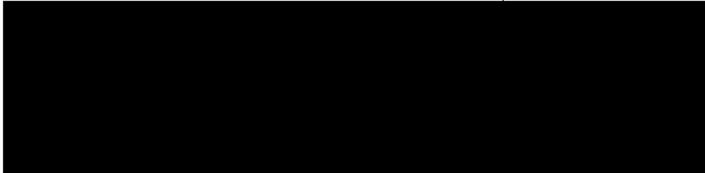


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FILE: WAC 04 093 51877 Office: CALIFORNIA SERVICE CENTER Date: NOV 30 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides rehabilitation services (physical, occupational, and speech therapy) to outpatient clinics, acute hospitals, skilled nursing facilities and adult day care. It desires to employ the beneficiary temporarily in the United States as a physical therapy intern, at an annual salary of \$38,563, for three years. The director determined that the petitioner did not establish that the proffered position qualifies as a specialty occupation. The director also determined that the petitioner did not establish that the beneficiary is eligible to fully practice in the specialty occupation and denied the petition.

On appeal, counsel states that the proposed position is that of a physical therapy intern; that it requires a baccalaureate degree in physical therapy; and that since a physical therapy intern is a pre-licensure internship position, it does not require a physical therapist license. Counsel discusses the California Business and Professions code that relates to licensure for a physical therapist.

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), defines an H-1(b) temporary worker as:

an alien . . . who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Similarly, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) provides that:

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) establishes four standards, one of which an occupation must meet to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-290B and supporting documentation; (2) the director's denial letter; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; and (5) Form I-129 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a physical therapy intern. In the initial petition, the petitioner stated that the beneficiary will be responsible for evaluating the functional ability of patients from tests, measurements, and analysis of supporting data in order to determine the most effective treatment plan; developing the treatment plan with the approval of the registered physical therapist (RPT) supervisor and other members of the staff; documenting and adjusting a patient's treatment according to his or her progress; administering and instructing patients about therapeutic exercises and equipment; applying therapy methods such as exercise, massage, and ultrasound; monitoring therapy equipment to ensure optimum operating conditions, safety or need for repair; and responding to requests made by physicians and insurance companies.

The director issued a request for evidence (RFE) asking that the petitioner provide a detailed description of the specific job duties and evidence that the position meets one of the standards for a specialty occupation as specified in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested that the petitioner submit evidence to establish that the beneficiary is qualified to perform the services in the specialty occupation.

In response, the petitioner provided a detailed job description. The petitioner asserted that a Bachelor of Science degree is required to perform the physical therapy intern duties; however, a license is not, since this

internship is only a pre-licensure internship, which serves to prepare the applicant for the State-licensing exam and is not subject to State board overview or approval. The petitioner explains that once the beneficiary passes the State-licensing exam, he will be qualified for the mandatory clinical internship, which is the prerequisite for licensure as a physical therapist.

In his decision, the director stated that the proposed position resembles a physical therapist assistant and aide as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* discloses that a physical therapist assistant and aide do not require a bachelor's degree. The director explained that the petitioner failed to establish any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The evidence in the record establishes that the proposed position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the proposed position qualifies as a specialty occupation requiring a baccalaureate degree in physical therapy, based on the *Handbook's* description of a physical therapist, and sections 2650 and 2650.1 of the California Business and Professions Code. The AAO recapitulates here those sections of the California Business and Professions Code:

2650. (a) Except as otherwise provided in this chapter, each applicant for a license as a physical therapist shall be a graduate of a professional degree program of an accredited postsecondary institution or institutions approved by the board, and shall have completed a professional education including academic coursework and clinical internship in physical therapy.

(b) As referenced in the evaluative criteria of the Commission on Accreditation in Physical Therapy Education of the American Physical Therapy Association, the curriculum shall consist of a combination of didactic, clinical, and research experiences in physical therapy using critical thinking and weighing of evidence, and shall include, at a minimum, all of the following:

(1) The sciences basic to physical therapy including biomedical, physical, physiological, neurobiological, anatomical, social and behavioral sciences.

(2) Clinical sciences including laboratory or other practical experiences involving quantitative and qualitative evaluation within the scope of physical therapy practice including kinesiology, neuroscience, pathology, human development, and gerontology.

(3) Treatment that constitutes the practice of physical therapy.

(4) Learning experiences provided in the areas of administration, education, and consultation.

(5) Research methods including the review and critical analysis of research reports.

(6) Ethical, legal, and economical concepts of physical therapy practice.

(c) Each applicant shall have at least 18 weeks of full-time clinical experience with a variety of patients.

2650.1. During the period of clinical practice referred to in Section 2650 or in any similar period of observation or related educational experience involving recipients of physical therapy, a person so engaged shall be identified only as a "physical therapy student," or as a "physical therapy intern" as authorized by the board in its regulations.

As related in the discussion above, the petitioner has established that the proposed position is a specialty occupation. However, the petition may not be approved as the record does not reflect that the beneficiary is qualified to perform services in the proposed position.

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

(v) *Licensure for H Classification-* (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.

