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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: EAC 07 146 52610 Office: VERMONT SERVICE CENTER Date: AUG 04 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center 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 group of physicians specializing in physical medicine and rehabilitation. To employ the beneficiary in a position that it has designated as a Physiotherapy Assistant, the petitioner endeavors to classify her 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).

In the present matter, the petitioner seeks to employ the beneficiary as an assistant physical therapist, under the title Physiotherapy Assistant. According to the Form I-129, the related Labor Condition Application (LCA), and the letter from the petitioner filed with them, the beneficiary would perform her services in Brooklyn, New York. Article 136 (Sections 6730-6743) of Title VIII of the New York State (NYS) Education Law governs the practice of physical therapists and physical therapy assistants in that State. Section 6739 of Article 136 states:

> Only a person certified or otherwise authorized under this article shall participate in the practice of physical therapy as a physical therapist assistant and only a person certified under this section shall use the title "physical therapist assistant."

In his decision, the director tacitly recognized the proffered position as a specialty occupation but denied the petition on finding that the petitioner failed to establish that the beneficiary was qualified to perform services in that occupation. The director based the adverse conclusion upon the petitioner's failures to provide the following types of documentation sought in the request for additional evidence (RFE) served upon the petitioner: (1) an evaluation of the beneficiary's education by an education credentials evaluation service; (2) certification from an approved credentialing agency verifying that the beneficiary's foreign education is comparable with that of an American healthcare worker of the same type pursuant to section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C); and (3) proof that the beneficiary possesses a license to practice physical therapy in the State of New York, the work location specified on the Form I-129 and the related LCA.

The RFE and the Petitioner's Reply

On July 31, 2007, the service center issued an RFE in this matter, the pertinent parts of which requested (1) an evaluation of the beneficiary's education by an education credentials evaluation service; (2) certification from an approved healthcare worker credentialing agency verifying that the beneficiary's foreign education is comparable with that of an American healthcare worker of the same type pursuant to section 212(a)(5)(C) of the Act; and (3) "a copy of the beneficiary's license to practice the occupation of Physical Therapist in New York." For the physical therapist occupation, the RFE listed as approved healthcare worker credentialing agencies the Commission on Graduates of Foreign Nursing Schools (CGFNS) and the Foreign Credentialing Commission on Physical

Therapists (FCCPT). The petitioner's response to the RFE did not include any of the requested documents.

With regard to the first request, for an evaluation of the beneficiary's education by an education credentials evaluation service, the petitioner's letter in response to the RFE states that an "independent credential organization" evaluated the beneficiary's qualifications as "equivalent to that of a Bachelor[']s Degree," and the petitioner cited the file number that the evaluation agency assigned to the file. The response letter states, however, that the evaluation had been mailed to the beneficiary and that the petitioner would furnish the evaluation if it were allotted "some more time" to do so. The petitioner's assertions had no evidentiary value, because they were not supported by any documentary evidence in the record when they were made. 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)). As will be noted below in the discussion of the USCIS regulations governing RFEs, they require that all documents in response to an RFE be submitted at the same time and within the response period specified in the RFE. In this matter, the petitioner's response to the RFE neither verbally addressed the request for CGFNS or FCCPT certification nor provided documentation of such certification.

With regard to the third relevant component of the RFE, the request for a copy of the beneficiary's license to practice physical therapy in the State of New York, the petitioner's letter of response states that the beneficiary is eligible to take the licensure exam, but that "the board requires an individual to have a social security number and lawful status in the United States of America for appearing for the licensure exam." Therefore, the petitioner's response letter requests that the petition be approved in order to allow the beneficiary to appear for the licensure exam. [1] These assertions also have no

[1] The AAO acknowledges the USCIS policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the overseas alien beneficiary's lack of a social security number, *see* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, INS Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions,* HQ 70/6.2.8 (November 20, 2001) (hereinafter referred to as the Cook Memo). The Cook Memo's continuing applicability is acknowledged in the Memorandum from Donald Neufeld, Deputy Associate Director, Domestic Operations, *Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization,* HQISD 70/6.2.8 (March 21, 2008) (hereinafter referred to as the Neufeld Memo). The Neufeld Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition. In this matter, however, the record of proceedings fails to establish lack of a social security number or valid immigration document as the only impediments to the beneficiary's attaining the licensure required to practice as an assistant physical therapist. Thus, the policy is irrelevant to this appeal.

