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FILE: LIN 04 233 51998 Office: NEBRASKA SERVICE CENTER Date: JAN 29 2007

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:



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 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 provides home-based health care 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, finding that the petitioner had failed to establish that the beneficiary has a state license to practice as a physical therapist in Illinois, or that she meets the requirements to practice the proffered profession on a temporary basis without a state license.

Counsel asserts on appeal that the beneficiary is authorized to take the national physical therapy license exam in Illinois, and that upon taking the exam, the beneficiary would be entitled to work as a physical therapist while awaiting the results of the exam. Counsel asserts that the beneficiary meets admissibility requirements to practice physical therapy in Illinois.¹ Counsel concludes that the Form I-129, Petition for a Nonimmigrant Worker (Form I-129) should therefore be approved.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the director's denial letter; and (4) Form I-290B, an appeal brief, and additional documents. The AAO reviewed the record in its entirety before issuing its decision.

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.

The regulation at 8 C.F.R. § 214.2(h)(4)(v) states, in pertinent part:

(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.

(C) Duties without licensure. In certain occupations which generally require licensure, a

¹ As indicated in the director's decision, the issue of visa screening and admissibility is not within the purview of the present decision, and is properly addressed at the overseas consular visa issuance stage.

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.

The Illinois Compiled Statutes (ILCS) contain statutory provisions pertaining to licensure and practice as a physical therapist in Illinois.

The statute at 225 ILCS 90/2 provides:

Sec. 2. Licensure requirement; exempt activities. Practice without a license forbidden – exception. . . .

This Act does not prohibit: . . .

(2) The practice of physical therapy by those persons, practicing under the supervision of a licensed physical therapist and who have met all of the qualifications as provided in Sections 7, 8.1, and 9 of this Act, until the next examination is given for physical therapists . . . and the results have been received by the Department [of Professional Regulation] and the Department has determined the applicant's eligibility for a license.²

The statute at 225 ILCS 90/8 provides:

Sec. 8. Qualifications for licensure as a Physical Therapist.

(a) A person is qualified to receive a license as a physical therapist if that person has applied in writing, on forms prescribed by the Department [of Professional Regulation], has paid the required fees, and meets all of the following requirements:

- (1) He or she is at least 18 years of age and of good moral character. . . .
- (2) He or she has graduated from a curriculum in physical therapy approved by the Department. In approving a curriculum in physical therapy, the Department shall consider, but not be bound by, accreditation by the Commission on Accreditation in Physical Therapy Education. A person who graduated from a physical therapy program outside the United States or its territories shall have his or her degree validated as equivalent to a physical

² It is noted that sections 7 and 9 have been repealed. Section 8.1 pertains to qualifications for licensure as a physical therapist assistant.

therapy degree conferred by a regionally accredited college or university in the United States. . . .

(3) He or she has passed an examination approved by the Department to determine his fitness for practice as a physical therapist

A review of the Illinois physical therapy licensing exam application reflects that, in order for an applicant to be considered for licensure and for the application to be approved, an applicant educated outside of the United States must submit, amongst other things, official school transcripts and course descriptions, and an evaluation of his or her education by the Foreign Credentialing Commission on Physical Therapy (FCCPT). *See* Illinois Physical Therapy Licensing Exam application at www.idfpt.com. The application states that:

First time candidates making application for examination will receive notification from [REDACTED], advising them of the receipt and approval of their application for licensure. At that time, you may practice in accordance with Section 90/2(2) of the Illinois Physical Therapy Act of 1987, which stipulates that the Act does not prohibit the practice of physical therapy by one who has applied in writing to the Department in form and substance satisfactory to the Department for a license as a physical therapist/physical therapist assistant, and has complied with all the provisions under Section 90/8 and 90/8.1, except taking the examination. . . . You are required to take the examination within 60 days upon notification from the Federation of State Boards of Physical Therapy (FSBPT) of the Authority to Test (ATT). NO APPLICANT FOR LICENSURE PRACTICING UNDER PROVISIONS OF THIS PARAGRAPH SHALL PRACTICE PHYSICAL THERAPY EXCEPT UNDER DIRECT/ONSITE SUPERVISION.

The record contains a June 24, 2004, letter to the beneficiary from the Illinois Department of Professional Regulation stating that the beneficiary's application and supporting documents are complete and that she has been approved to sit for the National Physical Therapy Examination. The record also contains the beneficiary's Authorization to Test (ATT) letter, and an April 20, 2005, Comprehensive Credential Evaluation Certificate for the Physical Therapist, from the Foreign Credentialing Commission on Physical [REDACTED] (FCCPT) certificate reflecting that the beneficiary satisfies language and educational requirements.

In addition, the record contains a June 28, 2004, letter from [REDACTED] to the beneficiary stating that the beneficiary's physical therapist examination application was approved, and stating that accordingly, the beneficiary is:

[N]ot prohibited from practicing, but must do so under direct, onsite supervision in accordance with Section 90/2(2) of the Illinois Physical Therapy Act, as a Physical Therapist, license pending until you are in receipt of your examination results. . . .

If you pass, you should immediately apply for your license. You may continue to practice, under direct supervision, as a Physical Therapist, until actual receipt of your license. IF YOU FAIL THIS EXAMINATION, YOU MUST IMMEDIATELY CEASE PRACTICE AS A PHYSICAL THERAPIST, LICENSE PENDING.

UNSUPERVISED PRACTICE BEFORE YOU RECEIVE YOUR LICENSE MAY RESULT IN DENIAL OF LICENSURE.

Based on the above evidence, the petitioner has established that the Department of Professional Regulation determined the beneficiary would be eligible to practice as a physical therapist in Illinois pursuant to 225 ILCS 90/2, provided she took the national physical therapy examination within 60 days of notification of her authorization to test (ATT), and under the condition that she practice the profession under the direct, onsite supervision of a licensed physical therapist.

The present record fails to establish that the beneficiary meets the conditions to practice physical therapy in Illinois, as set forth in 225 ILCS 90/2. The description of proffered position duties contained in the record reflects that the beneficiary would:

- Plan and administer medically prescribed therapy treatment;
- Review physician's referral (prescription) and patient's condition and medical records to determine physical therapy treatment required;
- Test and measure patient's strength, motor development, sensory perception, functional capacity and respiratory and circulatory efficiency and record findings to develop or revise treatment programs;
- Plan and prepare written treatment program;
- Administer manual exercises to improve and maintain function;
- Instruct, motivate, and assist patient to perform various physical activities;
- Evaluate effects of treatment at various stages and adjust treatments to achieve maximum benefit;
- Administer massage, apply knowledge of massage techniques and body physiology.

The proffered position description contained in the record contains no indication that the beneficiary would be supervised, in any way, by a licensed physical therapist, as required by Illinois law. Further, there is no indication from the petitioner that it will provide a licensed physical therapist on its staff to supervise the beneficiary. Going on record without supporting documentation is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In the present matter, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed, and the petition denied.

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