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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[redacted]

FILE: WAC 98-204-52026 OFFICE: CALIFORNIA SERVICE CENTER DATE: OCT 16 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

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 Citizenship and Immigration Services (CIS) 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 of the California Service Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is back before the AAO on a motion to reconsider. The motion is granted. The previous decisions of the director and AAO are affirmed. The petition is denied.

The petitioner sells herbal food products and ayurvedic foods, employs five persons, and has a gross annual income of $170,000. It seeks to employ the beneficiary as an herbal food consultant. The director denied the petition because the proffered position is not a specialty occupation. The AAO affirmed the director's decision and additionally added that the beneficiary was not qualified to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must:

> state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law of Bureau policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must: "state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

On motion, counsel reiterates past legal discussions and asserts that the AAO incorrectly denied the petition because: (1) the proffered position is equivalent to a dietitian, nutritionist and health service consultant; (2) the 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 or its equivalent; (3) a degree in ayurvedic medicine is the equivalent of a bachelor of science degree in health promotion and disease prevention; and (4) the petitioner obtained an approval for another similar position from Citizenship and Immigration Services (CIS) so further explanation should be provided in denying the instant petition. A new credential evaluation is submitted as new documentary evidence. Thus, counsel's motion is a motion to reconsider and/or reopen proceedings under 8 C.F.R. §§ 103.5(a)(2) and (3).

With regard to the first issue raised by counsel, namely, that the proffered position is equivalent to a dietitian, nutritionist and health service consultant, this appears to be a reference to the adjudication of various criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

A review of the record of proceeding shows that counsel's assertion cannot be established.

In its initial petition, the petitioner described the duties of the proffered position as follows: "Consult with and advise employer on ayurvedic foods, herbs, and herbal products[; and] [s]uggest new products, product improvements, and promotions for employer use." The petitioner submitted a copy of the beneficiary's bachelor's degree in ayurvedic medicine and surgery from Kurukshetra University in India with a credential evaluation stating that the beneficiary has the equivalent of a U.S. bachelor's degree with a major not offered in the United States.

Subsequent to the filing of the petition, the director requested from the petitioner a detailed job description, including specific job duties, level of responsibilities, and types of employees supervised; the minimum education, training, and experience necessary to do the job; an explanation why the work to be performed requires applicants to have a minimum of a baccalaureate or higher degree or equivalent; and evidence that a degree is common within the industry.[1] In response to this request, the petitioner's prior counsel provided the following additional job description:

> Ayurvedic herbal food supplements are prepared using specific proportions of different raw herbs. In order to determine the quality and quantity needed in the herbal food supplements, an Ayurvedic specialist is necessary. [The petitioner] specifically requires that their Ayurvedic specialist have a Bachelor's degree in Ayurvedic Medicine and the completion of a one-year internship at a hospital. An Ayurvedic degree is not available at this time in universities in this country. Therefore, [the petitioner] is forced to hire Ayurvedic specialists from overseas.
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> Additionally, [the petitioner] needs a full time herbal food consultant because they [sic] need someone who will advise them [sic] of the consequences and effects of certain herbs, research the effectiveness of new products, suggest product improvements, and help with the promotion of this alternative form of medicine.

On appeal, the petitioner, through current counsel, submitted the

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[1] The director also sought information concerning the beneficiary's maintenance of lawful status and the petitioner's size and financial solvency, which will not be discussed in this decision.

following: (1) declaration of the petitioner; (2) two expert opinions evaluating the beneficiary's credentials; (3) informational materials explaining the ayurvedic health system; and (4) a copy of an H-1B approval notice for a different ayurvedic health consultant issued to the petitioner.

The petitioner's declaration on appeal states that it provides "services and sales of Ayurvedic herbs to health food stores and herbal distribution companies." Additionally, the petitioner declares the following:

> Prior to selling any products, it is necessary to understand the nature of the ailment and the purpose of the herbal therapy in relation to the individual's body size, metabolic composition and also his or her psychological temperament. Knowledge of these variables is then applied to determine the specific combination of Ayurvedic herbs, as well as the quantities which are required for the individual's body type as part of an overall health plan. The consultant will help develop and promote a healthy lifestyle with the aid of food and herbal supplements.