evidentiary value because, when made, they were not supported by documentary evidence in the record. *Id.*

Consequences of the Petitioner's Non-Production of RFE-Requested Documents

For the reasons discussed below, the AAO will not consider evidence submitted on appeal that was requested by the RFE but not provided within the petitioner's response to the RFE. Consequentially, in this particular proceeding the AAO will limit its review to the evidence of record that was before the director when he issued his decision to deny the petition.

A service center director may issue an RFE for evidence that he or she may independently require to assist in adjudicating an H-1B petition, and his or her decision to approve a petition must be based upon consideration of all of the evidence as submitted by the petitioner, both initially and in response to any RFE that the director may issue. *See* 8 C.F.R. § 214.2(h)(9). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(1), (b)(8), and (b)(12).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* As discussed below, the pertinent regulations, at 8 C.F.R. § 103.2, compel the same outcome.

The regulation at 8 C.F.R. § 103.2(b)(11) provides the following rules on responding to an RFE. The petitioner has three options during the response period specified in the RFE: submission of a complete response containing all of the requested information; submission of a partial response with a request for a decision based on the record; or withdrawal of the petition. Submission of only some of the requested evidence will be considered a request for a decision on the record. Materials in response to the RFE must be submitted together at one time, along with the original RFE, and they must be filed within the period afforded in the RFE. Further, the regulation at 8 C.F.R. § 103.2(b)(8)(iv) states that in no case shall the maximum response period provided in an RFE exceed 12 weeks, and that additional time to respond may not be granted. Thus, the petitioner is afforded only one opportunity to file materials in response to the RFE. Operation of this provision precludes the petitioner from submitting on appeal any type of documentation requested in the RFE but not provided within the time specified in the RFE. In the context of this particular record of proceeding, this means that the AAO will not consider the documents submitted with the Form I-290B and the petitioner's letter on appeal, for they all fall within the category of documentary evidence requested by an RFE but not included in the RFE response.

Because the petitioner submitted a timely, although partial, response to the RFE, the regulation at 8 C.F.R. § 103.2(b)(13) does not come into play, which states that, if the petitioner fails to respond

to an RFE within the specified time, a petition may be summarily denied, denied based on the record, or denied for both reasons. However, pursuant to provisions at 8 C.F.R. § 103.2(b)(11) and (b)(14), if, as here, the petitioner submits materials only partially responsive to the RFE, the petitioner's RFE response will be deemed a request for a decision on the record, and a decision will be issued on the basis of the record as it existed upon receipt of the timely filed RFE response.[2] For this reason also, the AAO shall not consider the documentary evidence submitted with the Form I-290B and the petitioner's letter on appeal.

Additionally, 8 C.F.R. § 103.2(b)(14) also states that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition.

In light of the regulations discussed above, the petitioner is foreclosed from now expanding USCIS consideration to evidence sought by, but not submitted in response to, the RFE; and the issue for the AAO's determination is whether the director's decision to deny the petition was the correct disposition on the basis of the evidence of record as supplemented by the petitioner's response to the RFE.

