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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street, N.W.  
BCIS, AAO, 20 MASS, 3/F  
Washington, DC 20536

File: EAC 03 019 53854 Office: VERMONT SERVICE CENTER Date:

MAY 16 2003

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:

**PUBLIC COPY**

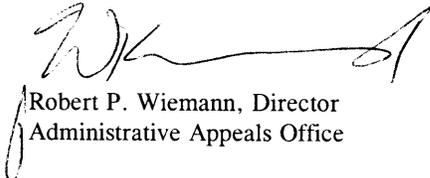
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained in part and remanded to the director for further consideration.

The petitioner is a New Jersey outpatient rehabilitation clinic with five employees and a gross annual income of \$474,007. It seeks to temporarily employ the beneficiary as a physical therapist for a period of three years. The director determined that the petitioner had not established that the beneficiary was immediately eligible to practice the profession of physical therapist.

On appeal, counsel asserts that the beneficiary is a H-4 dependent and as such is not eligible for a social security number in her present immigration status. Counsel submits additional documentation on the beneficiary's inability to obtain a social security card while in H-4 status and comments further on the Bureau of Citizenship and Immigration Service's (Bureau) interpretation of a previous memo on H-1B beneficiaries and social security cards.

Section 214(i)(1) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The Act further states the following at section 214(i)(2): "For purposes of section 101a (15)(H)(k)(b), the requirements of this paragraph, with respect to a specialty occupation, are—(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation."

With regard to licensure for H-1B classification, 8 C.F.R. § 214.2 (h)(4)(v), states the following:

(A) *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.

(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, 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.

In the original petition received by the Vermont Service Center on October 24, 2002, the petitioner submitted documentation that the beneficiary's three years of coursework for a baccalaureate degree in physical therapy from the University of Mumbai and subsequent coursework taken to obtain membership certification from the Indian Association of Physiotherapists were the equivalent of a baccalaureate degree in physical therapy from an accredited U.S. university. The petitioner also submitted a copy of an I-94 Record of Entry form that documented the beneficiary's entry into the United States as an H-4 spouse in March 2002.

On November 1, 2002, director asked for further information with regard to the beneficiary's status as the spouse of an H-1B non-immigrant worker. In addition, the director requested a copy of the beneficiary's license to practice the occupation of physical therapist in New Jersey, or, in the alternative, an original letter from the appropriate licensing authority that the licensure will be granted upon arrival, or that licensure is not required.

In response, the petitioner submitted pay statements for the beneficiary's spouse to help establish the beneficiary's valid nonimmigrant status. In addition, the petitioner stated that the beneficiary had not yet received the New Jersey physical therapist license since she did not have a valid social security number. The petitioner submitted for the record a letter from the New Jersey State Board of Physical Therapy dated June 27, 2002 that stated the beneficiary met all the requirements of the State of New Jersey, and that she could sit for the National Physical Therapy Examination (NPTE). Both the letter and a memorandum attached to the letter stated that neither permanent nor temporary licenses were now issued by the State of New Jersey without a valid social security number. The petitioner also submitted the beneficiary's test score on the National Physical Therapy Examination (NPTE) as administered by the Federation of State Boards of Physical Therapy (FSBPT). According to this

document, the beneficiary took the examination on August 22, 2002 and passed the exam.

On December 9, 2002, the director denied the petition. In referring to an earlier 1992 memo and a Bureau memo dated November 20, 2001,<sup>1</sup> the director determined that the beneficiary was not covered by the exceptions outlined in the memo because it dealt with individuals who were unable to get social security cards because they were not physically present in the United States. The director stated that the scenario described in the Bureau memo was not applicable to the instant petition since the beneficiary had been physically present in the United States since March of 2002. The director determined that since the beneficiary did not possess a social security card, she did not possess a license to practice physical therapy, and therefore was not eligible to work as a physical therapist in the State of New Jersey.

On appeal, counsel asserts that the director misinterpreted the intent of the Bureau memo dated November 2001, and placed the following excerpt on the record:

In order to avoid this situation and accommodate the needs of H-1B petitioners, INS 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 1 year time period 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 issuance of the state licensure is lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements of the occupation have been met.

The procedure is CONSISTENT with the [Bureau's] past policies with respect to the adjudication of H petitions where the State Licensing Board would not issue a license unless the alien was physically present in the United States. The [Bureau] officers should continue to approve H petitions that require state licensure when the only obstacle to obtaining the license is the alien's lack of physical presence. (Emphasis added by counsel).

Counsel asserts that the director's denial of the instant

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<sup>1</sup> Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions*, HQ 70/6.2.8 (November 20, 2001).

petition overlooked the fact that the beneficiary could not obtain a social security card due to the fact that she is a H-4 dependent. Counsel submits a document entitled "Report of Confidential Social Security Benefit Information" from the Social Security Administration that states the beneficiary is not permitted to have a social security number due to her immigration status. Finally counsel asserts that upon approval of the instant petition, the beneficiary will be able to apply for a social security number and obtain a license to practice physical therapy in the State of New Jersey.

With regard to the requirements for physical therapists who are graduates of foreign schools, Chapter Nine, Medicine and Surgery of the New Jersey Statutes, Article 2A Physical Therapy, states the following:

**45:9-37.22 Eligibility for Licensure**

To be eligible for licensure as a physical therapist or physical therapy assistant, an applicant shall submit to the board satisfactory evidence that:

- a. He has graduated from a program in physical therapy which has been approved for the education and training of physical therapists or physical therapist assistants by an accrediting agency recognized by the Council on Post-Secondary Accreditation and the United States Department of Education; and
- b. He has successfully completed a written examination administered by the board to determine his competence to practice physical therapy or to act as a physical therapist assistant.

