

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

b2



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: MAY 25 2007

WAC 02 245 55431

IN RE:

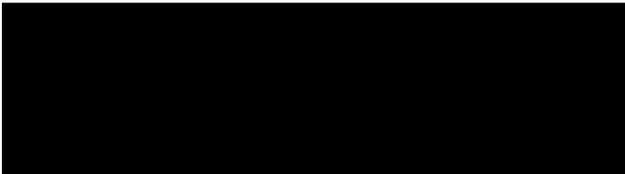
Petitioner:



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:



PHOTOLIC COPY

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, 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 is a home health care agency that claims to employ 12 personnel and to have a gross annual income of \$336,444 when the petition was filed. It seeks to employ the beneficiary as a dietitian. 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).

On September 25, 2003, the director denied the petition observing that the petitioner was an employment agency and had not submitted an itinerary and contracts with client doctors for the beneficiary's services. The director determined without contracts and itineraries for patients requiring dietitian services, the petitioner had not shown the beneficiary would be coming to the United States to perform work in a specialty occupation. The director further noted that without evidence of the contracts the petitioner holds for patients requiring dietitian services, Citizenship and Immigration Services (CIS) is unable to determine if the Labor Condition Application (LCA) ETA-9035 is valid in regard to the area of employment and wage for the beneficiary.

On appeal, counsel for the petitioner asserts that the petitioner qualifies as an employer or agent and that the LCA is valid. The first issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

The record pertinent to the Form I-129, Petition for a Nonimmigrant Worker¹ contains: (1) the July 30, 2002 Form I-129 and supporting documentation; (2) the director's July 15, 2003 request for further evidence (RFE); (3) counsel's August 22, 2003 response to the director's RFE; (4) the director's September 25, 2003 denial decision; and (5) the Form I-290B and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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,

¹ The record also contains information and evidence in conjunction with removal proceedings of the beneficiary in this matter. However, as the removal proceedings are not relevant to the substantive adjudication of the Form I-129, the information relating to the removal proceedings will not be listed or considered.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In a July 25, 2002 letter appended to the petition, the petitioner stated it "is in need of a Dietitian who possesses the necessary skill and knowledge required to administer and direct the activities of our food services to patients in accordance with accepted national standards, administrative policies and dietary needs of the residents." The petitioner stated further:

[The beneficiary] will work under the supervision of our Registered Dietitian. Together, they will confer regarding policies and recommend procedural changes to improve the quality of dishes, sanitation procedures and efficiency. [The beneficiary] will assure that there are

accurate and timely communications between the nursing staff and patients. She will help formulate in-service training programs monthly to update our health personnel. Going personally to our patients' homes, as advice [sic] our patients on basic food preparation procedures, modified diets, sanitation and safety procedures and techniques, portion control, disaster procedures, and P & P, Diet manual review. [The beneficiary] will present written reports on a regular basis to the facility's Administrator. She will discuss the report and recommendations with the Administrator so as to promote actions that support the health and well being of the patients.

The petitioner included an LCA showing the beneficiary's work location in Temecula, California and the beneficiary's rate of pay as \$17.70 per hour.

On July 15, 2003, the director requested, among other things: (1) a detailed description of the work done, including specific job duties, the percentage of time allocated to each duty, level of responsibility, hours per week of work, types of employees supervised, and the minimum education, training, and experience necessary to do the job; (2) as the evidence indicated that the petitioner's business is to outsource health care services to clients outside the petitioner's work site, a complete itinerary of services or engagements where the beneficiary will perform those services, including the dates of each service or engagement, names and addresses of the actual employers, the establishment, venue, or locations where the service will be performed, and all service planned for the period of time requested; and (3) contracts between the petitioner and the beneficiary and contracts between the petitioner and the clients for dietitian consulting services.

In an August 22, 2003 response to the director's RFE, counsel for the petitioner indicated that the beneficiary, under the supervision of a registered dietitian would perform the following duties:

Conduct dietary assessments on individual referred clients, in their homes[.] Provide recommendations and education to clients and/or staff in accordance with the Plan of Care and the client's preferences including:

- a. Provide assessments within a timely manner
- b. Recommend dietary modifications appropriate to the client's medical plan and the client's cultural and personal preferences
- c. Teach and clarify complex dietary regiments for clients
- d. Document findings, interventions, and plans in the clinical record
- e. Inform clients of community resources as appropriate

Help formulate in-service training programs monthly to update our health personnel[.] Counsel medically high-risk clients on nutritional needs and dietary modifications with consideration given to the physical, social, emotional and cultural care and revises the care plan as necessary:

- a. Review and evaluate nutritional education resources
- b. Present educational programs in identified areas of nutrition/dietary management
- c. Recommend educational and community resources for staff.

