U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: EAC 04 080 50168 Office: VERMONT SERVICE CENTER Date: SEP 12 2006

IN RE: Petitioner: [redacted]
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:

SELF-REPRESENTED

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

According to the petitioner's October 23, 2003 letter of support, the duties of the proposed position would include the following:

- Evaluating and treating individuals with temporary or long-term physical disabilities to relieve pain, restore function, and promote healing by applying the therapeutic properties of exercise, heat, cold water, electricity, ultrasound, massage, and other forms of treatment.
- Performing a full range of professional physical therapist assignments in a full-range functioning capacity. Considerable independent judgment would be required in making decisions to carry out assignments that have significant impact on services or programs.
- Treating the "whole person" by psychologically preparing the patient for treatment and working to rebuild confidence.
- Evaluating patients and starting treatment as prescribed by each individual's referring physician.
- Using different types of medical apparatuses, such as dynatrons, for modality.
- Evaluating patients' medical histories, testing and measuring their strength, range of motion, ability to function, and then developing treatment plans.
- Advancing patients to use their own muscles so as to further increase their flexibility and range of motion, using passive exercise, stretching, and manipulating stiff joints and unused muscles.
- Documenting patients' progress, conducting periodic evaluations, and modifying treatments when necessary, after having discussed the issue with the attending physician-in-charge.

The petitioner noted that it supplies physical therapists, occupational therapists, and nurses to "out patient rehab," chiropractors' offices, hospitals, and nursing homes.

The director denied the petition on the basis of her determination that the beneficiary is unqualified to perform the duties of a specialty occupation. Specifically, the director noted that the petitioner had failed to establish that the beneficiary possesses licensure to practice physical therapy in the State of New York. On appeal, the petitioner submits the Form I-290B and supporting documentation.

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

> (*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.

The first criterion requires a showing that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary earned his degree abroad, so he does not qualify under this criterion.

The second criterion requires a showing that the beneficiary earned a foreign degree determined to be equivalent to a United States baccalaureate or higher degree. Although the director requested an evaluation of the beneficiary's foreign credentials in his March 24, 2004 request for additional evidence, no such evaluation was submitted.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), requires a showing that (1) the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's work experience.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree under this criterion is determined by one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(D), as no such evaluation has been submitted.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary qualify under the third criterion, as the record does not an evaluation of educational credentials.

No evidence has been submitted to establish, nor has the petitioner contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated (1) that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; (2) that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and (3) that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[1];

[1] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

According to the beneficiary's resume, he has been working as a physical therapist since 1999. Therefore, the record traces the beneficiary's work history from 1999 onward, for a period of five years (the petition was filed in 2004). The formula utilized by CIS is three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. A baccalaureate degree from a United States institution of higher education would require four years of study, so the beneficiary would need to demonstrate at least 12 years of work experience in order to qualify for its equivalency. The beneficiary cannot meet this threshold.[2] As such, he does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*1*)(*2*)(*3*)(*4*), or (*5*), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*).

Accordingly, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation.

Moreover, the petitioner has not demonstrated that the beneficiary possessed the requisite licensure at the time the petition was filed.

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

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copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

[2] Since the beneficiary does not qualify under this mathematical formula, the AAO did not analyze whether his previous experience satisfied the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*5*)(*i*), (*ii*), (*iii*), (*iv*), or (*v*).

> demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
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> (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.
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> (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.

In her request for additional evidence, the director requested evidence that the beneficiary possesses licensure to practice physical therapy in the State of New York. The director stated the following:

> [P]lease provide evidence that the beneficiary will be immediately eligible to obtain a limited license to practice as a physical therapist upon entry into the United States.

In response, the petitioner submitted a copy of the beneficiary's application for a limited permit to practice physical therapy. The petitioner stated that

> [A] letter has been forwarded to the beneficiary in Manila, Philippines that he is qualified to take the Physical Therapy Boards [and] that his education is approved.
>
> His temporary license has been submitted to [the] State Education [Department] for processing [and] he will be issued a license upon approval in New York with current status.

In her denial, the director stated the following:

> The record does not include evidence that the beneficiary is a licensed physical therapist in New York, or other evidence that he is immediately eligible to practice his profession in New York.

The AAO finds that the director was correct to deny the petition on this ground; a letter stating that the beneficiary is qualified to take a board examination is not synonymous with licensure. Moreover, the letter that the petitioner referenced (the letter that "has been forwarded to the beneficiary in Manila") is not contained in the record. If the petitioner wanted this document to be considered, he should have submitted it.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

On appeal, the petitioner submits a letter from the New York Office of the Professions, Bureau of Comparative Education. This letter, dated May 25, 2004, states the following:

> Please be advised that [the beneficiary] has met the following requirements for the issuance of a limited permit to practice Physical Therapy in New York State: submission of an application for licensure with appropriate fee and evidence of acceptable education, permit application, signed by a prospective employer, with appropriate fee.
>
> The limited permit to practice Physical Therapy in New York State may be issued upon receipt of evidence that [the beneficiary] has received a valid status from the Immigration and Naturalization Service to work in the United States.