**45:9-37.23. Graduate of foreign school; qualifications for licensure**

An applicant for licensure who is a graduate of a foreign school of physical therapy shall furnish evidence satisfactory to the board that:

- a. He has completed a course of study in physical therapy which is substantially equivalent to that provided in an accredited program as described in section 12a of this act; and
- b. He has successfully completed a written examination as provided for in section 12b of this act.

**45:9-37.29. Temporary licenses**

a. Upon submission of a written application on forms provided by it, the board shall issue a temporary license to a person who has applied for licensure pursuant to this act and who, in the judgment of the board, is eligible for examination. A temporary license shall be available to an applicant with his initial application for examination and he may practice only under the direct supervision of a licensed physical therapist. A temporary license shall expire automatically upon failure of the licensure exam but may be renewed for an additional six month period until the date of the next exam at which time it shall automatically expire and be surrendered to the board.

The Physical Therapist Licensing Act of 1983, *available* at rules section for New Jersey Board of Physical Therapy at <http://www.state.nj.us/lps/ca/medical.htm> (as of May 9, 2003).

Upon review of the record, the letter from the New Jersey State Board of Physical Therapy dated June 27, 2002 clearly establishes that the beneficiary is not eligible to perform the duties of a physical therapist with either a permanent or a temporary license if she does not have a valid social security number. It should be noted that this letter from the State of New Jersey does not establish that the lack of a social security card was the only remaining obstacle to obtaining a license, as it also indicated that the beneficiary had not taken the National Physical Therapy Examination. Nevertheless, the record also establishes that the beneficiary took the NPTE and passed it apparently prior to the submission of the instant petition. According to the Federation of State Board of Physical Therapy (FSBPT), which administers the NPTE, the examination is a test taken on a computer with electronic test scores directly transmitted to State Boards within days. See information on the processing of NPTE examination results, *available* at <http://www.fsbpt.org/handbook/faq.html#>. (as of May 9, 2003). The record also establishes that the Social Security Administration has acknowledged that it will not process a social security card for the beneficiary in her present non-immigrant H-4 status. Thus at the time of filing the original petition, the beneficiary appears to have fulfilled all the necessary requirements to be licensed as a physical therapist as outlined by the State of New Jersey, with the exception of having a valid social security card.

While the November 20, 2001 memorandum does provide that Bureau officers should continue to approve H petitions that require state licensure when the only obstacle to obtaining the license is the alien's lack of physical presence, the memorandum **further specifies** that 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." (Emphasis added.) This interpretation has also been reiterated in a more recent Bureau memo relevant to the H-1B petition.<sup>2</sup> As such, it does not appear to be an excessive interpretation. Accordingly the director's decision to deny the instant petition based on the fact that the petitioner was not yet in possession of a valid U.S. social security card is an inappropriate basis for the denial of the petition.

Beyond the decision of the director, the record is not persuasive that the beneficiary is qualified to perform the duties of the proffered position. The Department of Labor's *Occupational Outlook Handbook* (*Handbook*) on page 259 clearly establishes that a bachelor's degree or higher in physical therapy is the minimum educational requirement for entry into the physical therapy field, which is one of the criteria to establish that the proffered position is a specialty occupation. Nevertheless, the educational equivalency document provided by the petitioner is unpersuasive that the beneficiary has the equivalent of a baccalaureate degree in physical therapy from an accredited U.S. university.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

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

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<sup>2</sup> Memorandum from [REDACTED] Executive Associate Commissioner, Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002.)

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.

The International Credentials Evaluation and Translation Services (ICETS) of New York City prepared the educational equivalency document. ICETS examined two types of evidence: first, the documentation of the beneficiary's three-year bachelor of science program in physical therapy at the University of Mumbai was examined; second, the evaluator examined a membership certificate from the Indian Association of Physiotherapists. Based on the University of Mumbai documents, the evaluator stated that the beneficiary had satisfied requirements for the completion of three years of academic study towards a bachelor of science degree from an accredited institution in the United States. The evaluator then stated that the beneficiary, by virtue of having been awarded a membership certificate from the Indian Association of Physiotherapists in January 1998, had completed enough coursework to complete requirements for the completion of a bachelor of science degree in physical therapy from a U.S. university.

The evaluator asserted that the Indian Association of Physiotherapists grants membership to individuals who have achieved "advanced standing in the profession" and who have "passed the requisite qualifying examinations." The record reflects no further evidence of any further academic work or examinations undertaken by the beneficiary to obtain the membership certificate. Neither the petitioner nor the evaluator provided any further documentation as to the academic significance of the Indian Association of Physiotherapists certificate procedures or similar information to further substantiate the findings of the educational equivalency document. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the Bureau may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Bureau is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). With regard to the present educational equivalency document, the Bureau finds the information provided only probative in part. As a result the present educational equivalency document is not found sufficient to establish the beneficiary's qualifications to perform the duties of the proffered position.

Without more persuasive evidence, the petitioner has not established that the combination of the beneficiary's university studies and certificate work are the equivalent of a baccalaureate degree in physical therapy in the United States. While the State of

New Jersey has found the beneficiary's education to be sufficient for her to work as a physical therapist, the record is not clear that the beneficiary actually meets the regulatory criteria for qualifications to perform the proffered position.

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 sustained that burden with regard to the issue raised by the director with regard to the lack of a social security card prior to approval of the H-1B petition. However, the record remains incomplete with regard to whether the beneficiary is qualified to perform the proffered position based on her educational equivalency document. Accordingly, the appeal will be sustained in part and remanded back to the Director for further consideration with regard to the beneficiary's qualifications.

**ORDER:** The decision of the director is withdrawn. The matter is remanded to the director for further consideration of the beneficiary's qualifications and entry of a new decision which, if adverse to the petitioner, shall be certified to the AAO for review.