



U.S. Citizenship
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FILE: WAC 04 068 50281 Office: CALIFORNIA SERVICE CENTER Date: MAY 01 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:
[Redacted]

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, California Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The petitioner operates state-licensed intermediate care facilities for the developmentally disabled. It seeks to employ the beneficiary as a qualified mental retardation professional (QMRP) 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 determining that the petitioner had not established that the beneficiary met the eligibility requirements for the specialty occupation.

On appeal, counsel asserted that the beneficiary was qualified to perform the duties of a QMRP as he possessed a degree in medicine, and that a physician's license is not required for a QMRP. The AAO observed that the petition had been filed January 9, 2004 and that the record contained a document from the Department of Developmental Services, (DDS) Health Facilities Program Section in Sacramento, California indicating that the DDS approved an application seeking to qualify the beneficiary as a QMRP for the petitioner's facilities on March 19, 2004. The AAO determined that the petitioner had not demonstrated the beneficiary's eligibility to perform the duties of the occupation when the petition was filed and thus the petition could not be approved.

On motion, counsel for the petitioner asserts that the proffered position of a QMRP in the State of California does not require a state license, registration, or certification to perform the duties of the occupation and that the approval issued on March 19, 2004 was not a certification or license for the beneficiary but was a requirement for the continued licensing of the petitioner's facility. Counsel submits the instructions for the California Health Facilities Program Section (HFPS) Application that indicates any QMRP changes made after the initial program plan approval need to be reviewed and approved by the HFPS staff. The document instructs that a copy of the QMRP applicant's degree, license, or qualifying document and a copy of their resume along with a completed application must be submitted and notes that a decision on the requested action would be forthcoming. Counsel also resubmits an excerpt¹ indicating the requirements for a QMRP to perform the duties of the occupation include at least one year of working directly with persons with mental retardation or other developmental disabilities; and who is a doctor of medicine or osteopathy, among other professions. Counsel notes the evaluation of the beneficiary's foreign education as equivalent to a U.S. doctorate degree in medicine and claims that the beneficiary qualifies as a QMRP in California. Counsel further claims that the evidence submitted demonstrates the beneficiary's work experience and establishes that the beneficiary meets one of the criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(C) and that in accordance with the California Health and Safety Code, the beneficiary is qualified to perform the duties of a QMRP based on his degree in medicine and his years of experience as a physician in the Philippines.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

¹ Title 22. Social Security Division 5. Licensing and Certification of Health Facilities, Home Health Agencies, Clinics, and Referral Chapter 8.5. Intermediate Care Facilities /Developmentally Disabled -- Habilitative Article 1. Definitions § 76830. Qualified Mental Retardation Professional (Q.M.R.P.).

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel has not submitted new facts supported by affidavits or other documentary evidence. The statements made by counsel are not affidavits as they were not sworn to or affirmed by the declarant before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus, as is the case with the arguments of counsel, are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Moreover, counsel has not submitted any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services policy based on the evidence of record at the time of the initial decision. Counsel does not substantiate the claim that the decision was an incorrect application of the law by pertinent precedent decisions, or otherwise establish that the director or the AAO misinterpreted the evidence of record. The evidence fails to satisfy the requirements of a motion to reconsider.

The AAO observes the only independent evidence in the record that establishes the beneficiary is qualified to perform the duties of a QMRP is the March 19, 2004 approval letter issued by the California Department of Developmental Services Health Facilities Program Section. This document shows that the "Date of QMRP Approval" for the beneficiary is March 19, 2004, a date subsequent to filing the Form I-129 petition in this matter. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Without the California Department of Developmental Services Health Facilities Program Section's approval of the beneficiary as a QMRP, the beneficiary could not perform the duties of a QMRP for the petitioner. When the petition was filed the beneficiary was not yet approved as a QMRP, thus the beneficiary was not eligible to perform the duties of the occupation.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

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