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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[REDACTED]

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2010**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, 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 appeal will be dismissed. The petition will be denied.

The petitioner is a skilled nursing facility in California. To employ the beneficiary as a Clinical Dietician, the petitioner 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 issue on appeal is whether the director erred in denying the petition because “the petitioner has not provided evidence that the beneficiary is licensed, registered or certified to perform the proffered position in the State of California and has provided insufficient evidence that such licensure, registration or certification is not required.” As will be discussed below, the AAO finds that the director did not err. Therefore, the appeal will be dismissed, and the petition will be denied. The AAO bases this decision upon its review of the entire record of proceeding as supplemented by the Form I-290B, counsel’s brief, and the documentation submitted in support of the appeal.

The petitioner has assigned the title “Clinical Dietician” to the proffered position,¹ and its March 28, 2007 letter of support describes the position as follows:

We are filing the attached petition on behalf of [the beneficiary] to permit her to work as a Clinical Dietician. As a Clinical Dietician, [the beneficiary] will be responsible for assisting in planning, organizing, developing and directing the operation of the Dietary Department in accordance with current federal, state, and local standards governing the facility, and as may be directed by the Administrator, to ensure that quality nutritional services are provided on a daily basis. In addition, the Dietician will be responsible for maintaining the Dietary Department in a clean, safe and sanitary manner. Specific duties will include: coordinating dietary services and activities with nursing services and other related department; assisting in developing, reviewing, and planning normal, special, and therapeutic diet plans for residents; ensuring meals are prepared and served in accordance with menu and diet preferences and established portion control procedures; maintaining proper records to ensure that residents’ diets are in compliance with physicians’ orders; ensuring an ongoing quality assurance program; ensuring proper storage of raw and leftover foods; inspecting and maintaining storage rooms, utility rooms, and other areas of the dietary department; ensuring control of equipment and supplies; recommending food, equipment, and supply needs of the Dietary Department to the Administrator; assisting in the order and purchase of food, equipment, and supplies as necessary,

¹ The variants “dietecian” and “dietition” appearing in this decision are only a matter of different spelling conventions used by various sources. They do not connote a substantive difference in the particular jobs to which they relate. The AAO will use the “dietitian” variant, which comports with the spelling in the related California regulations.

including interviewing and dealing with food, equipment and supply vendors; assisting in developing and monitoring adequate and cost effective inventory control procedures; making periodic inspections of food, equipment and supplies to ensure that adequate levels are maintained and that equipment is available and working properly; forecasting needs of the Dietary [D]epartment and assisting in preparing and planning the Department's budget for food, equipment[,] supplies, and labor; preparing written report of forecasting needs and submitting [them] to the editor for review; and maintaining current written records of [D]epartment expenditures. This is a professional assignment in a specialty occupation, requiring at least a Bachelor's degree in Nutritional Sciences, Dietetics, or related field and relevant experience.

According to the Form I-129 and the related labor condition application, the petitioner seeks to employ the beneficiary, in California, as a clinical dietician for the period October 1, 2007 to September 14, 2010. The petitioner states that, until she attains Registered Dietician (RD) status, the beneficiary will work as an assistant to the RD that the petitioner presently employs as a consulting dietician.²

Based upon the sections of the California Business and Professions Code (CBPC) referenced by the petitioner, the AAO finds that full performance of the duties of a clinical dietitian would require the beneficiary to hold the status of an RD in the State of California. The AAO reaches this conclusion because the record of proceeding indicates that a necessary attribute of the proffered clinical-dietician position is representation of the beneficiary as being a dietitian. Section 2585(c) of the CBPC specifies that it is a misdemeanor for any person other than an RD "to use, in connection with his or her name or place of business, the word[] . . . "dietitian". . . or any words, letters, abbreviations or insignia indicating or implying that the person is a dietitian . . . or to represent, in any way, that orally, in writing, in print, or by sign, directly or by implication, that he or she is a dietician. . . ."

