U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

D2

FILE: WAC 02 126 52191 Office: CALIFORNIA SERVICE CENTER Date: JUN 02 2004

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)

ON BEHALF OF PETITIONER:

[redacted]

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 The director's decision will be withdrawn. The matter will be remanded to the director for entry of a new decision.

The petitioner is a healthcare service provider. It seeks to employ the beneficiary as a dietetic technician, and endeavors to classify her 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).

The director denied the petition because the beneficiary did not qualify to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

The director's determination denying the I-129 petition was based solely on the beneficiary's qualifications to perform the duties associated with that occupation. The director found that the beneficiary was not qualified to perform the duties of a specialty occupation because she did not have appropriate licensing required for the position. The first issue to be discussed in this proceeding is whether the beneficiary is qualified to perform the duties of the offered position.

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), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (i) completion of such experience in the specialty equivalent to the degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent or the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The offered position is that of a dietetic technician, not a dietitian or nutritionist as discussed in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The beneficiary holds the equivalent of a bachelor of science degree in nutrition, with a concentration in dietetics, from an accredited college or university in the United States based upon her foreign education. The beneficiary, therefore, has sufficient education to qualify to perform the duties of the position offered, a dietetic technician. The petitioner has further established that the beneficiary is not required to have a license or certification to perform the duties of the offered position. She is, therefore, qualified for the position.

Beyond the decision of the director, however, the offered position does not appear to qualify as a specialty occupation. Counsel submitted documentation from the California Dietetic Association (CDA) indicating that the offered position was not subject to licensing. The AAO agrees. According to the CDA, diet techs, dietetic/nutrition students, 4-year nutrition grads, those eligible to take the RD/DTR CDR exam, nutrition

assistants, dietary service supervisors, dietary managers, and WIC para-professionals may perform the following duties: provide basic nutrition information to healthy people; screening "per-protocol"; gathering of data and reporting the data to a registered dietician (employees listed above may not interpret or assess the data collected); interview patients about food preferences and gather data on food intake; distribute written information per protocol (the registered dietician must answer patient questions concerning diet information). Those employees listed in the above categories may not provide medical nutrition therapy. Counsel asserts that the duties of the offered position are analogous to the above listed duties. Again, the AAO agrees. It would appear, therefore, that a minimum of a college degree in a specific specialty is not required to perform the duties of the proffered position as nutrition assistants, diet techs, and dietetic/nutrition students may perform the duties of the position. These employees may not provide medical nutrition therapy as would a licensed dietician. The director's decision must accordingly be withdrawn, and the matter remanded to the director to issue a new decision determining whether the proffered position qualifies as a specialty occupation. The director may obtain such additional evidence as he deems necessary in rendering his decision.

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 is withdrawn. This matter is remanded to the director to issue a new decision commensurate with the directives of this opinion.