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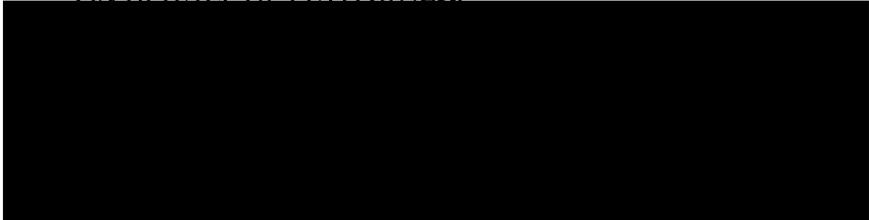
FILE: EAC 05 156 52038 Office: VERMONT SERVICE CENTER Date: **NOV 13 2007**

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:



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, Vermont Service Center, denied the nonimmigrant visa petition. 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 assistance to people, particularly young children, who have speech problems. It seeks to extend the employment of the beneficiary as a speech language teacher (pathologist). Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On July 3, 2006, the director denied the petition determining that the petitioner had not submitted a certificate from an independent credentialing organization in accordance with section 212(a)(5)(C) of the Act.

The record of proceeding before the AAO contains: (1) the Form I-129 filed May 9, 2005 with supporting documentation; (2) the director's December 15, 2005 request for further evidence (RFE); (3) the petitioner's February 27, 2006 response to the RFE; (4) the director's July 3, 2006 denial letter; and (5) the Form I-290B, with counsel's statement on appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the petitioner has fulfilled the eligibility requirements to obtain an H-1B visa petition extension without the beneficiary having obtained the Foreign Health Care Worker Certification required at Section 212(a)(5)(c) of the Act.

Section 212(a)(5)(C) of the Act provides, in pertinent part:

Uncertified foreign health-care workers. – Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services.

On July 25, 2003, the Department of Homeland Security (DHS) published a final regulation implementing this section of the Act. The rule establishes that certain nonimmigrant health care workers are required to obtain certification in accordance with section 212(a)(5)(C) of the Act.

The regulation at 8 C.F.R. § 212.15 in pertinent part provides:

(a) General certification requirements.

- (1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, any alien who seeks admission to the United States as an immigrant or as a nonimmigrant for the primary purpose of performing labor in a health care occupation listed in

paragraph (c) of this section is inadmissible unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

(c) Covered health care occupations. With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she receives his or her education or training:

(4) Speech Language Pathologists and Audiologists.

On September 22, 2003, the Associate Director for Operations issued a memorandum providing guidance to the final regulation and updating the Adjudicator's Field Manual AD 03-31. *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31*; Memorandum of [REDACTED] Associate Director for Operations, CIS, DHS, (September 22, 2003) (" [REDACTED] "). The Adjudicator's Field Manual was expanded to include a new chapter at 30.12. The new chapter addressed the implementation of the new regulation as follows:

(f) Implementation Dates.

(1) Prior to July 26, 2004, the DHS will admit and approve applications for extension of stay or change of status for nonimmigrant health care workers without requiring certification. The temporary admission, extension of stay, or change of status of such a nonimmigrant will be subject to the following conditions:

- (i) The admission, extension of stay, or change of status may not be for a period longer than 1 year from the date of the decision, even if the relevant provision of 8 CFR 214.2 would ordinarily permit the alien's admission for a longer period;
- (ii) The alien must obtain the requisite health care worker certification within 1 year of the date of decision to admit the alien or to extend the alien's stay or change the alien's status; and
- (iii) Any subsequent petition or application to extend the period of the alien's authorized status or change the alien's status must include proof that the alien has obtained the health care worker certification if the extension or stay or change of status is sought for the primary purpose of the alien's performing labor in an affected health care occupation. If the alien is adjusting status, all eligibility requirements must be met at the time of filing the application for adjustment of status. 8 CFR 103.2(b)(12). Therefore, a health care worker in one of the affected occupations must submit evidence of certification at the time the adjustment of status is filed.

- (2) On or after July 26, 2004, if an alien seeks admission to the United States, a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if his or her primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations. The DHS will then exercise its discretion to waive the certification requirement only on a case[-]by[-]case basis.

The petitioner filed the Form I-129 extension petition on May 9, 2005. In an April 20, 2005 letter appended to the petition, the petitioner described the duties of the proffered position as:

1. To assess speech and language problems with children including speech, cognition communication voice, fluency and other related disorders.
2. To help children who can't make speech sounds, or can't make them clearly including people with voice quality problems, such as inappropriate pitch, and those with problem understanding and producing language.
3. To prevent and treat children with above-mentioned problems.
4. To study and develop individualized plans of care, tailored to each child's needs. Work under the supervision of a licensed pathologist.

The petitioner noted that the beneficiary had been working as a speech language teacher and would continue working in the same position without change under the supervision of a licensed pathologist. The petitioner provided a copy of the beneficiary's previous approval notice approving the beneficiary's H-1B classification from July 16, 2002 to June 19, 2005.

On December 15, 2005, the director requested evidence that the beneficiary had been certified by the appropriate credentialing organization as required for certain health care occupations. In a February 27, 2006 response, counsel for the petitioner submitted a copy of the New York State Form 6, Acknowledgement of Supervisory Plan for Licensure in Speech-Language Pathology, for the beneficiary with a beginning date of August 2, 2004 and an ending date of August 2, 2006. The petitioner did not submit the health care certification requested by the director. For this reason, the petition will be denied.