Much of the informational material submitted by the petitioner on ayurvedic health indicates that it is considered a complementary alternative medicine (CAM) without acceptance by traditional medical practitioners in the United States. The petitioner's evidence shows that the National Institute of Health is researching CAM's viability, but to date has not made conclusions or endorsements to validate CAM. The petitioner's evidence also shows that some medical schools are beginning to add some CAM courses to their curricula. The petitioner's exhibit 9 from the *Vegetarian Times* provides the following information about ayurvedic medicine: "Because Ayurvedic medicine is fairly new to the U.S., no national certification board exists for Ayurvedic physicians, and most states currently offer no licensing." Thus, the AAO notes that ayurvedic medicine has not been validated as a health, science, or medical profession in the United States subject to regulation and licensure.

Nothing in the materials submitted by the petitioner establishes that the position offered to the beneficiary is a specialty occupation. Counsel confuses the issues by focusing on the beneficiary's credentials as support for the complexity of duties to be performed in the proffered position. In his motion to reconsider, counsel refers to expert opinions that attempt to identify an equivalent U.S. occupation for individuals with an ayurvedic academic background. For example, one expert opinion written by [redacted] M.D., M.S., Doctor of Ayurveda and Professor of Neurology at the U.S.C. School of Medicine, stated

that:

> A consultant with the equivalent of a Bachelor's Degree from an Indian college in Ayurvedic therapy is most like our professional dietitians, nutritionists, and health services consultants who regularly advise clients on improving and maintaining a healthy lifestyle[.] In the same way that a dietitian or nutritionist advises clients on how to improve their diet and lifestyle choices, an Ayurvedic consultant first determines a client's metabolic body type, and then inquires as to the individual's lifestyle including regular physical activity, food regime and vitamin intake, as well as background information on any conditions or ailments from which the client suffers. The Ayurvedic consultant then advises on the best way to improve physical and overall health, structuring a therapy plan that may include the use of Ayurvedic herbs. . . .

Dr. [redacted] opinion was general and referenced the capability of an individual with an ayurvedic degree to perform occupational duties similar to a dietitian or nutritionist in the United States. Dr. [redacted] opinion did not assess the description of duties proffered by the petitioner with respect to the herbal food consultant position. In his opinion, Dr. [redacted] did not state that the petitioner's proffered position is equivalent to a dietitian, nutritionist or health service consultant position.

The herbal food consultant position does not describe any duties that rise to the level of a dietitian or nutritionist. The Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*), 2002-2003 Edition, describes the duties of a dietitian and nutritionist at page 252 as follows:

> Dietitians and nutritionists plan food and nutrition programs, and supervise the preparation and serving of meals. They help prevent and treat illnesses by promoting healthy eating habits and suggesting diet modifications, such as less salt for those with high blood pressure or reduced fat and sugar intake for those who are overweight.
>
> Dietitians run food service systems for institutions such as hospitals and schools, promote sound eating habits through education, and conduct research. Major areas of practice include clinical, community, management, and consultant dietetics [sic].

> *Clinical dietitians* provide nutritional services for patients in institutions such as hospitals and nursing homes. . . . .
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> *Community dietitians* counsel individuals and groups on nutritional practices designed to prevent disease and promote good health. Working in places such as public health clinics, home health agencies, and health maintenance organizations, they evaluate individual needs, develop nutritional care plans, and instruct individuals and their families.
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> ....
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> *Management dietitians* oversee large-scale meal planning and preparation in healthcare facilities, company cafeterias, prisons, and schools.
>
> *Consultant dietitians* work under contract with healthcare facilities or in their own private practice. They perform nutrition screenings for their clients, and offer advice on diet-related concerns such as weight loss or cholesterol reduction. Some work for wellness programs, sports teams, supermarkets, and other nutrition-related businesses. They may consult with food service managers, providing expertise in sanitation, safety procedures, menu development, budgeting, and planning.

According to the *Handbook* at page 253, many states require licensing or certification for dietitians and nutritionists. The State of California, the employment location for the proffered position, requires a license for individuals to conduct themselves in those occupations. However, the petitioner did not require a license for the proffered position.