Those documents submitted on appeal but not considered by the AAO are: (1) an evaluation of the beneficiary's foreign educational credentials, conducted by the International Consultants of Delaware, Inc. (ICD), dated August 16, 2007; (2) a Form OPR/LPT-50(3/97), Certification of Physical Therapist Educational Requirements, of the Board of Physical Therapy of the Michigan Department of Consumer and Industry Services, in which, as the "Certifying Company," ICD certifies that the beneficiary meets Michigan's education requirements for the practice of physical therapy; (3) a congratulatory letter to the beneficiary from CGFNS, dated October 31, 2007, notifying her of passing the International Commission on Healthcare Professionals (ICHP) VisaScreen and conveying her VisaScreen Certificate as an enclosure; (4) her VisaScreen certificate, dated October 31, 2007, issued by the ICHP, as a division of the CGFNS, attesting that the beneficiary "has met all of the requirements of section 212(a)(5)(C) of the Immigration and Naturalization Act, as specified at Title 8, Code of Federal Regulations [C.F.R.] section 212.15(f) for the Profession of: Physical Therapist"; and (5) a letter from the Federation of State Boards of Physical Therapy (FSBPT), dated October 26, 2007, assigning the beneficiary an Alternate Identification Number for her use in lieu of a social security number for taking its National Physical Therapist Examination; and (6) a letter, dated August 28, 2007, from the Licensing Division of the Michigan Department of Community Health authorizing the beneficiary to take the National Physical Therapy Examination and indicating that a license to practice physical therapy will be issued to the beneficiary is she passes the examination.

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[2] The pertinent part of the regulation at 8 C.F.R. § 103.2(b)(11) states that submission of only some of the requested evidence will be considered a request for a decision on the record. The pertinent part of the regulation at 8 C.F.R. § 103.2(b)(14) states that where an applicant or petitioner does not submit all requested evidence and requests a decision based on the evidence already submitted, a decision shall be based upon the record.

The AAO makes the following specific findings with regard to the documents enumerated above, all of which are submitted for the first time on appeal.

All of these documents (that is, the ICD educational evaluation; the ICD certification that the beneficiary meets Michigan's education requirements for the practice of physical therapy; the CGFNS congratulatory letter; the VisaScreen certificate; and the FSBPT letter assigning an Alternate Identification Number for taking the National Physical Therapist Examination; and the letter from the Michigan Department of Community Health) are submitted for their value as documents with the types of information sought by the RFE. As such, the fact that they were submitted after the petitioner's RFE response forecloses their consideration in this appeal.

The AAO also finds that the ICD certification that the beneficiary meets Michigan's education requirements for the practice of physical therapy would have had no probative value, even if it had been timely submitted. This is because the petition and the related LCA were filed for the petitioner's services not in Michigan, but in Brooklyn, New York.

The AAO also notes that all of the documents submitted on appeal were issued after the filing date of the petition, April 2, 2007: (1) the ICD evaluation of the beneficiary's foreign educational credentials is dated August 16, 2007; (2) the ICD Certification of Physical Therapist Educational Requirements of the Board of Physical Therapy of the Michigan Department of Consumer and Industry Services is dated August 16, 2007; (3) the CGFNS congratulatory letter is dated October 31, 2007; (4) the beneficiary's ICHP VisaScreen certificate is dated October 31, 2007; (5) the FSBPT letter assigning an Alternative Identification Number, is dated October 26, 2007; and (6) a letter from the Michigan Department of Community Health is dated August 28, 2007.

Because all of these documents relate to credentials of the beneficiary that were generated after the date that the petition was filed, they are irrelevant. USCIS 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)(1). 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). Therefore, even if they were proper subjects for consideration in this appeal, none of the documents submitted on appeal would affect the outcome of this appeal.

The AAO further notes that the CGFNS certificate submitted on appeal is not indicative of whatever action the State of New York may take upon the beneficiary's application, if and when it is filed. In this regard, the AAO notes that the Internet site of the Office of Professions of the NYS Department of Education, *www.op.nysed.gov*, provides information about the State's requirements regarding the 47 professions governed by Title VIII of the NYS Education Law. The subsite *www.op.nysed.gov/ptlic.htm* specifically addresses physical therapists and physical therapist assistants. This site indicates that CGFNS certification is a preliminary part of the licensure application process, that the NYS Education Department uses this certification only to verify the authenticity of an applicant's educational credentials, and that the Education Department conducts its own independent evaluation of an applicant's educational credentials. This site also indicates that

permanent licensure will be issued to a physical therapy assistant applicant only after successful completion of the National Physical Therapist Assistance Examination, and that a physical therapist applicant must successfully complete the National Physical Therapy Examination. Both examinations are administered by FSBPT. Further, the NYS Education Law's sections 6734 (on licensing of physical therapists) and 6740 (on certifying physical therapist assistants) both indicate that New York State has experience and character requirements for licensure that are additional to its foreign education certification and FSBT examination requirements.