The AAO further finds that, as counsel asserts, the evidence of record establishes that the beneficiary meets all of the State of California's requirements for registration as an RD except successful completion of the requisite RD examination. Specifically, the AAO finds that that the beneficiary satisfies all of the criteria for initial certification as a Registered Dietician under CBPC section 2585(a)(2) except the examination requirement at section 2585(a)(2)(D). Section 2585(a)(2) states that "any person representing himself or herself as registered dietician" shall "possess all of the following qualifications":

- (A) Be 18 years of age or older.

² The record of proceedings includes copies of contracts with the firm RDs for Healthcare whereby that firm is to provide (1) a menu service for the petitioner, and (2) a consulting RD to visit the petitioner's skilled nursing facility "38 hours per month on a regularly scheduled basis during which time the dietician will perform consultant duties within the realm of the profession."

(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.

Upon review of the entire record of proceeding, the AAO finds that the beneficiary meets criteria A, B, and C (age, academic qualification, and supervised practice) of CBPC section 2585(a)(2).³ Additionally, the AAO finds that the record of proceeding establishes that the examination specified under criterion D of CBPC section 2585(a)(2) is available only within the United States.

As there is no regulatory provision for approving an H-1B visa so that a beneficiary may take a licensure qualifying examination, the petition must be denied.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), where, as here, a state or local license, registration, or certification is required for an individual to fully perform the duties of an occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that credential prior to approval of the petition. The regulation states:

General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

There are regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license. The regulation at 8 C.F.R.

³ The beneficiary satisfies these criteria by virtue of her age and the June 14, 2007 Verification Statement from the CDR (Commission on Dietetic Registration (the credentialing agency of the American Dietetic Association)) that through August 3, 2009, the beneficiary is registered by the Professional Regulation Commission (PRC), Board of Nutrition and Dietetics of the Philippines, as stipulated in the reciprocity agreement between CDR and the PRC. Of course, as already noted, the petitioner acknowledges that the beneficiary has not yet taken and passed the requisite examination, specified at section 2585(a)(2)(D) of the CBPC.

§ 214.2(h)(4)(v)(B) addresses situations where the beneficiary has been issued temporary licensure. It states:

Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

As the petitioner is not temporarily licensed to perform as an RD, this provision is not relevant to the appeal.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(C) would be relevant if the State of California allowed the beneficiary to fully practice as a dietitian under the supervision of the RD consultant, regardless of her lack of a temporary or permanent license. This provision states:

Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the 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 earlier noted, the petitioner attests that the beneficiary would work under the RD consultant's supervision until the beneficiary attains RD registration. However, the petitioner neither cites California statutory or regulatory support nor provides documentation from the State of California that would allow the beneficiary, prior to her achieving RD registration, "to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation." Moreover, even if it did, the evidence presented indicates that the consulting dietician will only visit the petitioner's facility 38 hours per month. It is unclear, therefore, under whose supervision the beneficiary would work for the remaining 120 plus hours such that the requirements of 8 C.F.R. § 214.2(h)(4)(v)(C) would be met.

The AAO acknowledges the USCIS policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the overseas alien beneficiary's lack of a social security number, *see Memorandum from [REDACTED] INS Office of Adjudications, Social Security Cards and the Adjudication of H-1B Petitions, HQ 70/6.2.8 (November 20, 2001) (hereinafter referred to as the [REDACTED] Memo). The [REDACTED] Memo's continuing applicability is acknowledged in the Memorandum from [REDACTED] Domestic Operations, Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment*

Authorization, HQISD 70/6.2.8 (March 21, 2008) (hereinafter referred to as the [REDACTED] Memo). The [REDACTED] Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition. In this matter, however, the record of proceedings fails to establish lack of a social security number or a valid immigration document as the only impediments to the beneficiary's attaining the licensure required to practice as an RD. Thus, these specific policy provisions are irrelevant to this appeal.

As is evident from the following excerpts from the [REDACTED] and the [REDACTED] Memos, USCIS allows for provisional approval of a petition for a one-year period, in order to allow a beneficiary to travel to the United States to obtain licensure, in the very limited circumstances where the beneficiary has met all of the pertinent State's licensure requirements except possession of a social security number or possession of a valid immigration document to establish his or her authorization to work in the United States. The [REDACTED] Memo states, in part:

Certain states require that an H-1B nonimmigrant be issued a social security card before the state or local licensing authority will issue a professional license to the alien to work in that jurisdiction. According to the regulations of the Social Security Administration (SSA), an H-1B alien is not able to obtain a social security card unless they are physically present in the United States. Some H-1B petitions in these cases have been denied because the alien beneficiary has not yet received his or her license.