The description of duties provided by the petitioner renders the position a general manager position or a product demonstrator/promoter for retail sales. The position involves selling herbal supplements for profit, not clinical diagnosis, and treatment of physical ailments through diet and nutrition.

The Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*), 2002-2003 edition, describes general managers at page 86 as those who:

> [p]lan, direct, or coordinate the operations of companies or public and private sector organizations. The duties include formulating policies, managing daily operations, and planning the use of materials and human

> resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services.

The *Handbook* at page 356 describes a product demonstrator/promoter as follows:

> Demonstrators and product promoters create public interest in buying a product by demonstrating it to prospective customers and answering their questions. They may sell the demonstrated merchandise, or gather names of prospects to contact at a later date or to pass on to a sales staff. *Demonstrators* promote sales or a product to consumers, while *product promoters* try to induce retail stores to sell particular products and market them effectively. Product demonstration is an effective technique used by both to introduce new products or promote sales of old products because it allows face-to-face interaction with potential customers.
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> Demonstrators and product promoters build current and future sales of both sophisticated and simple products. . . .[t]hey inform and educate customers about the features of products and demonstrate their use with apparent ease to inspire confidence in the product and its manufacturer. They also distribute information. . . .
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> . . . .
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> Demonstrations and product promotions are conducted in retail and grocery stores . . . .

The duties of a general manager or product demonstrator/promoter reflect the petitioner's described duties in its initial petition and declaration on appeal. Prior counsel's elaboration of duties in response to the director's request for additional evidence is discounted since assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1998); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The proffered position focuses on sales, promoting petitioner's products, and generally managing the retail store. The proffered position does not describe clinical modalities of diagnosing and treating patients with ailments but rather selling consumers health food supplements.

Another reason why CIS is not persuaded to classify the offered position as a dietitian or nutritionist relates to the type of

industry in which the beneficiary would be employed and the lack of license requirements. At page 252 and as noted above, the *Handbook* indicates that dietitians or nutritionists typically work in hospitals and schools, nursing homes, correctional facilities, public health clinics or health maintenance organizations, or in private practice. The *Handbook* made no mention of dietitians or nutritionists working for retail stores profiting from the sale of herbal supplements and health food. However, according to the *Handbook*, general managers and product demonstrators/promoters are employed by retail stores.

The *Handbook* clearly shows that general manager or product promoter/demonstrator positions do not require a bachelor's degree in a specific field of study to enter into the position. At page 87, the *Handbook* describes the following as training and educational requirements for general managers:

> The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts. . . .
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> . . . .
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> Since many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many are promoted from within the organization. In industries such as retail trade . . ., for instance, it is possible for individuals without a college degree to work their way up within the company and become managers.

The *Handbook* at page 358 describes the following as training and educational requirements for product demonstrators/promoters:

> Training usually is short-term, occurring over a period of days or weeks. Postsecondary education, while helpful, usually is not required. About 55 percent of these workers have no more than a high school diploma.
>
> Demonstrators and product promoters usually receive on-the-job training. Training is primarily product-oriented because a demonstrator must be familiar with the product to demonstrate it properly. . . . Experience with the product or familiarity with similar products may be required for demonstration of complex products. . . .

Instead of specifying a specific field of study required to enter

into a general manager or product demonstrator/promoter position, the *Handbook* delineates a multitude of educational backgrounds that could be preferred but not required by prospective employers. Additionally, individuals with a high school diploma may be hired into a general manager or product promoter/demonstrator position. Therefore, with respect to the position's characterization, the AAO correctly interpreted the evidence on the record. The petitioner has not established that the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

With regard to counsel's second assertion that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties are usually associated with the attainment of a baccalaureate or higher degree or its equivalent, a review of the record of proceeding shows that counsel's assertion cannot be established. The petitioner describes a position requiring the beneficiary to converse with consumers of health food and herbal supplements to increase sales. The petitioner does not describe a clinical environment with diagnostic or treatment responsibilities or facilities, nor does it describe duties equivalent to a dietitian or nutritionist. Additionally, the petitioner does not require a license or certificate for the beneficiary to function as the equivalent of a dietitian or nutritionist. Therefore, with respect to the complexity of the position's duties, the AAO correctly interpreted the evidence on the record. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

With regard to counsel's third assertion that the beneficiary has the equivalent of a bachelor of science degree in health promotion and disease prevention, a review of the record of proceeding shows that counsel's assertion cannot be established. To date, the record does not contain documentary evidence that establishes that the beneficiary has the equivalent of a bachelor of science degree in health promotion and disease prevention.

