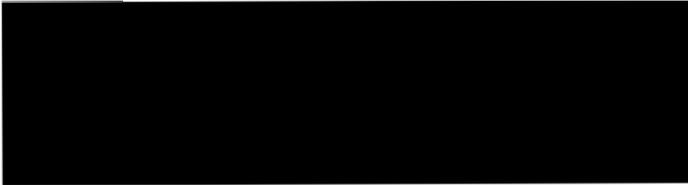


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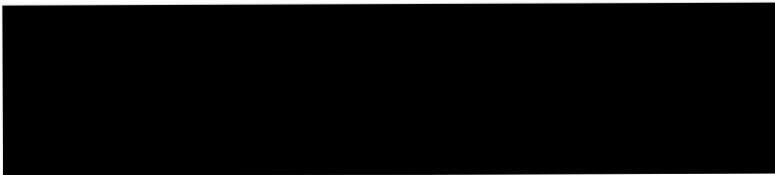
FILE: WAC 03 250 50859 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006

IN RE: Petitioner:
Beneficiary



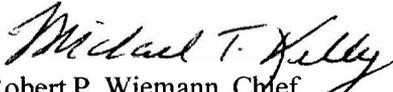
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief
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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a care facility for the elderly, with four employees at the time of filing. It seeks to extend its employment of the beneficiary as a nutritionist pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition based on his determination that the record did not establish the proffered position as 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; (4) the director's denial; and (5) Form I-290B, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To establish a proffered position as a specialty occupation, a petitioner must prove 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 nutritionist. Documentation of the beneficiary’s duties includes: the Form I-129; the petitioner’s August 11, 2003 letter in support of the petition; and counsel’s May 4, 2004 response to the director’s request for evidence. As described by counsel, the proffered position would require the beneficiary to:

- Prepare food;
- Ensure moderation, variety, and balance in food planning;
- Ensure careful diet-planning as prescribed by the respective physicians of elderly residents with special diet-related problems;
- Monitor food intake/consumption of residents;
- Ensure residents are eating a well-balanced diet that incorporates the 3-5-7 of good nutrition;
- Update the administrator and owner director on current issues in foods;
- Develop and modify food recipes; and
- Report directly to the owner, director, and administrator.

To make its determination whether the employment just discussed qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” *See Shanti, Inc. v.*

Reno, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found that the proffered position's food preparation duties to prevent the petitioner from establishing it as that of a nutritionist. The AAO does not agree. While the preparation of food is not a duty that characterizes the employment of dietitians, the AAO notes that the beneficiary's other responsibilities reflect the work of clinical dietitians, employment covered by the occupational title of dietitians and nutritionists in the 2006-2007 edition of the *Handbook*:

Dietitians and nutritionists plan food and nutrition programs and supervise the preparation and servicing 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.

Clinical dietitians provide nutritional services for patients in institutions such as hospitals and nursing care facilities. They assess patients' nutritional needs, develop and implement nutrition programs, and evaluate and report the results. They also confer with doctors and other health care professionals to coordinate medical and nutritional needs In addition, clinical dietitians in nursing care facilities, small hospitals, or correctional facilities may manage the food service department. [*Handbook* at page 284].

Further review of the *Handbook* indicates the following educational requirements are imposed on individuals seeking employment as dietitians/nutritionists:

Dietitians and nutritionists need at least a bachelor's degree in dietetics, foods and nutrition, food service systems management, or a related area. College students in these majors take courses in foods, nutrition, institution management, chemistry, biochemistry, biology, microbiology, and physiology. Other suggested courses include business, mathematics, statistics, computer science, psychology, sociology, and economics.

Of the 46 States and jurisdictions with laws governing dietetics, 31 require licensure, 14 require certification, and 1 requires registration. Requirements vary by State [*Handbook* at page 284].

In that the duties of the proffered position closely resemble the employment of a clinical dietitian and such employment normally imposes a degree requirement in a specialized field of study, the AAO finds the petitioner to have established the position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The petition may not be approved, however, as the record does not establish that the beneficiary is qualified to perform the duties of a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) – full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

To establish the beneficiary's qualifications to perform the duties of the proffered position, the petitioner, at the time of filing, submitted copies of the beneficiary's 1979 bachelor of science degree in foods and nutrition from De Ocampo Memorial College in The Philippines; her academic transcripts from this institution; an attendance certificate indicating her participation in a seminar on "A Practical Approach to Hazard Analysis Critical Control Points" held at the Center for Culinary Arts Manila; a certificate establishing her completion of the classes needed to complete a "Master in Cake Decoration," at the Heny Sison School of Cake Decorating and Baking; and an employment certification from Swift Foods, Inc. attesting to the beneficiary's eight years of employment.

While as noted by counsel, the beneficiary does not require a license to perform the duties of the proffered position,¹ the petitioner has failed to provide sufficient evidence to establish that the beneficiary's education,

¹ As noted in the above discussion, licensing requirements for dietitians and nutritionists vary by state. The State of California does not license this occupation. Dietitians/nutritionists may voluntarily seek registration to be classified as a "registered dietitian," but are not required to hold such a designation to work in the

training or employment qualify her to perform the duties of a specialty occupation. The record does not include an evaluation of the beneficiary's academic credentials by a reliable credentials evaluation service that would establish the beneficiary's Philippine degree as the equivalent of a U.S. baccalaureate or higher degree required by the proffered position under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Neither does the record contain sufficient evidence of the beneficiary's training and employment to provide her with a degree equivalent under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). *See* 8 C.F.R. § 214.2(h)(4)(iii)(D).

As the director did not reach a decision as to the beneficiary's qualifications to perform the duties of the proffered position, the petition will be remanded.

For the reasons related in the preceding discussion, the AAO will withdraw the director's decision and remand the instant case to the director for a decision as to whether the beneficiary qualifies to perform the duties of a specialty occupation. The director may request such evidence as may be necessary to assist in reaching that determination. The director shall then issue a new decision based on the evidence of record, as it relates to the statutory and regulatory requirements for H-1B nonimmigrant visa eligibility.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of June 4, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.

profession. *See* the discussion of the regulation of dietitians and nutritionists provided by the Commission on Dietetic Registration at www.carnet.org/certifications/licensure/index.htm. *See also* the *California Business and Professions Code*, Section 2585-2586.8 at www.leginfo.ca.gov.