Based on the record before it, the AAO finds that the petitioner has not complied with the filing requirement at 8 C.F.R. § 212.15(n)(2)(iii), which after July 26, 2004 requires any petition or application filed to extend the period of an alien's authorized stay or change his or her status to include proof that the alien has obtained certification from the CGFNS or an equivalent credentialing organization. In addition, the AAO observes that the record does not contain a copy of the beneficiary's license to work as a speech language pathologist in the State of New York.

To determine whether the proffered position in this matter requires a license to provide the duties of the position and any other requirements imposed upon the position, the AAO will first review the laws and regulations of the State of New York. The pertinent portions of the New York State Statute regarding the Education Department Office of Professions states at:

Article 159, Speech-Language Pathology and Audiology

§8200. Introduction.

This article applies to the professions of speech-language pathology and audiology. The general provisions for all professions contained in article one hundred thirty of this title apply to this article.

§8201. Definition of practice of speech-language pathology.

The practice of the profession of speech-language pathology shall mean the application of principles, methods and procedures of measurement, prediction, non-medical diagnosis, testing, counseling, consultation, rehabilitation and instruction related to the development and disorders of speech, voice, swallowing, and/or language for the purpose of preventing, ameliorating or modifying such disorder conditions in individuals and/or groups of individuals.

§8202. Practice of speech-language pathology.

Only a person licensed or otherwise authorized under this article shall practice speech-language pathology or use the title of speech-language pathologist.

§8206. Requirements for a professional license.

To qualify for a license as a speech-language pathologist or audiologist, an applicant shall fulfill the following requirements.

1. Application: file an application with the department;
2. Education: have obtained at least a Masters degree in speech-language pathology and/or audiology or its equivalent, as determined by the department, in accordance with the commissioner's regulations;
3. Experience: have experience satisfactory to the board and in accordance with the commissioner's regulations;
4. Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;
5. Age: be at least twenty-one years of age;
6. Character: be of good moral character as determined by the department; and

Fees: pay a fee of one hundred forty dollars to the department for admission to a department conducted examination and for an initial license, a fee of seventy dollars for each reexamination, a fee of one hundred fifteen dollars for an initial license for persons not requiring admission to a department conducted examination, and a fee of one hundred fifty-five dollars for each triennial registration period.

§8207. Exempt persons.

This article shall not be construed as prohibiting:

3. Any person from engaging in clinical or academic practice under the supervision of a licensed speech-language pathologist or audiologist for such period of time as may be necessary to complete an experience requirement for a professional license, as provided in this article and in rules or regulations approved by the board of regents with the advice of the state board for speech-language pathology and audiology.

The Department of Education Commissioner's regulations pertaining to Speech-Language Pathology and Audiology indicates at Part 75:

§75.1 Professional study of speech-language pathology and/or audiology

- a. To meet the professional education requirement for admission to the licensing examination, the applicant shall present evidence of:
 1. the completion of a program in speech-language pathology and/or audiology registered by the department or determined by the department to be the equivalent of a registered program; and
 2. having received a master's degree in speech-language pathology or audiology, or the equivalent as determined by the department.

§75.2 Experience

- a. An applicant for licensure shall have completed not less than nine months of supervised experience of a scope and nature satisfactory to the State Board for Speech-Language Pathology and Audiology after all requirements for the master's degree are completed.
- b. Duration.
 1. Within any two-year period following completion of an educational program that meets the requirements of section 75.1 of this Part, an applicant must accrue nine months of acceptable experience with not more than two employers.
 2. Credit toward the experience requirement may be given for part time employment accumulated at the rate of not less than two days per week and consisting of not less than 15 hours per week for continuous periods of not less than six months.
- c. Supervision.
 1. Supervision shall include meeting with and observing the applicant on a regular basis to review and evaluate the supervised experience and to foster professional development.
 2. Supervision shall be provided by the organization in which the applicant is working, and by an individual who is licensed in New York in the field for which the applicant seeks licensure, except that supervision of experience acquired in another state or in an exempt setting may be provided by a person holding the

Certificate of Clinical Competence of the American Speech-Language Hearing Association.

As observed above, the record in this matter contains an acknowledgement from the State of New York that the beneficiary began the New York State licensing requirement in August 2, 2004. The petitioner does not explain why the beneficiary did not begin the licensing process prior to August 2, 2004.¹ The Form 6 acknowledgement indicates that the beneficiary is allowed to work with the same supervisor for three months after the ending date (August 2, 2006) while the paperwork for licensure is being processed and finalized. Thus, the record shows that the beneficiary has complied with the New York State requirements to obtain a license. However, to extend the beneficiary's H-1B employment, the beneficiary must also comply with the Immigration and Naturalization Act and the regulations implementing the requirements of the Act.

However, as determined above, the extension request in this matter was filed after July 26, 2004, thus the petitioner must provide evidence of health care worker certification to continue work as a speech language teacher (pathologist). The petitioner has not provided the requested information. While the State of New York may allow the beneficiary to continue work as a physical therapist in pursuit of her license, the petitioner has not provided evidence or explanation regarding the beneficiary's failure to complete her licensing requirements in the three years of approved H-1B classification. The beneficiary had ample time to complete the New York State requirements to obtain a license prior to filing the extension petition. Although the beneficiary's delay in beginning the New York State licensing process may have resulted in the failure to obtain the appropriate credentialing certification from an approved organization, the failure to timely begin and complete the licensing process, is the fault of the beneficiary. The director's decision to deny the petition is correct.

As the petitioner has failed to establish the eligibility requirements for an extension petition on behalf of a foreign health care worker who requires certification pursuant to Section 212(a)(5)(C) of the Act, the petition must be denied.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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

¹ The AAO observes that the beneficiary's prior H-1B classification began July 16, 2002 and the petitioner indicates the beneficiary began her work for the petitioner three years prior to filing the current petition.