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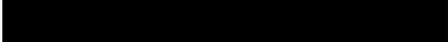
U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 137 51348 Office: CALIFORNIA SERVICE CENTER Date: **OCT 03 2005**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 operates two residential care facilities. It seeks to hire the beneficiary as a dietician. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation and that the beneficiary was qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The first issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

Citizenship and Immigration Services (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 (5th Cir. 2000). The critical element is not the title of the position nor 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 dietician. Evidence of the beneficiary’s duties includes: the Form I-129, a March 23, 2003 letter of support from the petitioner and counsel’s response to the director’s request for evidence. According to this evidence, the beneficiary would perform duties that entail consulting with residents’ physicians and health care providers to determine nutritional needs and restrictions; assess residents’ physical conditions in order to develop appropriate diets; assessing nutritional needs based on such specialized areas as overweight, renal disease, hypertension, diabetes, critical illness, stroke, gastric disorder, and pulmonary heart disease; developing nutritional restriction on case by case basis such as low salt, low calorie, high calorie, salt free, sugar free, caffeine free, allergy, high fiber, low fiber, reduced fat, protein count, etc.; developing food program in conjunction with physicians and healthcare providers; developing food chart and food plan for individualized and group menus; developing meal and snack menus and timetables; overseeing conformance with dietary frequency and requirements; overseeing food production and cooking staff to ensure compliance with nutrition plan; instructing cooking staff in preparation of special foods (e.g. sugar free desserts, fat-free baking and cooking alternatives, high protein high calorie food preparation for rehabilitative therapy); inspecting food for conformity with meal plan diet and palatability and appearance; instructing residents on nutritional therapy and explaining need for special diets. The petitioner indicated that it required a bachelor’s degree in nutrition for the proffered position.

The director issued a first request for evidence that the proffered position meets one of the above listed criteria. Additionally, the director requested a copy of the petitioner’s tax returns for the last two years and a copy of its business license. The director requested the beneficiary’s original degree and transcripts. In response, counsel contended that a clinical dietician was a specialty occupation as discussed in the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) and submitted copies of relevant pages from the *Handbook*. The petitioner provided copies of its 2001 and 2002 Federal Income Tax Returns. The petitioner submitted a copy of its licenses to operate two residential facilities.

The director issued a second request for evidence of licensure. The director requested a copy of the beneficiary’s valid dietician license for the State of California. The director requested that if the beneficiary is not in possession of a permanent unrestricted license, to submit a temporary license, interim permit or other authorization issued by the authority that authorizes the beneficiary to practice the profession. The director

noted that in the alternative, the petitioner could submit evidence that the alien may practice the profession without a license or under the direction of licensed professional. In response, counsel stated that the beneficiary was in the process of obtaining her license for the State of California through the Commission of Dietician Registration. Counsel requested that CIS approve the H-1B petition for one year and that at the time of the H-1B extension the beneficiary will submit evidence of the required license. As an alternative, the petitioner requested an additional 60 days so that it may properly respond to the request.

The director denied the petition and found that the majority of the duties described by the petitioner reflect the duties of a personal and home care aide. The director determined that the proffered position was not a specialty occupation. Additionally, the director noted that the petitioner asserted that the beneficiary would be employed as a clinical dietician. The director determined that the beneficiary did not hold the required State of California Dietician license/certification; therefore, the petitioner had not established that the beneficiary is eligible to fully practice the specialty occupation.

On appeal, counsel asserts that the proffered position is that of a clinical dietician and therefore is a specialty occupation. Counsel refers to the description of dietician in the *Handbook*

Based on the record of proceeding, the AAO has determined that the proffered position is most similar to that of clinical dietician. According to the *Handbook*, clinical dietitians provide nutritional services for patients in institutions such as hospitals and nursing care facilities. Dieticians assess patients' nutritional needs, develop and implement nutrition programs, and evaluate and report the results. It is noted in the *Handbook* that dieticians also confer with doctors and other healthcare professionals in order to coordinate medical and nutritional needs. Some clinical dietitians specialize in the management of overweight patients or the care of critically ill or renal (kidney) and diabetic patients. In addition, clinical dietitians in nursing care facilities, small hospitals, or correctional facilities may manage the food service department.

With respect to the educational qualifications required of dieticians and nutritionists, the *Handbook* states:

Dietitians and nutritionists need at least a bachelor's degree in dietetics, foods and nutrition, food service systems management, or a related area. Of the 46 States and jurisdictions with laws governing dietetics, 30 require licensure, 15 require certification, and 1 requires registration. The Commission on Dietetic Registration of the American Dietetic Association (ADA) awards the Registered Dietitian credential to those who pass a certification exam after completing their academic coursework and supervised experience.

Consequently, the petitioner has established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the clinical dietician position. The finding by the director that the proffered position is not a specialty occupation will be withdrawn.

The second issue to be considered is whether the beneficiary is qualified to perform the duties of the proffered position.

Pursuant to 8 C.F.R. § 214.2 (h)(4)(iii)(C), in order to qualify to perform services in a specialty occupation, a beneficiary must:

- (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.

Additionally, the regulation at 8 C.F.R. § 214.2(h)(v)(C) states:

In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

As noted above, the *Handbook* indicates that certain states regulate the field of dieticians. The State of California regulates nutritional professionals in the California Business and Professional Codes Sections 2585 & 2586. The California Dietetics Association states that only a person who meets the qualifications in California Business and Professions Code, Section 2585(a) can use the titles of dietician, registered dietician or registered dietician technician. The California Business and Professional Code, Section 2585(a)(2) states the qualifications for a registered dietician as the following:

- 18 years of age or older
- satisfactory completion of academic requirements for the field of dietetics
- a bachelor's degree or higher from an accredited college or university
- completion of a program of supervised clinical practice for a minimum of 900 hours
- satisfactory completion of an examination by the commission on dietetic registration (CDR) the credentialing branch of the American Dietetic Association
- satisfactory completion of continuing education requirements established by CDR

The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the specialty occupation. On appeal, counsel contends that the beneficiary is qualified to work as a dietician for the petitioner, as she is in the final process of obtaining her license and will be working under the direct supervision of a licensed dietician in the interim. The petitioner has not provided evidence of a licensed dietician. The record does not contain the name, evidence of licensure or an explanation of how the beneficiary would be supervised. 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)).

Additionally, the petitioner has not established that direct supervision meets the licensing/credential requirement of the State of California.

Therefore, for the reasons related in the preceding discussion, although the petitioner has established that the proffered position is a specialty occupation, the petitioner has not established that the beneficiary is qualified to perform the duties of the specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.