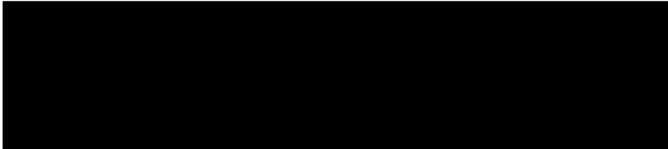


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U.S. Citizenship
and Immigration
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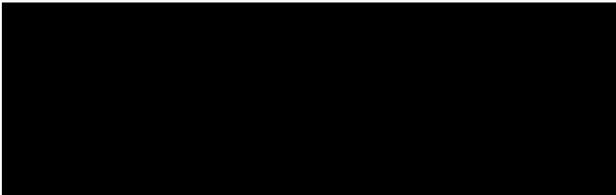
FILE: EAC 04 206 53738 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director of the Vermont 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, and the petition will be denied.

The petitioner, a provider of evaluation and therapy services for children, seeks to employ the beneficiary as a special education teacher. Accordingly, the petitioner filed this H-1B petition for classification of the beneficiary as a temporary nonimmigrant worker in a specialty occupation, 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).

The record reflects that the proffered position – special education teacher - is a specialty occupation. The director denied the petition for lack of evidence that the beneficiary held the necessary licensure at the time the petition was filed. The director stated, in part:

The record does not include evidence that at the time the petition was filed the beneficiary was eligible to practice teaching in New York because she was not in possession of a teaching certificate or license in New York. In addition, [the petitioner has] failed to demonstrate that the beneficiary is currently licensed as a teacher in New York, or other evidence that she is immediately eligible to practice her profession in New York.

On appeal, counsel acknowledges that New York State has not yet issued a “physical certificate” evidencing the beneficiary’s licensure as a special education teacher. Counsel argues that the issuance of a certificate is not necessary, on the basis of his assertions that the record establishes that petitioner is eligible for the necessary licensure, and that an appropriate New York State official has acknowledged, in a telephone conversation with the petitioner, that the beneficiary has been approved for licensure. Counsel states, in part:

Clearly, the physical certificate cannot be produced by the beneficiary because the application for such certificate is still pending with the “NYS Office of Teaching Initiatives.” The delay and backlog by the “NYS Office of Teaching Initiatives” in the processing of the certificate must not and cannot be taken against the beneficiary. This delay by the government agency responsible for the processing cannot be used to the detriment of the beneficiary.

As discussed below, the AAO finds that the director was correct in denying the petition for failure to establish the necessary licensure at the time the petition was filed. The AAO bases its decision on the entire record as supplemented by the matters submitted on appeal, including: (1) the petitioner’s Form I-129 (Petition for Nonimmigrant Worker) and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief with its attachments.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. §1184(i)(2), states, in pertinent part, that an alien applying for classification as an H-1B nonimmigrant worker must have completed a degree in the specialty that the occupation requires, and that, if he or she does not possess the required degree, the petitioner must demonstrate that the alien has [1] experience in the specialty equivalent to the completion of such degree, and [2] 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 regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D) contain the criteria for establishing that a beneficiary's education, training and/or experience equate to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), above.

The Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), a resource the AAO routinely consults for its information about the duties and educational requirements of particular occupations, confirms that licensure is required for special education teachers in every State. Counsel does not contest the fact that New York State licensure is required for the special education teacher position in question; rather, he argues that licensure sufficient for the relevant regulations has been achieved, although a certificate of licensure has not been issued. Therefore, the regulatory provisions at 8 C.F.R. § 214.2(h)(4)(v), *Licensure for H classification*, are critical to the outcome of this appeal. They determine when the CIS beneficiary qualification threshold has been satisfied with regard to licensure:

The regulation at 8 C.F.R. § 214.2(h)(4)(v) provides:

- (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.

* * * *

- (E) *Limitation on approval of petition.* Where licensure is required in any occupation, including registered nursing, the H petition may only 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. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

Another critical factor is the principle, long established by precedent decisions binding upon CIS, that the determination to approve or deny a petition shall be governed by the facts at the time that the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition; and a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO accords no weight to any statement in the November 13, 2004 affidavit of the petitioner's Human Resources Director (HRD) that is not corroborated by documentary evidence in the record. This includes the HRD's uncorroborated assertion that, sometime after August 10, 2004, [REDACTED] of the New York State Education Department informed her that "the application for Conditional Initial Teaching Certificate of [the beneficiary] has been approved." Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)). Because they are not supported by evidence in the record, by citations to statutes, regulations, precedent decisions that bind CIS officers, or by any other legal authority, the AAO accords no weight to the assertions of counsel to the effect that: CIS must allow for a license-issue backlog delay in the New York State Office of Teaching Initiatives; eligibility for a license is equivalent to licensure; the sole reason for the delay in the issuance of a certificate of licensure to the beneficiary is “extreme delay in processing and issuing” certificates by the New York State Office of Teaching Initiatives; the beneficiary is “automatically granted a ‘two-year Conditional Initial Certificate’ by the NYSED”; and there is “no doubt that the Beneficiary’s application’s approval has been verbally confirmed by [REDACTED]s of the ‘New York State Office of Teaching Initiatives.’” Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

With regard to the asserted confirmation by [REDACTED], the AAO also notes that there is no evidence that Mr. [REDACTED]’s “confirmation” is final or determinative of whether a certificate of licensure will be issued to the beneficiary.

The decisive facts established in the record are that: the petition was filed on June 28, 2004; on the date the petition was filed, the beneficiary held a Texas Educator Certificate allowing her to practice as a Probationary Special Education Teacher (Grades EC-12) in Texas for a one-year period ending on July 30, 2004; the beneficiary’s application for licensure was received by the New York State Department of Education, Office of Teaching Initiatives, on August 12, 2004 – more than one month after the petition was filed; per the record’s November 11, 2004 computer printout from the Office of Teaching Initiatives Internet site, as of October 27, 2004 the beneficiary’s application was “pending evaluation or reevaluation” and “citizenship required for permanent certification” was noted as a deficiency; per the record’s April 26, 2005 computer printout from the Office of Teaching Initiatives Internet site, the beneficiary’s application was still “pending evaluation or reevaluation” as of that date; and there is no evidence of record that, at the time the petition was filed in June 2004, the beneficiary had any grant of authority from New York State to engage in the pertinent licensure-required specialty occupation prior to its issuance of a certificate of licensure. As the beneficiary did not have the requisite licensure at the time the petition was filed, and therefore was not authorized to serve in the specialty occupation at that time, the director’s decision was correct. The appeal will be dismissed and the petition will be denied.

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 and the appeal shall accordingly be dismissed.

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