Participate in interdisciplinary activities per agency guidelines:

- a. Attend client conferences as requested to provide information to health care team.
- b. Participate in the agency improvement activities as appropriate
- c. Participate in agency meetings as requested

Perform job in compliance with agency polices and procedures, and professional and community standards:

- a. Accept responsibility in accordance with the role of Nutrition Consultant
- b. Provide services in accordance with applicable state and federal standards
- c. Accept responsibility for personal and professional development and identify learning/developmental needs

Maintain confidentiality in all aspects of the job

Perform other related duties and responsibilities as deemed necessary

Counsel indicated that the beneficiary's time would be allocated as follows:

- 40% - Conduct dietary assessment of patients in their homes;
- 40% - Provide educational programs/resources for staff on current nutritional practices and nutritional dietary management; Participate [in] interdisciplinary activities per agency guidelines; Perform job in compliance with agency policies and procedures, and professional and community standards; Maintain confidentiality in all aspects of the job;
- 20% - Perform other related duties and responsibilities as deemed necessary.

The petitioner also provided a copy of an employment agreement between the beneficiary and the petitioner dated August 21, 2003. The agreement indicated that the employee (the proposed beneficiary) would provide services to patient in the patient's place of residence and that "[s]ervices will be provided to patients in the countries [sic] of San Bernardino and Riverside and such other countries [sic] as may be agreed upon by [the petitioner] and Employee."

As noted above, on September 25, 2003, the director denied the petition observing that the petitioner was an employment agency and had not submitted an itinerary and contracts with client doctors for the beneficiary's services. The director determined without contracts and itineraries for patients requiring dietitian services, the petitioner had not shown the beneficiary would be coming to the United States to perform work in a specialty occupation. The director further noted that without evidence of the contracts the petitioner holds for patients requiring dietitian services, Citizenship and Immigration Services (CIS) is unable to determine if the Labor Condition Application (LCA) ETA-9035 is valid in regard to the area of employment and wage for the beneficiary.

On appeal, counsel for the petitioner submits a service agreement commencing September 2003 between the petitioner and Ambassador Residential Care Home, a residential care home in Moreno Valley, California, for the services of a dietitian. The contract does not describe the duties that will be performed by the dietitian. Counsel asserts that the petitioner is in fact the beneficiary's employer and that there is an itinerary and a contract with client doctors for patient care by a dietitian. Counsel submits a new LCA listing the beneficiary's rate of pay and

location of employment as in Moreno Valley.

Counsel's assertion is not persuasive. The record in this matter establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.² See 8 C.F.R. § 214.2(h)(4)(ii). The initial record also suggested that the beneficiary would work in multiple locations. In the Aytes memorandum cited at footnote 2, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request contracts and an itinerary reflecting the dates and locations of the proposed employment. In response, counsel confirmed the petitioner's business involved outsourcing health care services to clients outside the petitioner's worksite but failed to provide itineraries, contracts, or any other evidence establishing the details of the beneficiary's employment. As the petitioner failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the director properly denied the petition.³

The AAO observes that the contract between the petitioner and Ambassador Residential Care Home, (Ambassador Contract) submitted on appeal was not in effect when the petition was filed and does not provide a description of the beneficiary's proposed duties for the petitioner's client. The petition in this matter was filed July 30, 2002 and the contract for the services of a dietitian does not commence until September 2003. The petitioner does not provide any other evidence that it had contracts or statements of work for the performance of the beneficiary's services when the petition was filed. The petitioner cannot use the Ambassador Contract to demonstrate that a position existed when the petition was filed. CIS regulations require a petitioner to establish eligibility for the beneficiary it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The petitioner has not established that as of the date of filing the petition on July 30, 2002, the alien beneficiary had an actual job rather than speculative employment.

Moreover, although the petitioner has provided a description of the beneficiary's proposed duties as a dietitian, the petitioner has not included evidence establishing that the beneficiary will perform the duties of a dietitian for the ultimate user of the beneficiary's services. The Ambassador Contract does not detail the services expected of the beneficiary, other than to note that the petitioner will provide dietitian services. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical

² See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

³ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, CIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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)).

Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1). In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Of note, the AAO also finds that the petitioner's description of the beneficiary's proposed duties does not provide a comprehensive understanding of the proposed duties. For example, the petitioner initially indicated, in part, that the beneficiary would recommend procedural changes to improve the quality of dishes, sanitation procedures, and efficiency. In response to the director's RFE, counsel stated generally that the beneficiary would perform the job in compliance with agency policies and procedures, and professional and community standards, maintain confidentiality in all aspects of the job, and perform other duties and responsibilities as necessary. These general statements do not provide a clear understanding of the beneficiary's actual daily duties. The AAO acknowledges that advising patients on basic food preparation, modified diets, sanitation, portion control, and reporting recommendations are activities that may be part of a dietitian's duties. In addition, conducting dietary assessments of patients in their homes and providing educational programs to other staff are indicative of a dietitian's duties. However, the petitioner also indicates that the beneficiary will be under the supervision of a registered dietitian, which suggests that the beneficiary will not be performing the services of a dietitian but rather assisting in the performance of those duties. Thus, the record is not clear regarding the actual conduct of duties and whether the performance incorporates the

theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific specialty as a minimum for entry into the United States. The AAO does not contest that the occupation of a dietitian is a specialty occupation. However, CIS does not rely on a position's title to determine whether a particular job qualifies as a specialty occupation. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. In this matter, the record is insufficient to establish that the beneficiary will be performing the duties of a dietitian for the entity ultimately using the beneficiary's services or that the petitioner's generally described duties, even if required by the entity ultimately using the beneficiary's services, include the duties of a dietitian.