Most recently, this issue has arisen regarding the adjudication of H-1B petitions filed for certain public high school teachers. In the case of the teachers, the Immigration and Naturalization Service (INS) has been receiving H-1B petitions filed on behalf of public school teachers that are not supported by the required license. The teachers are unable to obtain licensure solely because they cannot obtain a social security card because they are not physically present in the United States.

In order to avoid this situation and accommodate the needs of H-1B petitioners, INS [now USCIS] officers involved in the adjudication of H-1B petitions are instructed to use the following guidance. An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. At the time an extension application is filed by the alien, the adjudicator should determine that the required license was obtained. If it has not been obtained at that time the application should be denied.

The [REDACTED] Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition. The [REDACTED] Memo states, in part:

This AFM update instructs adjudicators to approve an H-1B petition for a **one-year** validity period if a State or local license to engage in the profession is required and the appropriate licensing authority will not grant such license to an alien absent evidence that the alien has been granted H-1B status. As a condition to approving such a petition, the alien must demonstrate that he or she has filed an application for such license in accordance with State or local rules and procedures. Further, prior to approving an H-1B petition under such circumstances, adjudicators should verify that the alien beneficiary is fully qualified to receive the State or local license, meaning that all educational, training, experience, and other substantive requirements must be met (where appropriate, the adjudicator may issue a request for evidence). It should be noted that the approval of any such H-1B petition shall not constitute approval by USCIS for the alien beneficiary to engage in any activity requiring possession of such State or local license. Any petition that requests an extension of stay on behalf of an alien who has been granted H-1B status under this provisional measure must show that the alien has obtained the requisite license. If the alien has not obtained the requisite license at the time the petition and extension are filed, such petition will be denied.

Again, the circumstances addressed in the Memos are not present in the proceeding on appeal, as the evidence of record reveals that lack of a social security number or a valid immigration document to establish her authorization to work in the United States is not the only obstacle to the beneficiary's registration as a dietitian in California.

Next, the AAO accords no weight to counsel's contention (at page 5 of the brief on appeal) that the petition should be approved because "the beneficiary's duties are more akin to the duties of a Dietetic Service Supervisor (DSS), an Occupation which does not require licensure in the State of California," and, therefore, "the proposed job offer should be considered as an 'exemption or exception' from the licensure requirement in 8 C.F.R. § 214.2(h)(4)(v)." Upon review of the two sections of Title 22 of the California Administrative Code (CAC) provided by the petitioner, the AAO finds as follows. First, the Dietetic Service Supervisor position is materially different from the title and scope of the position for which the petition was filed.⁴ As it materially differs from the position as specified in the Form I-129 and the accompanying LCA, a DSS position may not be substituted for the clinical dietitian position for which the position was filed. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the

⁴ For instance, according to section 72335 of CAC Title 22(c), a DSS is not authorized to receive or record prescriptions for regular and therapeutic diets.

organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the classification sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Second, because the LCA filed with the petition is not certified for the DSS position, substituting positions would preclude approval of this petition, as the petition would then lack the corresponding LCA required by the USCIS H-1B regulations. Third, USCIS allows amendment of an H-1B petition only by filing a new petition with fee and an LCA certified for the position for which the petition is filed. *See* 8 C.F.R. § 214.2(h)(2)(i)(E). Finally, if a DSS position were the basis of the petition, section 72035 of CAC Title 22 would indicate that the position is not a specialty occupation, as that provision specifies three alternative avenues for qualifying for the position with less than a bachelor's degree or its equivalent in the specialty.

USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). 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 (Reg. Comm. 1978). As the evidence of record does not establish that at the time the petition was filed the beneficiary had satisfied the requirements for licensure necessary to perform the duties of the proffered position, the director's decision was correct and shall not be disturbed. The appeal will be dismissed, and the petition will be denied.

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 appeal will be dismissed.

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