For the reasons discussed above, the AAO will base its decision upon the evidence of record at the time that the director issued his decision.

THE EVIDENCE OF RECORD BEFORE THE DIRECTOR

Evidence Prior to the RFE

The record indicates that the beneficiary received all of her education in India. When the service center issued the RFE in this matter, on July 31, 2007, the record of proceeding contained certified copies of the following documents regarding the beneficiary's education and physiotherapy credentials in India: (1) a diploma certifying the award of a B.P.T. [Bachelor's of Physiotherapy] Degree by Rajiv Gandhi University of Health Sciences, Karnataka, in May 2002; (2) separate "Statement of Marks" sheets for each of the four B.P.T. examinations that the beneficiary took as requirements for her diploma from Rajiv Gandhi University of Health Sciences; (3) academic transcripts, issued in March 4, 2003 by the Jawhatlal Nehru Medical College, on the four years of studies leading to the beneficiary's B.P.T. degree from the Rajiv Gandhi University of Health Sciences; (4) a certificate of registry with the Indian Association of Physiotherapists as a Life Member, dated November 8, 2003, which states that the beneficiary is "a qualified physiotherapist eligible for the practice of Physiotherapy anywhere in India"; (5) an English Transcript showing the beneficiary's courses and marks obtained in 1996, 1997, and 1998 at the Mahatma Gandhi Post Graduate College, Gorakhpur, an affiliate of the Deendayal Upadhaya Gorakhpur University, and attesting that the beneficiary received a three-year Bachelor of Science (Bio-Group) Degree in 1998; (6) a copy of the beneficiary's Deendayal Upadhaya Gorakhpur University diploma awarding a Bachelor of Science Degree (Three Years Course); (7) a Provisional Certificate, dated November 30, 2005, from Hemwati Nandan Bahuguna Garwhal University, Srinagar (Garhwal), Uttarnchal, indicating that the beneficiary would be awarded a Master's Degree in Physiotherapy "in convocation"; and (8) the academic transcript related to the issuance of the Provisional Certificate. When the RFE was issued, the record also contained a three-page printout of an examinee's scores from the TOEFL Internet site.

Counsel's letter accompanying the Form I-129 stated that the documents submitted with the Form I-129 included an "educational evaluation." However none was submitted. Also, as originally filed,

the petition contained no evidence that the beneficiary possessed a standard or temporary provisional license to practice physical therapy in the State of New York.[3]

Evidence Submitted in Response to the RFE

The petitioner's response to the RFE consists of its November 15, 2007 letter of reply and one enclosure, namely, a brochure on SHK Consultants, Inc., which the petitioner describes as "the profile of the petitioner." The brochure is irrelevant to the issue on appeal, and, as indicated earlier in this decision, the letter's statements about documents requested by the RFE have no evidentiary value, as those documents were not in the record at the time of the RFE reply and were not submitted within the time specified by the RFE.

DISMISSAL ON THE BASIS OF THE LICENSURE ISSUE

Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), 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."

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(A) states that, where, as here, a state or local license is required for an individual to fully perform the duties of an occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition. The regulation states:

> *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.

There are regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license (*see* 8 C.F.R. §§ 214.2(h)(v)(B), (C), and (E)), but the petitioner has not established that they apply to the facts in this case.

The AAO observes that the record before the director lacked evidence establishing that the beneficiary had been licensed or certified by the State of New York to practice physical therapy, and also lacked any documentation from the State of New York regarding the filing or status of a license application by the beneficiary. Therefore, the director was correct in denying the petition for its failure to establish that the beneficiary possessed the licensure required to perform the services for which the petition was filed. By itself, this lack of evidence of required licensure in the record

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[3] The AAO notes that Article 136 of the NYS Education Law provides that the State may issue a limited permit to an applicant for licensure as an assistant physical therapist, valid for six (6) months. However, the record contains no evidence that the beneficiary possessed such a permit.

before the director compels the AAO to dismiss the appeal, in accordance with section 214(i)(2)(A) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A). Also, the AAO notes that the documents submitted on appeal do not remedy this material deficiency, and that, therefore, the appeal would be subject to dismissal for lack of sufficient proof of licensure even if the documents submitted on appeal had been properly submitted for consideration, which they are not. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

As discussed, the lack of licensure evidence is dispositive of this appeal. However, for the sake of clarity and completeness, the AAO will also address the evidentiary value of the evidence before the director on the issue of the beneficiary's qualifications other than licensure.

