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U.S. Citizenship
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FILE: LIN 05 236 51803 Office: NEBRASKA SERVICE CENTER Date: DEC 27 2008

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director 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 public school district that seeks to employ the beneficiary as a special education teacher. 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 on the basis of his determination that the petitioner had failed to demonstrate that the beneficiary qualifies to perform the duties of a specialty occupation. Specifically, the director found that the beneficiary lacked the licensure required by the State of Missouri for this position. On appeal, counsel contends that the director erred in denying the petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the petitioner's September 30, 2005 supplemental submission; (3) the director's denial letter; and (4) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

According to the petitioner's August 3, 2005 letter of support, the duties of the proposed position would include providing specialized instruction to pupils to meet the goals and objectives developed in their Individualized Education Programs (IEP); providing educational assessments to individual students to determine their present level of performance; implementing the IEP with appropriate lesson plans, materials, and classroom strategies; preparing IEPs; using effective behavior management techniques to achieve a functional learning atmosphere in the classroom; preparing schedules and timelines to implement classroom activities; observing and making ongoing evaluations of pupils' academic and social growth; keeping appropriate records; preparing progress reports; communicating with parents regarding pupils' progress; cooperating with other professional staff members in helping pupils solve health, attitude, and learning problems; mainstreaming children into integrated settings for maximum interaction with peers; creating a functional and attractive environment for learning through room displays, bulletin boards, and interest centers; planning, coordinating, and supervising the work of paraprofessionals in the implementation of planned and coordinated programs and services; maintaining professional competence through participation in in-service educational activities and self-selected professional growth activities; and meeting and conferring with parents and staff members regarding children's needs.

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. Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

- (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.
- (D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.
- (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.

The record contains two letters from the Missouri Department of Elementary and Secondary Education. The first letter, dated August 2, 2004, states the following:

After reviewing the materials submitted by fax for [the beneficiary and another individual], Educator Certification confirms that these two teachers could receive Temporary Authorization Certificates for the school year 2005-06. These would be issued upon receipt of the original documents required for this classification (to include applications for the Initial Missouri Certificate and the Temporary Authorization, official credentialing report, processing fee, and fingerprint cards) and an acceptable background clearance.

The second letter, dated September 29, 2005, states the following:

I am writing in response to the application of [the beneficiary] for a Missouri certificate of license to teach in the area of special education. We have reviewed the application and supporting information from Lincoln International Education Association (a credentialing evaluation service) and believe she has the necessary educational background for a temporary authorization certificate (renewable).

[The beneficiary] will be able to fully teach in the area of mild/moderate cross-categorical special education in the State of Missouri once the temporary authorization certificate is issued. Missouri regulations require that [the beneficiary] complete a fingerprint clearance by the FBI and Missouri Highway Patrol prior to issuing the license.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), 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. Licensure would not preclude the granting of a petition if the only bar to licensure is the fact that a beneficiary cannot obtain a social security card because the beneficiary is not yet present in the United States. See Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Social Security cards and the Adjudication of H-1B Petitions*, HQISD 70/6.2.8-P (November 20, 2001). This memorandum, at page 2 states the following:

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA [emphasis in original]. 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 lack of a social security card.

The petitioner has not established that the only obstacle to the beneficiary obtaining licensure is the fact that she cannot obtain a social security card. Neither letter from the Missouri Department of Elementary and Secondary Education states that the beneficiary's lack of a social security card is the sole obstacle to the beneficiary obtaining licensure. The August 2, 2004 letter indicated that the beneficiary had yet to submit an original application and fee to the Missouri Department of Elementary and Secondary Education. The September 29, 2005 letter indicated that while the application had been received, the beneficiary would still be required to complete fingerprint clearances by the FBI and Missouri Highway Patrol.

Moreover, the AAO notes that the September 29, 2005 letter, which acknowledged that the Missouri Department of Elementary and Secondary Education had received the beneficiary's application for licensure, was issued after the instant petition was filed on August 9, 2005. Thus, the petition cannot be approved, as the letter was issued subsequent to the filing of the petition. 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).

On appeal, counsel references a December 20, 2002 memorandum regarding immigrant petitions for nurses who are unable to obtain social security cards.¹ However, the memorandum is not applicable to this case, as this is not an immigrant petition, is not for a Schedule A occupation, and does not involve a nurse. Moreover, the memorandum specifically states the following:

The instruction in this guidance affects the adjudication of I-140 petitions only . . .

¹ Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, *Adjudication of Form I-140 Petitions for Schedule-A Nurses Temporarily Unable to Obtain Social Security Cards*, HQ 70/6.1.3 (December 20, 2002).

Finally, counsel contends that CIS should approve the petition for a period of one year, citing to 8 C.F.R. § 214.2(h)(4)(v)(B).² That regulation, cited *supra*, states that if temporary licensure is available, CIS shall examine the facts of a case and, if an analysis of the facts demonstrates that the beneficiary is authorized to fully perform the duties of the occupation, the requested classification may be granted.

However, the facts in this case do not lead to such a conclusion. The record does not demonstrate that the beneficiary would be able to fully perform the duties of the occupation. Rather, the record demonstrates the opposite: the letters from the Missouri Department of Elementary and Secondary Education lead to a conclusion that the beneficiary may not fully perform the duties of the proposed position until she has either temporary or permanent licensure, regardless of whether she is supervised. Thus, the record does not establish that the beneficiary would be able to fully perform the duties of the occupation.

Accordingly, the petition was properly denied. The petitioner has not established that the beneficiary meets the licensure requirements as set forth at 8 C.F.R. § 214.2(h)(4)(v), and the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the record does not establish that the beneficiary meets the threshold requirements for demonstrating qualifications to perform the duties of a specialty occupation, as the record contains no evaluation of the beneficiary's foreign degree. For this additional reason, the petition may not be approved.

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.

² The AAO notes that the petitioner requested a three-year period of authorized employment (October 1, 2005 through September 30, 2008).