



U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 141 55094 Office: CALIFORNIA SERVICE CENTER Date: *Aug 11 2003*

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:

[Redacted]

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 provider of medical/rehabilitation services. It seeks to employ the beneficiary as a physical therapist. The petitioner, therefore, endeavors to classify the beneficiary 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 because the beneficiary was not qualified to perform the duties of the proffered position. On appeal, counsel states that the beneficiary has an approved application with the Physical Therapy Board of California to take the National Physical Therapy Examination (NPTE) and the California Laws Examination (CLE). Counsel states that the beneficiary missed her May 5, 2003 deadline to take the examinations because the immediate H-1B petition was denied. Counsel states that CIS may approve the instant petition under either 8 C.F.R. § 214.2(h)(4)(iii)(C) or 8 C.F.R. § 214.2(h)(4)(v)(E).

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 full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), 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 the approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

According to 8 C.F.R. § 214.2(h)(4)(v)(B), 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.

Furthermore, 8 C.F.R. § 214.2(h)(4)(v)(C) provides that 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.

Finally, the regulation at 8 C.F.R. § 214.2(h)(4)(v)(E) indicates the limitation on approval of the petition where licensure is required. This states that the petition may be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation.

The record contains: (1) the letter from the Physical Therapy Board of California that states that the beneficiary may take the NPTE and the CLE; and (2) the Authorization to Test letter from the Federation of State Boards of Physical Therapy (FSBPT).

The letter from the Physical Therapy Board of California stated that the beneficiary is not authorized to work as a physical therapist license applicant, but may work as an aide as defined in the Requirements for Use of Aides in section 1399 of the Physical Therapy Practice Act.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) does not apply to the instant petition. A temporary license is not available that would allow the beneficiary to perform the duties of the occupation without a permanent license. The Physical Therapy Board of California explicitly stated that the beneficiary is not authorized to work as a physical therapist license applicant, but may work as an aide as defined in the Physical Therapy Practice Act.

The regulation set forth at 8 C.F.R. § 214.2(h)(4)(v)(C) also does not apply to the situation at hand. Based on the letter from the Physical Therapy Board of California, the state of California does not authorize the beneficiary to fully practice as a physical therapist under the supervision of licensed senior or supervisory personnel in the occupation of physical therapy.

Last, the regulation at 8 C.F.R. § 214.2(h)(4)(v)(E) is not applicable to this case. It merely discusses the period of time that a petition may be approved. It does not provide the ground for the petition's approval.

Based on the above reasons, the petitioner fails to establish that the beneficiary is qualified to perform the duties of the proffered position. 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 appeal is dismissed. The petition is denied.