

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



DI

FILE: WAC 04 036 52216 Office: CALIFORNIA SERVICE CENTER Date: **SEP 09 2005**

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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the California Service Center denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a provider of assisted living services, serving clients at its in-patient facilities and at home. It seeks to extend its employment of the beneficiary as its director of rehabilitation services 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 he found the beneficiary was not qualified to perform the duties of the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's December 4, 2003 request for evidence; (3) counsel's response to the director's request; (3) the director's December 24, 2003 denial letter; (4) Form I-290B, with counsel's brief; (5) the AAO remand of the Form I-129; (6) the director's April 25, 2005 notice of intent to deny; (7) counsel's response to the director's notice; and (7) the director's July 14, 2005 notice of certification. The AAO reviewed the record in its entirety before reaching its decision.

On March 15, 2005, the AAO remanded the instant case to the director, having determined that the proffered position of rehabilitation director or manager was a specialty occupation. The AAO found the petitioner's description of the proffered position's duties to be closely aligned to the occupation of physical therapists, as described in the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The evidence of record was not, however, sufficient to allow the AAO to determine whether the beneficiary was qualified to perform the duties of the proffered position. The matter was, therefore, remanded to the director for his determination of the beneficiary's qualifications, with certification to the AAO should that decision be adverse to the petitioner. On July 14, 2005, the director found the beneficiary to lack the qualifications necessary to perform the duties of the proffered position and certified his decision to the AAO for review.

The only issue before the AAO is whether the beneficiary is qualified to perform the duties of the proffered position. In determining whether an alien is qualified to perform the duties of a specialty occupation, Citizenship and Immigration Services (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.

In its discussion of the occupation of physical therapists, the *Handbook*, at page 292, states the following regarding the requirements for employment:

All States require physical therapists to pass a licensure exam before they can practice, after graduating from an accredited physical therapist educational program.

According to the American Physical Therapy Association, there were 203 accredited physical therapist programs in 2003. Of the accredited programs, 113 offered master's degrees, and 90 offered doctoral degrees. All physical therapist programs seeking accreditation are required to offer degrees at the master's degree level and above, in accordance with the Commission on Accreditation in Physical Therapy Education.

As the petitioner's business operations are located in California, the State of California's Business and Professions Code is also relevant to the determination of the beneficiary's qualifications. Section 2650, which addresses state licensing of physical therapists, states:

2650. (a) Except as otherwise provided in this chapter, each applicant for a license as a **physical** therapist shall be a graduate of a professional degree program of an accredited postsecondary institution or institutions approved by the board [Physical Therapy Board of California], and shall have completed a professional education including academic coursework and clinical internship in **physical** therapy

Therefore, as the proffered position has been found to be that of a physical therapist and physical therapists must be licensed by the state in which they practice, the petitioner must establish that the beneficiary holds a license to practice physical therapy in California.

The record contains the following evidence of the beneficiary's qualifications: a copy of her bachelor of science degree in physical therapy from Fatima College of Physical Therapy in The Philippines, copies of her academic transcripts, a certificate from the Fatima College secretary/registrar indicating that the beneficiary both graduated from the college and satisfactorily completed her ten-month internship at Fatima Medical Center, and an evaluation of the beneficiary's academic credentials from Josef Silny & Associates of Coral Gables, Florida, which finds the beneficiary to hold the equivalent of a U.S. bachelor of science degree in physical therapy. There is no documentation of the beneficiary's licensing as a physical therapist by the State

of California. Accordingly, the petitioner has failed to establish the beneficiary is qualified to perform the duties of the proffered position.

The AAO's review of the record also finds that the beneficiary does not appear to hold a degree from an accredited physical therapist educational program, the first step in acquiring a license as a physical therapist in California. Although the educational equivalency provided by Josef Silny & Associates determined the beneficiary's foreign academic credentials to be the equivalent of a U.S. baccalaureate degree in physical therapy, the record does not indicate that these credentials are recognized as a degree from a physical therapist educational program accredited by the Commission on Accreditation in Physical Therapy Education or the Physical Therapy Board of California and would allow the beneficiary to apply for a physical therapist's license in California. Therefore, the beneficiary not only does not possess a license to practice as a physical therapist, she does not appear to have the educational background necessary to acquire one.

The AAO notes that, in response to the director's notice of intent to deny, counsel contended that the proffered position is not that of a physical therapist, as it does not involve any patient care or contact. Instead, counsel asserted that the position is a coordinator and director of the petitioner's rehabilitative team and process, a "paperwork-related job" that makes no use of any practical aspect of physical therapy or rehabilitation and does not require the beneficiary to be licensed. The AAO does not find counsel's statements to be supported by the evidence of record.

Like the director, the AAO has taken note of the petitioner's description of the proffered position's duties in its November 20, 2003 letter of support. In its initial description of the proffered position's duties, the petitioner specifically stated that the beneficiary, at the time of patients' admissions, "assesses all physical, occupational and speech therapy needs of the patient," and, in conjunction with the physician, "direct[s] the creation of a rehab. plan for the patient which covers the patient's particular schedule and needs for physical and other types of therapy." The petitioner's support letter also indicated that the beneficiary would review and supervise the activities and performance of physical therapists. These duties do not describe employment that requires no contact with the petitioner's patients or that makes no use of any practical aspect of physical therapy. Instead, it appears that the beneficiary is directly involved in patient care activities, assessing patients' rehabilitation needs, developing rehabilitative treatment plans, and supervising and evaluating the performance of those staff members and contract employees, including physical therapists, who carry out rehabilitative treatment. As a result, the AAO continues to find the proffered position to be closely aligned to the employment of physical therapists and, therefore, to require the beneficiary to be licensed as a physical therapist.

The AAO is aware of CIS' previous approval of H-1B status for the beneficiary to perform duties that, counsel has asserted, are identical to those of the proffered position. However, as stated in its March 15, 2005 decision, the AAO does not find this prior decision to constitute a basis for approving the instant petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). If the prior petition was approved based on the evidence substantially similar to the evidence contained in this record of proceeding, the approval of the prior petition

was erroneous. Further, each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

**ORDER:** The director's July 14, 2005 decision is affirmed. The petition is denied.