The director also found that, without an itinerary or contracts, it could not be determined whether the LCA was valid with respect to the area of employment and the proposed wage to be paid to the beneficiary. The AAO agrees. The statute and regulations require that the petitioner file a certified LCA with the Form I-129 petition offering to pay the beneficiary the prevailing wage for the occupational classification in the area of employment. Section 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 212(n)(1)(A)(i); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1); 8 C.F.R. § 214.2(h)(4)(i)(B)(1). The petitioner submitted an LCA for Temecula, CA with its initial submission. On appeal, the petitioner submitted a second LCA for Moreno Valley, CA. These two locations are within the same metropolitan area, and the petitioner offered the same prevailing wage for both. Nevertheless, as the petitioner did not have a definite itinerary of employment for the requested duration of the visa at the time it filed the petition, CIS cannot determine that the LCA is valid for all areas of intended employment. For this additional reason, the petition must be denied.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The California Business and Professions Code states in pertinent part at section 2585(a):

Any person representing himself or herself as a registered dietitian shall meet one of the following qualifications:

(1) Been granted, prior to January 1, 1981, the right to use the term "registered dietitian"

* * *

(2) Possess all of the following qualifications:

(A) Be 18 years of age or older.

(B) Satisfactory completion of appropriate academic requirements for the field of dietetics and related disciplines and receipt of a baccalaureate or higher degree from a college or university accredited by the Western Association of Schools and Colleges or other regional accreditation agency.

(C) Satisfactory completion of a program of supervised practice for a minimum of 900 hours that is designed to prepare entry level practitioners through instruction and assignments in a clinical setting. Supervisors of the program shall meet minimum qualifications established by public or private agencies or institutions recognized by the State Department of Health Services to establish those qualifications.

(D) Satisfactory completion of an examination administered by a public or private agency or institution recognized by the State Department of Health Services as qualified to administer the examinations.

(E) Satisfactory completion of continuing education requirements established by a public or private agency or institution recognized by the State Department of Health Services to establish the requirements.

The petitioner has not indicated whether the proffered position is for an individual that will hold himself or herself out as a dietitian. However, the petitioner relies upon the Department of Labor's *Occupational Outlook Handbook (Handbook)* to establish the proffered position as a specialty occupation.⁴ Regarding the educational requirements of the occupation of a dietitian, the *Handbook* reports:

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.

As observed above, the State of California requires satisfactory completion of: appropriate academic requirements for the field of dietetics and related disciplines and receipt of a baccalaureate or higher degree; a program of supervised practice for a minimum of 900 hours; an examination administered by a public or private agency or institution; and continuing education requirements. If the petitioner proposes to utilize the beneficiary's services as a registered dietitian or to utilize the beneficiary's services as contemplated in the *Handbook*, the petitioner must meet the California State requirements.

The AAO acknowledges counsel's response to the director's RFE regarding the beneficiary's qualifications, wherein counsel asserted that the Commission on Dietetic Registration (CDR) extended reciprocity for professional employment in the U.S. for individuals who had completed all certification requirements in the country with whom CDR had an agreement. Counsel included an excerpt from CDR's "Dietitian Registration Eligibility Pathways" showing that CDR had an agreement with the Philippine Professional Regulation Commission. Upon review of CDR's website, however, CDR states:

State licensure and state certification are entirely separate and distinct from registration or certification by the Commission on Dietetic Registration. Information on state licensure and certification is provided here as a service to licensed dietetics professionals and state licensure boards.

⁴ As observed above, the AAO does not find the proffered position to be a specialty occupation for the reasons previously stated; however, the petitioner's use of the *Handbook* as evidence to establish the position as a specialty occupation suggests that the petitioner acknowledges the requirements outlined in the *Handbook* to perform the duties of the occupation of dietitian.

CDR states further:

The majority of states have enacted laws which regulate the practice of dietetics. Should you plan to practice dietetics in these states it is important that you contact a state regulatory agency prior to practicing dietetics. In many states it is a VIOLATION of state law to practice dietetics without a license.

Thus, counsel's submission of the beneficiary's foreign professional license as a nutritionist-dietitian issued in 1997 in the Philippines is not sufficient to establish that the beneficiary is qualified to perform the duties of a dietitian-nutritionist in the State of California. The AAO declines to speculate further on the qualifications of the beneficiary and her eligibility to practice as a dietitian in the State of California, observing only that the record is deficient in this regard. In this matter, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C). For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the director's decision will be affirmed.

ORDER: The appeal is dismissed. The petition is denied.