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U.S. Citizenship
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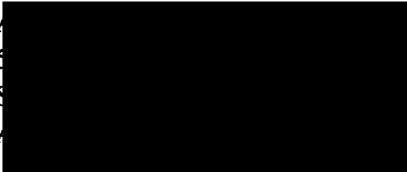
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FILE: EAC 06 174 54842 Office: VERMONT SERVICE CENTER Date: OCT 04 2007

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:



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. 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 physical therapy clinic. It seeks to employ the beneficiary as a physical therapist. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On September 13, 2006, the director denied the petition determining that the petitioner had not provided the beneficiary's required certification as a physical therapist in accordance with section 212(a)(5)(C) of the Act. The director observed that Citizenship and Immigration Services (CIS) had requested evidence that the alien had received a certificate from an independent credentialing organization; but that the petitioner's response did not include the required certificate.

The issue before the AAO is whether the petitioner's failure to submit the certification requested by the director is a basis for denying the instant petition.

Section 212(a)(5)(C) of the Act provides, in pertinent part:

Uncertified foreign health-care workers. – Subject to subsection (r), any alien who seeks to enter the United States for the purpose of performing labor as a health-care worker, other than a physician, is excludable unless the alien presents to the consular officer, or, in the case of an adjustment of status, the Attorney General, a certificate from the Commission on Graduates of Foreign Nursing Schools, or a certificate from an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services.

On July 25, 2003, the Department of Homeland Security (DHS) published a final regulation implementing this section of the Act. The rule establishes that certain nonimmigrant health care workers are required to obtain certification in accordance with section 212(a)(5)(C) of the Act. On September 22, 2003, the Associate Director for Operations issued a memorandum providing guidance to the final regulation and updating the Adjudicator's Field Manual AD 03-31. *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31*; Memorandum of William R. Yates, Associate Director for Operations, CIS, DHS, (September 22, 2003) ("Yates Memo"). The Adjudicator's Field Manual was expanded to include a new chapter at 30.12. The revision of the Adjudicator's Field Manual at 30.12 in pertinent part reads:

(b) Health Care Occupations Requiring Certification. The health care occupations requiring certification are nurses (licensed practical nurse, licensed vocational nurses, and registered nurses), physical therapists, occupational therapists, speech-language pathologists and audiologists, medical technologists (also known as clinical laboratory scientists), medical technicians (also known as clinical laboratory technicians) and physician assistants.

(f) Implementation Dates.

- (1) Prior to July 26, 2004, the DHS will admit and approve applications for extension of stay or change of status for nonimmigrant health care workers without requiring certification. The temporary admission, extension of stay, or change of status of such a nonimmigrant will be subject to the following conditions:
 - (i) The admission, extension of stay, or change of status may not be for a period longer than 1 year from the date of the decision, even if the relevant provision of 8 CFR 214.2 would ordinarily permit the alien's admission for a longer period;
 - (ii) The alien must obtain the requisite health care worker certification within 1 year of the date of decision to admit the alien or to extend the alien's stay or change the alien's status; and
 - (iii) Any subsequent petition or application to extend the period of the alien's authorized status or change the alien's status must include proof that the alien has obtained the health care worker certification if the extension or stay or change of status is sought for the primary purpose of the alien's performing labor in an affected health care occupation. If the alien is adjusting status, all eligibility requirements must be met at the time of filing the application for adjustment of status. 8 CFR 103.2(b)(12). Therefore, a health care worker in one of the affected occupations must submit evidence of certification at the time the adjustment of status is filed.
- (2) On or after July 26, 2004, if an alien seeks admission to the United States, a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if his or her primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations. The DHS will then exercise its discretion to waive the certification requirement only on a case[-]by[-]case basis.

The petitioner submitted the Form I-129 on May 22, 2006. On June 3, 2006, the director requested a copy of the beneficiary's license to practice physical therapy in the State of New York and evidence that the beneficiary had obtained certification by the Foreign Credentialing Commission on Physical Therapy, Inc. (FCCPT). In an August 25, 2006 response, counsel for the petitioner provided a copy of the beneficiary's New York State registration certificate and the beneficiary's New York State license to practice physical therapy. Counsel noted that the beneficiary had been working hard to pass the exams for FCCPT certification but that the process was not yet complete and could take some time. Counsel requested that the director withhold the decision until the results of the FCCPT exam were complete.

On September 13, 2006, the director denied the petition determining that the record did not contain the requisite FCCPT certification and thus did not establish that the beneficiary qualified for classification under section 101(a)(15)(H)(i) of the Act.

On appeal, counsel for the petitioner asserts that as credentialing certificates require multiple exams and requirements an exception should be made for physical therapists because of the shortage of physical therapists. Counsel contends that a state license to practice physical therapy should be sufficient for H-1B purposes.

In this matter, the director has not waived the certification requirement. As the petitioner has not submitted the required certificate as required by section 212(a)(5)(C) of the Act, the petition must be denied. The AAO notes that the issue of the beneficiary's inadmissibility is not within the AAO's jurisdiction. The AAO notes further that the regulation at 8 C.F.R. § 214.1(a)(3) requires every nonimmigrant alien who applies for admission to or an extension of stay in the United States to establish that he or she is admissible or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act.

The burden of proof in this proceeding 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.