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 is not yet present in the United States.[3]

The instant petition was filed on January 27, 2004. However, the letter authorizing the beneficiary's temporary licensure was not issued until May 25, 2004. Therefore, the beneficiary did not meet the licensure requirement of 8 C.F.R. § 214.2(h)(v)(A) because, at the time the petition was filed for approval, the State of New York had not authorized the beneficiary to receive a temporary license to immediately practice physical therapy. Accordingly, the director was correct to deny the petition for lack of licensure. 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). For this additional reason, the appeal will be dismissed, and the petition will be denied.

Furthermore, even if the petitioner had submitted the May 25, 2004 letter at the time of filing, the evidence of record would be insufficient to establish that the beneficiary is qualified to perform the services of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(v)(B), 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.

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[3] *See* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, Johnny N. Williams, *Social Security Cards and the Adjudication of H-1B Petitions,* HQISD 70/6.2.8-P (November 20, 2001).

The May 25, 2004 correspondence from the State of New York indicates that, as of that date, the beneficiary was qualified for temporary licensure in physical therapy. However, there would be restrictions on the temporary license. The duration of the license would be six months – renewable, for proper cause, for only an additional six months – and the temporary licensee would be subject to supervision. Office of the Professions, New York State Education Department, Education Law, Article 136, section 6735 on limited permits states:

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.

The record does not contain any information about the licensed physical therapist who would be required to supervise the beneficiary, and it does not provide sufficient evidence describing the level at which the duties of the proffered position would be performed under temporary licensure, the nature of the supervision that would be imposed on the beneficiary as a temporary licensee at the place of work, and any limitations that would be placed on the beneficiary's practice while under temporary licensure.

Therefore, the record of proceeding does not provide CIS with sufficient information to reasonably determine that the beneficiary would be authorized to fully perform the duties of the occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(v)(B). For this additional reason, the petition must be denied.

Beyond the decision of the director, the AAO notes that the beneficiary would not be performing services at the petitioner's place of business, but would rather be working at various locations as established by contractual agreements between the petitioner and its clients.

The evidence of record, including the petitioner's statement in its letter of support that it supplies physical therapists, occupational therapists, and nurses to "out patient rehab," chiropractors' offices, hospitals, and nursing homes, as well as the "Agreement for Contract Professional Staffing Services" between the petitioner and [redacted] establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.[4] *See* 8 C.F.R. § 214.2(h)(4)(ii).

[4] *See also* Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B*

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

Pursuant to the Aytes memorandum cited at footnote 4, CIS has the discretion to request that that the employer who will employ the beneficiary in multiple locations submit an itinerary. Here, the record contains no documentation regarding the dates and locations of the beneficiary's employment. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.[5] For this additional reason, the petition may not be approved.

Moreover, the AAO finds that the petitioner has failed to demonstrate that the beneficiary would be performing services in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

> (*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

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Nonimmigrant Classification, HQ 70/6.2.8 (December 29, 1995).

[5] As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

(*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.

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 proposed position.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § **214.2(h)(1)(B)***(1)*.

For this additional reason, the petition may not be approved.

The petitioner has failed to demonstrate that the beneficiary qualified to perform the duties of a specialty occupation on the date the petition was filed. Beyond the decision of the director, the record's lack of an itinerary of definite employment precludes approval of the petition, and the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l). Accordingly, the AAO will not disturb the director's denial of the petition.

Finally, the AAO notes that Section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), requires that certain healthcare workers obtain a certificate that verifies (1) that the alien's education, training, licensure, and experience meet all applicable statutory and regulatory requirements for entry into the United States under the requested classification, are comparable to those required for American healthcare workers of the same type, and are authentic; (2) that the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate to the type of healthcare work in which the alien will be engaged; and (3) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, that the alien has passed such a test or such an examination.

In a September 22, 2003 memorandum,[6] CIS noted that, in the case of physical therapists, two organizations are authorized to issue these certificates: (1) the Commission on Graduates of Foreign Nursing Schools (CGFNS) and (2) the Foreign Credentialing Commission on Physical Therapy (FCCPT).

The record does not contain the requisite certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act.

However, this matter is an issue pertaining to the beneficiary's admissibility, which is beyond the AAO's jurisdiction. Accordingly, the AAO will not address the matter.

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.

[6] Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31* (September 22, 2003).