly specialized knowledge attained through a four-year course of study in a specific specialty. Moreover, the *Handbook* indicates: "[o]f the 46 States and jurisdictions with laws governing dietetics, 31 require licensure, 14 require certification, and 1 requires registration. Requirements vary by State." If the petitioner in this matter is requiring the beneficiary to perform the duties of a dietitian, the record does not indicate the beneficiary has obtained the necessary licensure to perform those duties. See California Business and Professions Code Section 2585-2586.8. In this matter, the petitioner does not require the individual in the proffered position to have a license nor is there evidence in the record that suggests the beneficiary has obtained a dietitian's license. The petitioner's failure to require a license of the individual in the proffered position undermines its contention that the position encompasses the duties of dietitian/nutritionist.

The description of duties for the proffered position does not provide a comprehensive understanding of the daily activities of the petitioner's food and nutrition planner. It is not possible to ascertain whether the proffered position will primarily involve kitchen management as suggested by the petitioner's indication that the individual hired will be involved in volume food production, infection control/sanitation, menu development and modification, meal assembly, meal portion control, inventory management, and maintenance of food service equipment; or whether the proffered position will primarily include tasks associated with food and nutrition programs that require the theoretical and practical application of a body of highly specialized knowledge, and the 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 record is insufficient in this regard. The AAO is unable to conclude that the proffered position includes duties that encompass the duties of a specialty occupation.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. To adequately detail duties that directly relate to the petitioner's business, the record must contain evidence sufficient to provide an understanding of the petitioner's business. In the instant matter, the petitioner states that it employs 45 individuals; however the record does not contain evidence substantiating the petitioner's employment of 45 employees. The record does not include the number of beds in the petitioner's facility or the number of food handlers and kitchen staff. The record is unclear regarding the actual duties of the proffered position as those duties relate to the petitioner's other staff and their routine duties. The petitioner does not provide evidence of its organizational hierarchy or otherwise define the duties of its other

employees. The record does not provide a description of the duties of the proffered position as those duties relate to the petitioner's nursing home business sufficient to assess how the individual in the proffered position interacts with other employees, patients, and the public. The petitioner does not adequately describe how it will utilize the services of a food and nutrition planner in its nursing home facility. The AAO acknowledges that the size of the petitioner is not dispositive; however, it is relevant as a factor when considering whether the duties of a particular position will require the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. The duties of a proffered position combined with the position title and business size are all components in the H-1B visa petition analysis. CIS must examine the interplay among the petitioner, the job, and the industry when making its determination; and, it is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. *EG Enterprises, Inc. v. Department of Homeland Security*, 2006 WL 3770781 (E.D. Mich.). The record in this matter lacks sufficient detail in regard to the petitioner to conclude that the generally stated duties of the proffered position require the knowledge of an individual with a bachelor's degree or higher in a specific discipline.

The AAO acknowledges counsel's reference to the *O\*NET* and the JobZone rating and SVP ratings. However, the AAO does not consider the *O\*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O\*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of a food and nutrition planner as broadly described by the petitioner would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The petitioner in this matter has not sufficiently described the duties of the proffered position so that CIS can assess whether the position encompasses the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. 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 petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish the first prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel on appeal references the six job announcements previously submitted. The AAO acknowledges that the director's analysis of the six job announcements is deficient. A review of the six job announcements finds that each job announcement is from a nursing home type facility or a hospital; however the job announcements do not contain information identifying the number of beds in the facility or the number of employees. It is not possible to compare the petitioner's facility with any one of the advertising organizations, as the job advertisements do not describe the size of the advertisers. The petitioner likewise has not provided information regarding the size of its

facility. The petitioner has not established that it is similar to any of the organizations advertising for various positions in the food and nutrition area.

In addition, each of the job advertisements contains a brief description of the job duties, similar to the petitioner's brief and general job description of its proffered position. Without a meaningful job description, the petitioner may not establish the proffered position's duties as parallel to any of the job announcements requiring degree holders for the advertised positions. Further, two of the six job announcements do not require a degree in a specific discipline, a requirement to establish the occupation as a specialty occupation; and a third is for a community hospital, a business sufficiently dissimilar from the petitioner on its face to eliminate it from consideration. Thus, the six job announcements submitted when reviewed as a whole do not establish the proffered position's duties as parallel to any degreed positions within similar organizations.

Likewise, the petitioner cannot distinguish its position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prong of the second criterion. Absent a detailed listing of the expected duties the petitioner cannot establish which duties are more complex or unique than duties pertaining to similar, but non-degreed, employment, and thus require the theoretical and practical application of a body of highly specialized knowledge associated with the attainment of a bachelor's or higher degree in a specific specialty. The record does not contain evidence that shows the proffered position is so complex or unique that only an individual with a degree in a specific discipline can perform the duties of the petition. The petitioner has, accordingly, failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO notes counsel's assertion that it is the petitioner's policy to hire only degreed individuals for the proffered position. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this matter, as the petitioner was a relatively new business when the petition was filed and had not previously employed a food and nutrition planner, its past employment practices cannot provide probative information.

The AAO observes further that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree 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. The AAO again finds that it is not possible to discern from the petitioner's general description of the duties of the proffered position that the duties would require the attainment of a specific baccalaureate degree. 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.

Counsel asserts that the duties of the proffered position are far more complex and demanding than the duties listed in the *Handbook* and requires more responsibility, skill, and knowledge than those of a normal dietician, nutritionist, and food service manager. The AAO finds that the generally described duties of the proffered position do not exceed the scope of those performed by a food service manager, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), namely, 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. The petitioner has not provided a sufficiently detailed description of specific duties of the proffered position to establish that the beneficiary would perform the work of a dietitian or a nutritionist. Moreover, the record does not contain evidence that the beneficiary is licensed to perform the duties of a dietitian, which suggests that the petitioner only requires an individual that can perform the duties of a food service manager, a position that does not require a bachelor's degree. Although the petitioner may require the successful candidate to have a general understanding of diet and nutrition, such a general requirement is insufficient to elevate the position to one usually associated with a four-year degree in the specific field of diet and nutrition. As reflected in this decision's earlier comments about the generality of the information in the record regarding the position and its duties, the petitioner has not developed the proposed duties with sufficient specificity to establish either a specific body of highly specialized knowledge that the beneficiary would have to apply or a particular educational level usually associated with such knowledge. Accordingly, the petitioner has not proved that the position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, 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.

The petition will be denied and the appeal dismissed for the above stated 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.