

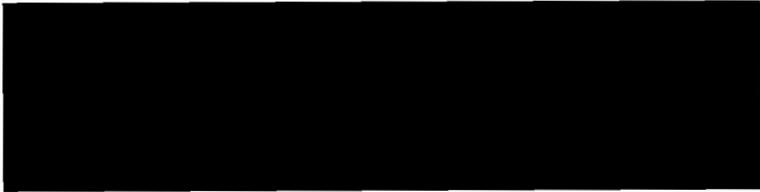
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FILE: EAC 06 193 52927 Office: VERMONT SERVICE CENTER Date: JAN 16 2008

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 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, Vermont Service Center, denied the nonimmigrant visa petition. 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 retail pharmacy. It seeks to employ the beneficiary as a graduate pharmacy intern in Arlington, Virginia. Accordingly, the petitioner endeavors to classify the beneficiary as a temporary nonimmigrant worker 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 record of proceeding before the AAO contains: (1) the Form I-129 filed June 15, 2006 with supporting documentation; (2) the director's October 24, 2006 request for further evidence (RFE); (3) an undated response to the director's RFE;¹ (4) the director's December 20, 2006 denial decision; and (5) the Form I-290B, counsel's brief, and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On December 20, 2006, the director denied the petition. The director observed that in a November 17, 2006 response to the RFE, the petitioner had provided an application to register the beneficiary as a pharmacy intern in Virginia. The record contains an application for registration as a pharmacy intern dated November 13, 2006. The director determined that the document submitted did not indicate that the beneficiary had been approved for registration as a pharmacy intern in Virginia, or is eligible for approval pending issuance of a social security number upon arrival in the United States. The director found that submission of a registration form does not guarantee licensure and that the record did not contain evidence of an intern registration card issued by the appropriate authority in the Commonwealth of Virginia. The director concluded that the petitioner had not provided evidence that the beneficiary would be immediately eligible to practice the profession in the Commonwealth of Virginia, upon entrance into the United States.

On appeal, counsel for the petitioner asserts that the petitioner pursued an intern permit in response to the director's RFE, but had not yet received the pharmacy intern registration permit when the response to the director's RFE was filed. Counsel provides a copy of license information for the beneficiary from the Virginia Department of Health Professions that indicates the license is temporary and expired February 21, 2007.

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:

¹ The record contains a letter dated November 3, 2006 prepared by counsel that states it is in response to the director's RFE. The letter discusses the proffered position and asserts the position is a specialty occupation; references twelve exhibits that are not attached to the response; and notes that to obtain professional licensure as a pharmacist, a pharmacy graduate intern must complete 1,200 hours of a professional experience program in the Commonwealth of Virginia. The content of the letter suggests it is not a direct response to the director's RFE in this matter, as the director only requested evidence of the beneficiary's pharmacist intern license or evidence from the appropriate licensing authority that the beneficiary is eligible for an intern license upon receipt of a social security number. The director notes that the petitioner responded to the RFE on November 17, 2006.

- (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
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The Form ETA 9035E, Labor Condition Application (LCA) indicates that the petitioner plans to employ the beneficiary in Arlington, Virginia and requests certification from October 1, 2006 to October 1, 2009. Counsel acknowledges that a registration permit had not been submitted to the appropriate licensing agency in the Commonwealth of Virginia when the petition was filed. The record before the director did not contain evidence of the term of the beneficiary's license.² Although the petitioner pursued registration in response to the director's RFE, the record did not establish eligibility when the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). 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." Moreover, the record on appeal, although containing a temporary license, indicates that the license expired February 21, 2007.

The record is deficient in establishing that the beneficiary had complied with the Virginia law regarding licensure of a pharmacy intern when the petition was filed. The record does not establish that the beneficiary is qualified to perform the duties of the specialty occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 361. The petitioner has not sustained that burden.

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

² A printout from the Virginia Department of Health Professions website indicates that the beneficiary had a license as a pharmacy intern as of January 19, 2007, with an expiration date of February 21, 2007. The record does not indicate when the beneficiary initially applied for or received the pharmacy intern license.