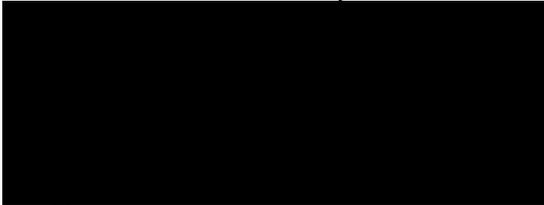


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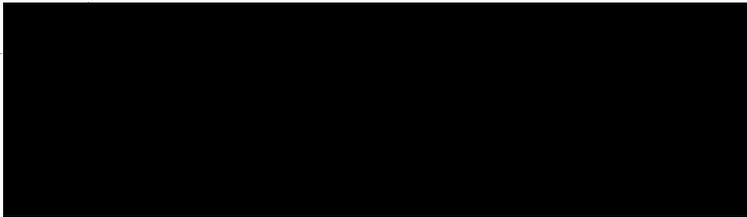
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FILE: WAC 04 049 52299 Office: CALIFORNIA SERVICE CENTER Date: **AUG 31 2005**

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 materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of rehabilitation services. It seeks to employ the petitioner as a speech pathologist and 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 on the ground that the petitioner failed to establish that the beneficiary has the requisite license from the State of California to practice speech pathology. Accordingly, the beneficiary was ineligible for classification as an alien employed in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2)(A) provides that an alien must have “full state licensure to practice in the occupation, if such licensure is required to practice in the occupation” in order to be qualified to perform the services of a specialty occupation. The licensure requirement is further explained in the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), in pertinent part, as follows:

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

California, the state of intended employment, requires speech pathologists to be licensed. The beneficiary was not licensed by the State of California, nor did she possess a temporary license, at the time the instant H-1B petition was filed on December 11, 2003. The record indicates that the beneficiary filed an application for a temporary license with California’s Speech-Language Pathology and Audiology Board (“Board”) on November 26, 2003. By letter dated December 9, 2003 the Board advised the beneficiary that her application was incomplete because she had failed to fill in her social security number and date of birth. The Board also asked for clarification as to whether the beneficiary’s education was a master’s degree in the United States or a master’s degree equivalency in another country. The application was returned to the beneficiary for completion, including re-signing, and re-dating. On December 23, 2003, in

response to the RFE, the petitioner telefaxed to the service center the following explanation of the licensure issue:

Licensure: The beneficiary . . . shall be issued a California speech pathologist license after submitting the social security number to the [Board] in Sacramento The Board does not issue a license to a professional without a social security number. The beneficiary is not an admitted non-immigrant worker in [the] USA and has not yet landed in [the] USA. The social security number is only allotted to eligible non-immigrant workers after providing the proof of legal admittance in [the] USA. The beneficiary shall obtain the necessary licensure as soon as [an] H-1B visa is approved and [the] beneficiary is actually admitted in [the] USA and obtains a social security number

Based on the foregoing documentation the director concluded, in his decision dated January 2, 2004, that the beneficiary did not possess the requisite speech pathologist license from the State of California. The director determined that the petitioner failed to establish the beneficiary's eligibility to fully practice the specialty occupation. Accordingly, the beneficiary was not eligible for H-1B classification.

The petitioner filed a timely appeal on January 8, 2004, reiterating that the beneficiary cannot obtain a social security number until she is in the United States and that the State of California will not issue a temporary speech pathology license without a social security number from the beneficiary. According to the petitioner, the beneficiary meets all the requirements for licensure and will be issued a temporary license by the Board as soon as she submits a social security number. Excerpts from the beneficiary's license application were submitted with the appeal. That documentation was later supplemented by another letter from the Board dated February 25, 2004 (filed with the service center on May 3, 2004) acknowledging receipt of the beneficiary's resubmitted application for a temporary license and stating once again that "[w]e are unable to process your application without a social security number [y]ou may not begin practicing until you have received written approval from this office." (Emphasis in the original.) Based on this latest correspondence the petitioner requests that the instant petition for H-1B classification be approved.

The AAO determines that the beneficiary has not complied with the requirements for licensure, set forth in the regulations. The petitioner has not shown that the beneficiary possessed a permanent or temporary license from the State of California to practice speech pathology at the time the instant petition was filed. Under 8 C.F.R. § 103.2(b)(12) a petitioner must establish that it was eligible for a requested benefit at the time the petition was filed. *See also* 8 C.F.R. § 214.2(h)(4)(iv)(A), which provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by . . . required evidence sufficient to establish that the beneficiary *is qualified* to perform services in a specialty." [Emphasis added.] A visa petition may not be approved at a later date based on a set of facts not present at the time of filing. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Since the beneficiary was not licensed to practice speech pathology at the time the H-1B petition was filed on December 11, 2003, she was not qualified to perform the services of the specialty occupation. Accordingly, the beneficiary is ineligible for H-1B classification pursuant to the instant petition.

Further, the petitioner has not shown that the beneficiary has taken any steps toward receiving a license in speech pathology. The record does not reflect that the beneficiary has submitted her educational

credentials for review by the state of California, or that she has been determined by the state of California to be qualified to practice speech pathology, but for the lack of a social security number.

An internal memorandum of the legacy Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS) from Acting Assistant Commissioner Thomas E. Cook, dated November 20, 2001, provides the following guidance on the adjudication of H-1B petitions when the beneficiary is unable to obtain a state license because he or she is not in possession of a social security card:

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 one year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card for the SSA [Social Security Administration]. 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 [Emphasis in the original.]

The letter from the California Speech-Language Pathology and Audiology Board on February 25, 2004 does not meet the above criterion. It does not clearly state that the only obstacle to the issuance of a temporary license to the beneficiary is the lack of a social security card. The letter simply states that the Board is “unable to process” the application without a social security number. It does not state that the application has been reviewed by the Board, been found sufficient in all other respects, and would be approved if a social security number were submitted. Accordingly, the record does not establish the beneficiary’s eligibility for H-1B classification for a period of one year.

For the reasons discussed above, the AAO concludes that the beneficiary does not meet the licensure requirements of 8 C.F.R. § 214.2(h)(4)(v)(A) and is therefore ineligible for H-1B classification as a non-immigrant worker in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

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