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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

OCT 28 2008

FILE: EAC 05 110 52872 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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, Vermont Service Center, 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 nursing home and provides health care services. It 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 director denied the petition, finding that the petitioner failed to submit a copy of a certificate from an independent credentialing organization pursuant to section 212(a)(5)(C) of the Act. In addition, the director noted that the beneficiary worked at a location other than the one stated on her limited permit and that the beneficiary did not possess a limited permit to practice as a physical therapist in the State of New York from July 27, 2004 through May 24, 2005.

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

The issue in this matter is whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), which relates to licensure for the H classification, states that if an occupation requires a licensure for an individual to fully perform the duties of the occupation, an alien 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.

The petitioner stated in the Form I-129 that the beneficiary would be employed as a physical therapist. The documentation submitted by the petitioner in support of the Form I-129 confirms that the duties to be performed by the beneficiary are those of a physical therapist. As a minimum qualification for entry into the proffered position, the petitioner requires that the all applicants "possess at least a bachelor's degree in physical therapy or related field."

The issue to be determined is whether the beneficiary is qualified to perform the duties of the proffered position. The State of New York's educational requirement for the position, where the beneficiary would work as a physical therapist, is a bachelor's degree in physical therapy. The State of New York approved the beneficiary's foreign education and found that she meets all requirements necessary for the issuance of a

limited permit to practice physical therapy in New York State. The record of proceeding contains two limited permits from the Division of Professional Licensing Services from the State of New York for the beneficiary. The original limited permit was issued on January 28, 2004 and expired on July 27, 2004. The beneficiary's limited permit was reissued and valid from May 24, 2005 to September 20, 2005. Therefore, the beneficiary did not have a valid limited permit from July 28, 2004 to May 23, 2005. The Form I-129 was filed on March 11, 2005, during the time period that the beneficiary did not possess a valid limited permit. Therefore, the beneficiary did not meet the licensing requirements of Section 214(i)(2) of the Act and was not in valid H-1B status when the petition to extend status was filed. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12).

On appeal, counsel states that during the time period that the beneficiary did not possess a valid limited permit, the beneficiary worked as a "physical therapist assistant." Although counsel states that "unlike physical therapists, the position of physical therapist assistant does not require a limited permit in order for the beneficiary to discharge her duties as such," the State of New York in fact does require that anyone using the title physical therapist assistant be licensed.[1] Counsel does not provide evidence in support of his statements regarding the licensing requirements of physical therapist assistants. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence of a New York physical therapist assistant license in the record of proceeding for the beneficiary. Furthermore, the AAO notes that the pay stubs in the record list the same rate of pay for the beneficiary even during the time when counsel states that she was working as a physical therapist assistant and not as a physical therapist. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, counsel also discounts the beneficiary's working for facilities not listed on the limited permit and states that the beneficiary "was still working under the immediate supervision of the same licensed physical therapist [redacted]." The AAO notes that the limited permit states that it is "valid only at [the] institution named above." Furthermore, the original limited permit lists "[redacted]" as the beneficiary's supervisor and the reissued limited permit lists "[redacted]" as the beneficiary's supervisor. Therefore, the beneficiary did not comply with the provisions stated on the limited permit.

Another issue addressed by the director is whether the beneficiary is subject to the credentialing requirements for healthcare workers under section 212(a)(5)(C) of the Act and the regulation at 8 C.F.R. § 212.15.

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

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[1] *See* http://www.op.nysed.gov/ptlic.htm.

> 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.

The applicable regulatory requirements at 8 C.F.R. § 212.15 state as follows:

(a) General certification requirements.

(1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, any alien who seeks admission to the United States as an immigrant or as a nonimmigrant for the primary purpose of performing labor in a health occupation listed in paragraph (c) of this section is inadmissible to the United States unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

(b) Inapplicability of the ground of inadmissibility. This section does not apply to:

(2) Aliens seeking admission to the United States to perform services in a non-clinical healthcare occupation. A non-clinical health-care occupation is one where the alien is not required to perform direct or indirect patient care. Occupations which are considered to be non-clinical include, but are not limited to, medical teachers, medical researchers, and managers of healthcare facilities;

(c) Covered health care occupations. With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she received his or her education or training.

(1) Licensed Practical Nurses, Licensed Vocational Nurses and Registered Nurses;

(2) Occupational Therapists;

(3) Physical Therapists;

(4) Speech – Language Pathologists and Audiologists;

(5) Medical Technologists (Clinical Laboratory Scientists);

(6) Physicians Assistants;

(7) Medical Technicians (Clinical Laboratory Technicians).

As noted above, the petitioner seeks to employ the beneficiary as a physical therapist. That occupation is specifically listed in the regulation above as one that requires a certificate from one of the approved credentialing organizations set forth in 8 C.F.R. § 212.15(e). The beneficiary is a nonimmigrant health care worker seeking admission to the United States for the purpose of performing labor in a health occupation. The beneficiary is, therefore, required by the above-cited regulation to obtain, as a condition of admissibility, a certificate from an approved credentialing organization. The record does not establish that the beneficiary complied with the above-cited regulation by obtaining a certificate from an approved credentialing organization. Counsel for the petitioner concedes in his letter of September 29, 2005 that "the beneficiary is in the process of taking the required examinations in order that she may comply with the requirements of CGFNS before they may issue the visascreen certificate." On appeal, counsel states that "the beneficiary is in the process of obtaining her visascreen certificate." CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). 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). As such the director's decision denying the petition shall not be disturbed.

As related in the discussion above, the petitioner has not established that the beneficiary is qualified to perform the duties of the proposed position. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.