DISMISSAL FOR FAILURE TO ESTABLISH THE BENEFICIARY'S QUALIFICATIONS IN ACCORDANCE WITH 8 C.F.R. §§ 214.2(h)(4)(iii)(C) AND (D)

In situations where licensure is not required to practice the occupation that is the subject of the petition, sections 214(i)(2)(B) and (C) of the Act, 8 U.S.C. §§ 1184(i)(2)(B) and (C), state that an alien applying for classification as an H-1B nonimmigrant worker must establish:

> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
>
> (C) (i) experience in the specialty equivalent to the completion of such degree, and
>
> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(l)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

> *(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 [1] 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 [2] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) would require 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]

(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. . . .

According to its express terms, to satisfy the beneficiary qualification criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), a petitioner must demonstrate three years of specialized training and/or

[4] The petitioner should note that, in accordance with this provision, USCIS accepts a credentials evaluation service's evaluation of *education only*, not experience.

work experience for each year of college-level training the alien lacks. This provision allows crediting only training and work experience for which it is "clearly demonstrated" that the training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation. Furthermore, the record must contain evidence of professional recognition of expertise in the claimed specialty, in accordance with the provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) requiring that it be "clearly demonstrated" 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[5];
>
> (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.

As already discussed, per section 214(i)(2)(A) of the Act and 8 C.F.R. § 214.2(h)(4)(v)(A) the petitioner's failure to establish the licensure required to practice the position for which the petition was filed precludes approval of the petition even if the petitioner were to establish that the beneficiary satisfied any of the beneficiary qualification criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). However, the petitioner's failure to satisfy any of those beneficiary qualification criteria provides an additional ground for dismissing the appeal and denying the petition.

The AAO reiterates that, by application of the regulations at 8 C.F.R. § 103.2 previously discussed in this decision, the AAO will limit its consideration to the evidence of record as it existed at the time the director issued his decision. By way of review, the AAO notes that the following documentation of the beneficiary's education was before the director when he issued his decision: (1) a diploma certifying the award of a B.P.T. by Rajiv Gandhi University of Health Sciences,

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

Karnataka; (2) "Statement of Marks" sheets for each of the four B.P.T. examinations that the beneficiary took as requirements for her diploma from Rajiv Gandhi University of Health Sciences; (3) a certificate of registry with the Indian Association of Physiotherapists as a Life Member; (4) an English Transcript showing the beneficiary's courses and marks obtained in 1996, 1997, and 1998 at the Mahatma Gandhi Post Graduate College, Gorakhpur, and attesting that the beneficiary received a three-year Bachelor of Science (Bio-Group) Degree in 1998; (5) a Provisional Certificate, dated November 30, 2005, from Hemwati Nandan Bahuguna Garwhal University Srinagar (Garhwal), Uttarnchal, indicating that the beneficiary would be awarded a Master's Degree in Physiotherapy "in convocation"; (6) the academic transcript related to the issuance of the Provisional Certificate; and (7) a certified copy of a one-page academic transcript for the "Fourth Year B.P.T." and an "Internship Program," from the Jawhatlal Nehru Medical College, which does not contain the name of the person to which the document refers.

The AAO finds that, by not including in its RFE response an evaluation of the beneficiary's foreign education by an education credentials evaluation service, as requested in the RFE, the petitioner failed to establish that the beneficiary held "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," in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the regulatory provision governing proof of the equivalency of a foreign degree to a U.S. degree in a specific specialty from an accredited college or university. For this reasons also, the appeal must be denied.

