



U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 078 50511 Office: NEBRASKA SERVICE CENTER Date: *[Handwritten date]*

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.

6- Mai Johnson
Robert P. Wiemann, Director
Administrative Appeals Office

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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 rehabilitation services and staffing company that seeks to employ the beneficiary as a physical therapist. The petitioner 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 is not qualified to perform the duties of a specialty occupation. On appeal, the petitioner submits a letter.

Section 214(i)(2) of the Immigration and Nationality Act (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. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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 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 record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a physical therapist. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in physical therapy for the proffered position.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary does not possess a temporary or permanent license to practice physical therapy in the State of Indiana. On appeal, the petitioner states that the beneficiary had a temporary license that was current as of the date the petition was filed. In addition, the petitioner states that the beneficiary is eligible to take the licensing exam.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a license.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if an occupation requires a license, a beneficiary must have a license prior to approval, have a temporary license if it is available or be allowed to practice the occupation without a license under the supervision of someone who is licensed. The beneficiary did have a temporary license, which expired February 16, 2003, approximately five weeks after the petition was filed. The petitioner asserts that since the beneficiary is eligible to take the physical therapy examination upon her arrival in the United States, the petition should be approved, even though her temporary license expired. The regulations require that an individual "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." 8 C.F.R. § 214.2(h)(4)(v)(A).

In the instant matter, the beneficiary does not have a valid temporary or permanent license to practice physical therapy and, therefore, she is not able to immediately engage in employment in the United States. That she may be able to take the exam immediately upon her arrival is irrelevant. The regulations clearly require licensure prior to approval of the petition. Without the requisite license, the beneficiary is not qualified to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment. Although the petitioner claims that the beneficiary could work as a physical therapist under the supervision of another licensed physical therapist, the certified Labor Condition Application (LCA) indicates that the beneficiary's place of employment is Indiana, whereas the petitioner is a staffing agency in Missouri. There is no evidence that the petitioner has direct knowledge that the beneficiary would actually be under the supervision of another licensed physical therapist while working in Indiana.

Beyond the decision of the director, there is insufficient evidence to determine that the petitioner is the beneficiary's actual U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii). For example, the beneficiary's place of employment on the certified LCA is listed as Lafayette, Indiana. There is no evidence in the record establishing that the petitioner would have an employer-employee relationship with the beneficiary while she is working in another state.

As related in the discussion above, the petitioner has failed 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.

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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.