The petitioner's March 10, 2004 letter states that the petitioner routinely hires graduates of bachelor's degree programs in physical therapy for pre-licensure internships; however, the petitioner submitted no evidence from the state of intended employment that the beneficiary is eligible to work under supervision without a license. The AAO notes that the California and Business Professions Code section 2650, paragraph c, which permits at least 18 weeks of full-time clinical experience with a variety of patients, relates to the curriculum and clinical internship offered through a professional degree program of an accredited postsecondary institution or institutions; this provision does not apply here as the petitioner is not an educational institution.

No evidence reflects that the requirements under California Business and Professions Code sections 2653¹ or 2639, qualifying the beneficiary to perform services as a physical therapist license applicant, have been satisfied. The AAO sets forth here those sections:

2653. (a) An applicant for a license as a physical therapist who was issued a diploma by a physical therapist education program that is not an approved program and is not located in the United States shall meet all of the following requirements in order to be licensed as a physical therapist:

(1) Furnish documentary evidence satisfactory to the board, that he or she has completed the equivalent professional degree to that issued by a United States accredited physical therapist education program in a physical therapist education program that entitles the applicant to practice as a physical therapist in the country where the diploma was issued. The physical therapy education received by the applicant shall meet the criteria set forth in subdivisions (b) and (c) of Section 2650. The board may require an applicant to submit documentation of his or her education to a credentials evaluation service for review and a report to the board.

(2) Pass the written examination required by Section 2636. The requirements to pass the written examination shall not apply to an applicant who at the time of application has passed, to the satisfaction of the board, an examination for licensure in another state, district, or territory of the United States, that is, in the opinion of the board, comparable to the examination given in this state.

(3) Complete a period of clinical service under the direct and immediate supervision of a physical therapist licensed by the board which does not exceed nine months in a location approved by the board, in a manner satisfactory to the board. The applicant shall have passed the written examination required in subdivision (b) prior to commencing the period of clinical service. The board shall require the supervising physical therapist to evaluate the applicant and report his or her findings to the board. The board may in its discretion waive all or part of the required clinical service pursuant to guidelines set forth in its regulations. During the period of clinical service until he or she is issued a license as a physical therapist by the board, the applicant shall be identified as a "physical therapist license applicant."

(4) An applicant for licensure under this subdivision, whose application is based on a certificate issued by a physical therapist licensing authority of another state, may be required to pass an oral examination given by the board, and to file a statement of past work activity.

(b) Nothing contained in this section shall prohibit the board from disapproving any foreign physical therapist education program or from denying the applicant if, in the opinion of the board, the instruction received by the applicant or the courses were not equivalent to that

¹ Title 16, Professional and Vocational Regulations, Division 13.2, Physical Therapy Board of California, Article 2, Applications and Examinations, Section 1398.26.5 relates to Section 2653 of the California Business and Professions Code and discusses clinical service requirements for foreign educated applicants.

required by this chapter. If the applicant does not qualify to take the physical therapist examination, his or her education may be evaluated and the applicant may be eligible to take the physical therapist assistant examination.

2636. Except as otherwise provided in this chapter, no person shall receive a license under this chapter without first successfully passing an examination given under the direction of the board. The examination shall be in writing and shall be conducted by those persons and in the manner and under regulations as shall be prescribed by the board but shall be so conducted that the identity of each applicant taking an examination will be unknown to all of the examiners until all of the papers have been graded. Applicants for licensure as a physical therapist shall be required to demonstrate knowledge of the laws and regulations related to the practice of physical therapy in California. The examination shall reasonably test the applicant's knowledge of these laws and regulations.

2639. Every graduate of an approved physical therapist education program who has filed a complete application for licensure with the board for the first time may, following receipt of a letter of authorization to perform as a "physical therapist license applicant," perform as a physical therapist under the direct and immediate supervision of a physical therapist licensed in this state pending the results of the first licensing examination administered for which he or she is eligible following graduation from an approved physical therapist education program. During this period the applicant shall identify himself or herself only as a "physical therapist license applicant." If the applicant passes the examination, the physical therapist license applicant status shall remain in effect until a regular renewable license is issued, or licensure is denied, by the board. If the applicant fails the licensing examination, or if he or she passes the examination but licensure is denied, the applicant shall be prohibited from performing as a physical therapist license applicant at any time in the future.

A person shall not be considered a graduate unless he or she has successfully completed all the clinical training and internships required for graduation from the program. If the applicant fails to take the next succeeding examination without due cause or fails to pass the examination or receive a license, all privileges under this section shall terminate upon notice by certified mail, return receipt requested. An applicant may only qualify once to perform as a physical therapist license applicant.

No evidence in the record reflects that the beneficiary has complied with California Business and Professions Code section 2639, which requires filing a complete application for licensure with the board, as the record does not contain a letter of authorization issued to the beneficiary to perform services as a "physical therapist license applicant" under the direct and immediate supervision of a physical therapist licensed in California pending the results of the first licensing examination. Absent such evidence, the petitioner has not established that the beneficiary is qualified to perform the duties of the specialty occupation, a physical therapist license applicant, based on the laws of California.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

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