The AAO notes that the evidence before the director of the beneficiary's registry with the Indian Association of Physiotherapists as a Life Member suffices only to establish that the beneficiary has professional recognition in a recognized foreign association or society in a specialty occupation, as described at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(ii). However, this fact is not sufficient to establish the beneficiary as qualified to perform services as an H-1B worker under any of the provisions of 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D).

Next, the AAO finds that the petitioner's failure to comply with the RFE's request for a certificate issued by CGFNS or FCCPT regarding the beneficiary's qualifications to serve in the physical therapy occupation is not a proper ground for denying the petition in the present circumstances, where the alien beneficiary is residing overseas. This aspect of the RFE relates to the provision at section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), on the inadmissibility of uncertified health care workers. As indicated in the RFE, section 212(a)(5)(C) of the Act states that any alien seeking to enter the United States to perform labor in a non-physician healthcare occupation there described, including physical therapy, is inadmissible unless he or she presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certificate from CGFNS, or an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services. This section of the Act states:

> Subject to subsection (r),[6] 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 inadmissible 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, verifying that--
>
> (i) the alien's education, training, license, and experience--
>
> (I) meet all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application;
>
> (II) are comparable with that required for an American health-care worker of the same type; and
>
> (III) are authentic and, in the case of a license, unencumbered;
>
> (ii) 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 for health care work of the kind in which the alien will be engaged, as shown by an appropriate score on one or more nationally recognized, commercially available, standardized assessments of the applicant's ability to speak and write; and
>
> (iii) 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, the alien has passed such a test or has passed such an examination.
>
> For purposes of clause (ii), determination of the standardized tests required and of the minimum scores that are appropriate are within the sole discretion of the Secretary of Health and Human Services and are not subject to further administrative or judicial review.

It should be noted that the regulation at 8 C.F.R. § 212.15 implements section 212(a)(5)(C) of the Act. While the regulation is too lengthy and complicated for copying here, some provisions are worth review for their application to this particular appeal.[7] With exceptions not applicable to the

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[6] Section 212(r) of the Act, 8 U.S.C. § 1182(r), which states an exception for certain alien nurses, is not relevant to the appeal.

[7] The regulation should be reviewed for exceptions and nuances that may affect situations other than the particular one presented in this appeal.

present petition, 8 C.F.R. § 212.15(a) states that 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 healthcare occupation listed at 8 C.F.R. § 212.15(c) is inadmissible unless the alien presents a certificate from a credentialing organization listed at 8 C.F.R. § 212.15(e). The credentialing organizations that 8 C.F.R. § 212.15(e) specifies for physical therapists are CGFNS and FCCPT.[8]

The healthcare occupations listed at 8 C.F.R. § 212.15(c) are: (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) physician assistants; and (7) medical technicians (clinical laboratory technicians).

The regulation at 8 C.F.R. § 212.15(d)(1) provides that an alien who is applying for admission under a nonimmigrant visa to perform labor in one of the healthcare occupations enumerated at 8 C.F.R. § 212.15(e) must present the required healthcare worker certificate to a counselor officer at the time of visa issuance and to the Department of Homeland Security (DHS) at the time of admission. This regulation also provides that an alien who has previously presented a foreign healthcare worker certification or certified statement for a particular health care occupation will be required to present it again at the time of visa issuance or each admission to the United Sates. This regulation also cautions that the certification must be valid at the time of visa issuance and admission at a port of entry.

As previously noted, the petitioner seeks to employ the beneficiary as a physical therapist assistant. That occupation is not listed in the regulation above as one requiring a certificate from one of the approved credentialing organizations set forth in 8 C.F.R. § 212.15(e). The beneficiary is, therefore, not required by the above-cited regulations to obtain, as a condition of admissibility, a certificate from an approved credentialing organization. It is true that, at the time of the director's decision, the record did not include a certificate from an approved credentialing organization, although it had been requested by the RFE. However, the director was incorrect in noting that the beneficiary had not complied with the above-cited sections of 8 C.F.R. § 212.15.