As noted above, one expert opinion submitted into evidence concerning the qualifications of the beneficiary was written by [redacted] M.D., M.S., Doctor of Ayurveda and Professor of Neurology at the U.S.C. School of Medicine. Dr. [redacted] opinion is general and states the following:

> [A]lthough [ayurvedic medicine] would not be considered as a medical degree, the underlying courses of study and educational requirements are nevertheless equivalent to [a] Bachelor['s Degree required for other non licensed health care professionals. The closest equivalent degree in the United States is a

> Bachelor of Science in Health Promotion and Disease Prevention.

Dr. [redacted] evaluated the beneficiary's specific educational qualifications as "equivalent to a US Bachelor's Degree[sic] at an accredited institution with a major that is not offered in this particular form." Thus, Dr. [redacted] did not equate the beneficiary's specific academic credentials to the equivalent of a bachelor of science degree in health promotion and disease prevention.

The other expert opinion is written by [redacted] D.C., for whom no credentials are provided to ascertain his level of expertise. Mr. [redacted] provided additional details about what ayurvedic consultants do, but again does not assess the specific position's duties described by the petitioner. Thus, this opinion is given little weight.

Additionally, on motion to reopen and reconsider, new evidence is presented. The new evidence is a credential evaluation submitted by Morningside Evaluations and Consulting and written by [redacted] CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Dr. [redacted] a professor of mathematics, stated the following concerning the beneficiary's credentials:

> On the basis of the credibility of Kurukshetra University, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that [the beneficiary] has attained the equivalent of a Bachelor of Medicine Degree with a concentration in Homeopathic Medicine from an accredited institution of higher education in the United States.

A search of the Internet does not indicate that any accredited U.S. colleges or universities offer a bachelor degree in medicine with a major in homeopathic medicine.[2] Additionally, Dr. [redacted] does not explain how ayurvedic medicine and homeopathic medicine are related. Without evidence concerning ayurvedic

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[2] A pre-medical degree is offered at a bachelor degree level; a medical degree is offered at a doctoral level; and alternative health degrees are offered at a master and doctoral level.

medicine's equivalency to homeopathic medicine, and how a professor with a specialty in mathematics would be able to make that assessment, the AAO is unable to determine how much weight to give to Dr. [redacted] credential evaluation. The evaluation's failure to provide context and reference, coupled with a lack of evidence of an accredited U.S. college or university offering a bachelor degree in medicine with a concentration in homeopathic medicine, there is no evidence in the record that the beneficiary holds 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 as required under 8 C.F.R. § 214.2(h)(4)(iii)(C).

A credential evaluation was submitted with the petitioner's initial evidence. That evaluation, along with Dr. Mishra's expert opinion and copies of the beneficiary's academic credentials, indicates that the beneficiary does not have the equivalent of a bachelor's degree from an accredited college or university because such a degree is not offered in this country. The record does not contain evidence that the beneficiary's educational background is the equivalent of a bachelor's degree in health promotion and disease prevention. Thus, counsel has not established his third assertion that the beneficiary's degree has an equivalency to a bachelor of science in health promotion and disease prevention. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform in a specialty occupation under 8 C.F.R. §§ 214.2(h)(4)(iii)(C) or (D).

Counsel does not establish his fourth assertion that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another similar petition in the past. This record of proceeding does not contain all of the supporting evidence submitted to the California Service Center in the prior referenced case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether that petition is parallel to the proffered position. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the Bureau is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Upon review of the issues raised in the motion to reopen and reconsider, the petitioner has not sustained the burden of overcoming the legal basis for the initial decision.

ORDER: The motion to reopen and reconsider is granted. The prior AAO decision, dated December 14, 2000, is affirmed. The petition is denied.