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FILE: EAC 05 181 50129 Office: VERMONT SERVICE CENTER Date: NOV 05 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:

SELF-REPRESENTED

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 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 medical health facility that provides home healthcare services. It seeks to employ the beneficiary as a physical therapist and endeavors to classify him 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 stating that the petitioner failed to submit a copy of the license of the immediate on-site supervisor at the facility where the beneficiary will be working. It is incumbent upon the petitioner to establish that the beneficiary has the requisite license which permits him to work as a physical therapist upon arrival in the United States, or that he is otherwise exempted from licensing requirements. The director also found that the petitioner failed to submit a certificate from an approved credentialing agency verifying that the beneficiary's foreign education is comparable with that of an American healthcare worker of the same type pursuant to section 212(a)(5)(C) of the Act. On appeal, the petitioner submits additional information asking that the petition be approved.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with petitioner's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first address the licensure issue.

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
- (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.

As noted in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, all states require physical therapists to pass national and State licensure exams before they can begin practice. They must also graduate from an accredited physical therapist education program. The *Handbook* also indicates that in most States physical therapists need a master's degree from an accredited physical therapy program and a State license, requiring passing scores on national and State examinations. The *Handbook* notes that only master's degree and doctoral degree programs are accredited in accordance with the Commission on Accreditation in Physical Therapy Education, and that, in the future, a doctoral degree might be the required entry-level degree. The State of New York's educational requirement for the position, however, where the beneficiary

would work as a physical therapist, is a bachelor's degree in physical therapy. The State of New York has approved the beneficiary's foreign education and found that he meets all requirements necessary for the issuance of a limited permit to practice physical therapy in New York State upon proof of valid immigration status.¹ The petitioner, however, has failed to establish that the beneficiary was qualified to perform the duties of the proffered position when the Form I-129 was filed. In the director's request for evidence dated August 4, 2005, the director asked the petitioner to provide a copy of the physical therapist license of the on-site supervisor of the beneficiary if the beneficiary will be working under a limited permit to practice physical therapy. The petitioner did not provide a copy of the license of the physical therapist who would be the beneficiary's on-site supervisor with its response to the request for evidence. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the Administrative Appeals Office will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director. As the record before the director did not contain a copy of the physical therapist license of the beneficiary's on-site supervisor, which is a supervisory requirement for physical therapists working under a limited permit, the beneficiary was not deemed qualified to perform the duties of the position when the petition was filed. Further, the supervisor's physical therapist license submitted on appeal was issued on December 29, 2005, approximately six months after the Form I-129 was filed. The petitioner has failed to establish that the beneficiary was qualified to perform the duties of the petition as of the petition filing date. The director's decision in this regard shall not be disturbed.

The director also denied the petition finding that the petitioner failed to submit a certificate from an approved credentialing agency verifying that the beneficiary's foreign education is comparable with that of an American healthcare worker of the same type pursuant to section 212(a)(5)(C) of the Act.

Section 212(a)(5)(C) of the Act provides, in pertinent part:

Uncertified foreign health-care workers. – Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services.

The applicable regulatory requirements at 8 C.F.R. § 212.15 state as follows:

(a) General certification requirements.

(1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, any alien who seeks admission to the United States as an immigrant or as a nonimmigrant for the

¹ A letter from the State Education Department of New York dated March 31, 2004 confirms that the beneficiary has met all requirements for issuance of a limited permit to practice physical therapy in New York upon receipt of evidence that the beneficiary has received valid immigration status.

primary purpose of performing labor in a health occupation listed in paragraph (c) of this section is inadmissible to the United States unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

(b) Inapplicability of the ground of inadmissibility. This section does not apply to:

....

(2) Aliens seeking admission to the United States to perform services in a non-clinical healthcare occupation. A non-clinical health-care occupation is one where the alien is not required to perform direct or indirect patient care. Occupations which are considered to be non-clinical include, but are not limited to, medical teachers, medical researchers, and managers of healthcare facilities;

(c) Covered health care occupations. With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she received his or her education or training.

- (1) Licensed Practical Nurses, Licensed Vocational Nurses and Registered Nurses;
- (2) Occupational Therapists;
- (3) Physical Therapists;
- (4) Speech – Language Pathologists and Audiologists;
- (5) Medical Technologists (Clinical Laboratory Scientists);
- (6) Physicians Assistants;
- (7) Medical Technicians (Clinical Laboratory Technicians).

As previously noted, the petitioner seeks to employ the beneficiary as a physical therapist. That occupation is specifically listed in the regulation above as one that requires a certificate from one of the approved credentialing organizations set forth in 8 C.F.R. § 212.15(e). The beneficiary is a nonimmigrant health care worker seeking admission to the United States for the purpose of performing labor in a health occupation. The beneficiary is, therefore, required by the above-cited regulation to obtain, as a condition of admissibility, a certificate from an approved credentialing organization. The record does not establish that the beneficiary complied with the above-cited regulation by obtaining a certificate from an approved credentialing organization. Thus, the beneficiary does not appear to be *admissible to the United States*. The alien must present a certificate or certified statement to a consular officer at the time of visa issuance and to the Department of Homeland Security at the time of admission. 8 C.F.R. § 212.15(d)(1). The petition was, in part, improperly denied because the beneficiary was

found to be inadmissible. That issue, however, is not properly before the AAO.

Beyond the decision of the director, the petitioner did not submit an itinerary for the beneficiary's employment during the period of intended stay, nor copies of contracts with the end user of the beneficiary's services detailing the work to be performed by the beneficiary and the beneficiary's work location. Without an itinerary or copies of client contracts (the petitioner is a staffing agency that provides healthcare workers for third party clients), it cannot be determined where the beneficiary will be working and if a valid Labor Condition Application (LCA) has been submitted for the beneficiary's work location. For this additional reason, the petition may not be approved.

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 failed to sustain that burden.

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