In addition, even if the proffered position were included among the healthcare occupations enumerated at 8 C.F.R. § 212.15(e), the regulation at 8 C.F.R. § 212.15(d)(1) requires presentation of the certification only to a consular officer at the time of visa issuance and to the Department of Homeland Security at the time of admission. Therefore, the director's decision is incorrect to the limited extent that it used the absence of CGFNS or FCCPT certification as a basis to deny the petition. The AAO therefore withdraws only so much of the director's decision that denies the petition for the petitioner's failure to provide CGFNS or FCCPT certification prior to the director's decision.

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[8] With regard to, 8 C.F.R. § 212.15(e) states that FCCPT is authorized to issue certificates in the field of physical therapy "pending final adjudication of its credentialing status under this part."

Beyond the decision of the director, the AAO finds that the evidence of record also fails to establish that the position stated in the Form 129 and the related LCA - that of a physical therapy assistant ("Physiotherapist Assistant" in the Form 129 and LCA) in Brooklyn, New York - is a specialty occupation. Section 6740b of the NYS Education Law states the educational requirement for certification as a physical therapist assistant as follows:

> Education: have received an education including completion of a two-year college program in a physical therapist assistant program or equivalent in accordance with the commissioner's regulations.

Also, according to the chapter "Physical Therapist Assistants and Aides" in the 2008-2009 edition of the Department of Labor's *Occupational Outlook Handbook* (*Handbook*),[9] "most physical therapist assistants earn an associate degree from an accredited physical therapist assistant program"; "in many States, physical therapist assistants are required by law to hold at least an associate degree"; according to the American Physical Therapy Association, "there were 233 accredited physical therapist assistant programs in the United States as of 2006"; and "[a]ccredited programs usually last 2 years, or 4 semesters, and culminate in an associate degree." Moreover, the Commission on Accreditation in Physical Therapy Education (CAPTE) indicates through its accreditation process that graduation from an associate degree level program is sufficient for entry into a physical therapist assistant position.[10] This information indicates that physical therapist assistant positions do not constitute a class of specialty occupation positions. In addition, the evidence of record does not contain any evidence refuting or excepting the *Handbook's* information, or Section 6740b of the NYS Education Law.

Therefore, if the beneficiary is to be employed as a physical therapist assistant, as the job title on the Form I-129 and the LCA and the wage stated on the LCA attest, then the proffered position is not a specialty occupation. As a cautionary observation, the AAO notes that if the petitioner were to assert that the substantive duties of the proffered position actually constitute a physical therapist position, the petitioner has not submitted evidence that the beneficiary has the required license to perform the duties of a physical therapist in New York and has also failed to submit an LCA valid for that position, as the wages attested in the LCA (a prevailing wage of $38,000) appear to be only those of a physical therapist assistant.[11] For this additional reason, the petition may not be approved.

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[9] The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

[10] CAPTE is the only physical therapy accreditation agency recognized by the United States Department of Education. *See* U.S. Department of Education's website on accrediting agencies, available at http://www.ed.gov/admins/finaid/accred/accreditation _pg8.html#health. (accessed July 29, 2009).

[11] The AAO notes that, as of April 2009, for the geographical area of the proposed position (area code 35644) the Department of Labor's Federal Labor Certification Data Center OnLine Wage Library specifies the following prevailing wage for the lowest level position in each occupation:

Also, beyond the decision of the director, the AAO finds that the petitioner's failure to comply with the RFE's requests for an evaluation of the beneficiary's foreign education and for proof of licensure precluded a material line of inquiry relevant to the beneficiary's educational qualifications and ability to practice physical therapy in the State specified in the Form I-129 and the related LCA. As noted earlier in this decision's discussion of the RFE regulations, 8 C.F.R. § 103.2(b)(14) states that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. The AAO herby invokes that regulation as another basis for dismissing the appeal and denying the petition. The fact that the director did not invoke this provision does not preclude the AAO from doing so now.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

Physical Therapy Assistant: $10.16 per hour - $21,133 year; Physical Therapist: $27.54 per hour - $57,283 per year. This information was retrieved at the following Internet sites, respectively: *www.flcdatacenter.com/OesQuickResults.aspx?area=35644&code=31-2021&year=9&source=1*; *www.flcdatacenter.com/OesQuickResults.aspx?area=35644&code=29-1123&year=9&source=1.*