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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: SRC-01-238-53297 Office: Texas Service Center

Date: MAR 13 2003

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



**PUBLIC COPY**

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is an assisted living retirement facility with 47 employees and a gross annual income of \$1,400,000. It seeks to employ the beneficiary as a nutritionist for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, the petitioner submits a brief.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), the term "specialty occupation" is defined 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.

The director denied the petition because the petitioner had not demonstrated that a baccalaureate degree is required for the proffered position, or that the beneficiary holds the proper State licensing to be employed as a nutritionist in North Carolina. On appeal, the petitioner's vice president states, in part, that the beneficiary, in the capacity of a food service supervisor and licensed N.C. dietitian, would increase the competitive advantage of the petitioner's business. He further states that the beneficiary's application for licensing as a N.C. dietitian is still pending with the North Carolina Dietetic Association.

The petitioner's statement on appeal is not persuasive. The Bureau does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Bureau considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

\* evaluate and analyze company requirements and goals in relation to marketing and promotional matters, hinging on dining related concerns, as well as those which relate to

the end result of helping clientele live, longer, healthier and more enjoyable lives;

\* design and implement operating systems relating to the provision of health care and nutrition, and lifestyle enhancing amenities, within the specific context of a business initiative which hinges on an ability to amalgamate medical issues with more hedonistic concerns;

\* plan and put into effect specific initiatives designed to maximize the Company's ability to establish a presence and reputation in the high end market sector we seek to dominate;

\* develop and enhance our operational ability to combine healthy living with enjoyable living for our clientele;

\* work on ensuring that the Company's business activity and product are on the cutting edge of such trends, while ensuring that the avenues we choose to utilize, in that regard, are not completely untried, or capable of proving to be too experimental in nature[.]

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Bureau does not agree with the petitioner's argument that the beneficiary is a "dietitian/nutritionist," an occupation that would normally require a bachelor's degree in dietetics, foods

and nutrition, food service systems management, or a related field. In its *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, at page 252, the Department of Labor (DOL) describes the jobs of dietitians and nutritionists, in part, as follows:

Dietitians and nutritionists plan food and nutrition programs, and supervise the preparation and serving of meals. They prevent and treat illnesses by promoting healthy eating habits and suggesting diet modifications...

Dietitians run food service systems for institutions such as hospitals and schools, promote sound eating habits through education, and conduct research.

*Management dietitians* oversee large-scale meal planning and preparation in healthcare 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 record reflects that the petitioner, which is an assisted living retirement business, employs 47 persons and has a gross annual income of 1,400,000. Although the petitioner is a business that may require the services of dietitian/nutritionist, there is no evidence that the position offered includes such complex duties as conducting research, hiring, training, and directing other dietitians, budgeting, and preparing records and reports.

The duties that the petitioner endeavors to have the beneficiary perform are primarily those of a food service manager and a marketing manager. In contrast to the description of an dietitian/nutritionist, at page 55 of the *Handbook*, the DOL describes the position of a food service manager, in part, as follows:

In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation and service, managers now are responsible for a growing number of administrative and human resource tasks.

At page 27 of the *Handbook*, the DOL also describes the position of a marketing manager, in part, as follows:

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine the demand for products and

services offered by the firm and its competitors. In addition, they identify potential markets . . . Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firms's customers are satisfied.

The types of duties the petitioner ascribes to the beneficiary fall within the scope of a food service manager position and a marketing manager position rather than a dietitian/nutritionist position. For example, the petitioner states that the beneficiary will "design and implement operating systems relating to the provision of health care and nutrition, and lifestyle enhancing amenities, within the specific context of a business initiative which hinges on an ability to amalgamate medical issues with more hedonistic concerns" and "plan and put into effect specific initiatives designed to maximize the Company's ability to establish a presence and reputation in the high end market sector we seek to dominate...." Such duties fall primarily within the scope of a food service manager position and a marketing manager position. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty such as nutrition, for the offered position. Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed 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 failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the description of a food service manager and a marketing manager, rather than a dietitian/nutritionist. At page 55 of the *Handbook*, the DOL finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a food service manager. Most food service management companies and national or regional restaurant chains recruit management trainees from 2 and 4-year college hospitality management programs. In addition, some restaurant and food service manager positions, particularly self-service and fast food, are filled by promoting experienced food and beverage preparation and service workers. Also in the *Handbook*, at page 28, the DOL finds no requirement of a baccalaureate or higher degree in a specific specialty for employment in marketing managerial jobs. A wide range of educational backgrounds are suitable, but many employers prefer those with experience in related occupations plus a broad liberal arts background. In

addition, most marketing management positions are filled by promoting experienced staff or related professional or technical personnel. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. For this reason, the petition may not be approved.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record indicates that the beneficiary's application to be licensed as a dietitian in the State of North Carolina is still pending with the North Carolina Dietetic Association. Pursuant to 8 C.F.R. § 103.2(b)(12), an application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. For this additional reason, the petition may not be approved.

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.