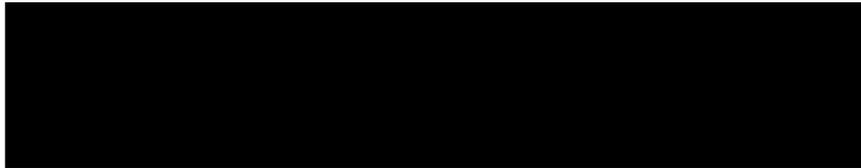


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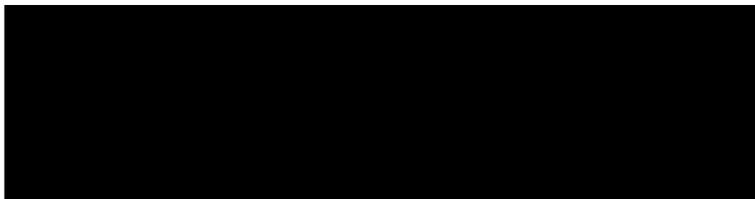
Date: SEP 28 2007

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 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 nursing home and provides 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 failed to submit the beneficiary's license or other evidence showing that the beneficiary is immediately eligible to engage in the proposed position, that of a physical therapist. The director found the letter from the New York State Department of Education and copies of New York State Education Law Article 136 sections 6731, 6732, 6733, 6734, and 6735 insufficient to establish that the beneficiary is qualified for the proposed position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), an alien must meet one of the following criteria to qualify to perform services in a specialty occupation:

- (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.

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)(A), which relates to licensure for the H classification, states that if an occupation requires a licensure 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 approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

The record reflects that the beneficiary has the equivalent of a bachelor of science degree in physical therapy from an accredited college or university in the United States. The record does not reflect that the beneficiary has applied for a limited permit to practice physical therapy in the state of New York.

On appeal, counsel states that limited permits for physical therapists are available and licenses are not available until the physical therapist can sit for the New York examination when the physical therapist is physically present in the United States. Counsel also states that “in anticipation of the Beneficiary’s entry into the United States, the petitioner, files applications for limited permits so that the beneficiary is immediately able to work for the facility.”

Upon review of the record, the petitioner has not established that the beneficiary is qualified to provide services as a physical therapist in the state of New York.

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 (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial letter; and (5) Form I-290B, an appeal brief, and additional documents. The AAO reviewed the record in its entirety before issuing its decision.

Counsel correctly stated that limited permits are available for physical therapists. Section 6735, Article 136 of the New York Consolidated Laws, which relates to limited permits for physical therapists, reads as follows:

Limited permits.

- a. The department of education shall issue a limited permit to an applicant who meets all requirements for admission to the licensing examination.
- b. All practice under a limited permit shall be under the supervision of a licensed physical therapist in a public hospital, an incorporated hospital or clinic, a licensed proprietary hospital, a licensed nursing home, a public health agency, a recognized public or non-public school setting, the office of a licensed physical therapist, or in the civil service of the state or political subdivision thereof.
- c. Limited permits shall be for six months and the department may for justifiable cause renew a limited permit provided that no applicant shall practice under any limited permit for more than a total of one year.
- d. Supervision of a permittee by a licensed physical therapist shall be on-site supervision and not necessarily direct personal supervision except that such supervision need not be on-site when the supervising physical therapist has

determined, through evaluation, the setting of goals and the establishment of a treatment plan, that the program is one of maintenance as defined pursuant to title XVIII of the federal social security act.

- e. The fee for each limited permit and for each renewal shall be seventy dollars.

On appeal, counsel asserts that the petitioner has filed for limited permits so that the beneficiary will be immediately eligible for work in the State of New York. However, counsel's assertion is not persuasive as the AAO finds that the petitioner submitted no supporting evidence reflecting that the New York State Education Department (NYSED) issued a limited permit to the beneficiary or that the beneficiary is eligible for the issuance of limited permit upon her arrival in the United States.<sup>1</sup> USCIS guidance indicates that when a beneficiary is outside of the United States and the only obstacle to the issuance of a license is the alien's lack of physical presence in the United States, the petition may be approved for a limited period. The guidance indicates that petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the alien's presence outside of the United States. See U.S. Immigration and Naturalization Service Memorandum, Thomas Cook, Acting Assistant Commissioner, *Social Security Cards and the Adjudication of H-1B Petitions* (Nov. 20, 2001). The record does not contain any evidence from the New York state licensing authority. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In her decision, the director refers to a letter from the New York State Department of Education which indicates that the beneficiary's formal education credentials have been reviewed and approved by the Bureau of Comparative Education. This letter is not in the record of proceeding and the AAO withdraws the director's statements with regard to this letter.

In a facsimile dated September 7, 2007, counsel submitted a copy of the beneficiary's "Individual Score Report" from the New York State Board for Physical Therapy. This report lists an examination date of March 2, 2006. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, although this report states that the beneficiary passed an examination, this report is not a license to practice physical therapy in the State of New York.

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<sup>1</sup> According to section 6735, Article 136 of the New York Consolidated Laws, limited permits are issued for six months and a limited permit may be renewed for justifiable cause provided that no applicant shall practice under any limited permit for more than a total of one year. The AAO notes that in her response to the director's RFE, counsel misstated the length of time that a permittee is issued a limited permit. Counsel stated that "section 6735 of the Education Law of the State of New York allows the issuance of a limited permit to practice Physical Therapy in an 'incorporated hospital or clinic' or 'licensed nursing home' under supervision for one year by a licensed [sic] physical therapist and for an additional year when justifiable 'upon meeting the requirements for admission to the licensing exam.'"

Beyond the decision of the director, section 6735, Article 136 of the New York Consolidated Laws requires that “all practice under a limited permit shall be under the supervision of a licensed physical therapist.” In her RFE, the director stated:

In addition, if the beneficiary will be receiving a limited permit to practice physical therapy in the State of New York, please submit a copy of the license of the physical therapist who will be immediate on-site supervisor of the beneficiary at the specific facility the beneficiary will be working.

However, in her response to the director’s RFE, counsel did not provide information regarding the beneficiary’s proposed work under supervision or a copy of the supervisor’s physical therapist license. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Without such information, the AAO is unable to determine whether the beneficiary will practice in accordance with section 6735 as stated above. For this additional reason, the petition may not be approved.

Furthermore, the AAO notes that on appeal, counsel references two petitions filed on behalf of physical therapists that were previously approved. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether a prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If a prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

As related in the discussion above, the petitioner has not established that the beneficiary is qualified to perform the duties of the proposed position. Accordingly, the AAO shall not disturb the director’s denial of the petition on this ground.

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.