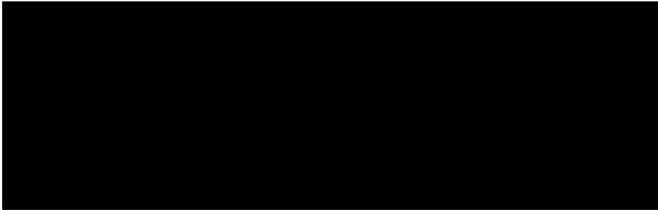




U.S. Citizenship  
and Immigration  
Services



D<sub>1</sub>

FILE: EAC 08 143 53312 Office: VERMONT SERVICE CENTER

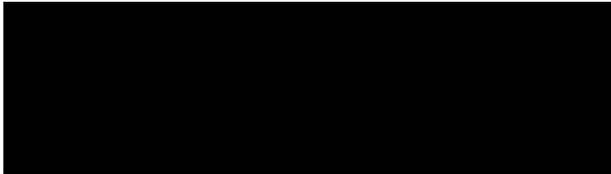
Date: DEC 08 2009

IN RE: Petitioner:  
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:



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).

Perry Rhew  
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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that it provided therapy services; that it was established in 2003, that it employed 95 persons, and that its gross annual income is \$7,000,000 and its net annual income is \$150,000. The petitioner seeks to employ the beneficiary as a speech language pathologist from October 1, 2008 to September 12, 2011. 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 AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 filed April 1, 2008 and the supporting documentation filed with it; (2) the director's denial letter; and (3) the Form I-290B, counsel for the petitioner's brief, and documentation submitted on appeal.

On May 30, 2008, the director denied the petition, determining that the petitioner had not provided evidence that the beneficiary was a licensed speech pathologist in New York or other evidence that the beneficiary was immediately eligible to practice her profession in New York when the petition was filed.

On appeal, counsel for the petitioner asserts that the beneficiary's education, credentials, and experience are "licensure qualifying in accordance with the New York State Education Law and regulations." Counsel provides evidence that the beneficiary took the Praxis Series Examination on January 12, 2008 and passed and that the beneficiary's nine months of supervised experience began September 17, 2007 and was completed June 17, 2008. Counsel also provides evidence that the beneficiary received her visa screen certificate from the International Commission on Healthcare Professions, a division of CGFNS on March 27, 2008. Counsel also submits a copy of the beneficiary's license to practice as a speech – language pathologist issued July 10, 2008 in the State of New York.

Counsel asserts that 8 C.F.R. § 214.2(h)(4)(v)(C) authorizes United States Citizenship and Immigration Services (USCIS) to examine the nature of the duties and the level at which they are performed and if the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

The issue in this matter is whether the beneficiary is eligible to perform the duties of the proffered position. The AAO observes that the director properly concluded that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. The regulation at 8 C.F.R. § 103.2(b)(1) reads:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

The AAO also observes that the petitioner in this matter is offering the beneficiary the position of speech language pathologist. The petitioner is not offering the beneficiary a position that is exempt from the licensing due to the individual's need for clinical or academic practice under the supervision of a licensed speech-language pathologist or audiologist to complete the experience requirement for a professional license.<sup>1</sup> The AAO notes specifically, that the petitioner in its March 31, 2008 letter in support of the petition stated: “[t]his letter is being submitted in support of the above referenced petition by [the petitioner] to employ [the beneficiary], a citizen of India, as an H-1B specialty worker in the professional, licensed occupation of Speech Language Pathologist, commencing on October 1, 2008.” The petitioner further noted: “[o]ur therapists are Bachelor or Master’s level professionals who present applicable licensure, certification and continuing education credentials.” Further on appeal, counsel for the petitioner asserts that the beneficiary’s education, credentials, and experience are “licensure qualifying in accordance with the New York State Education Law and regulations.” **Thus, when the petition was filed on April 1, 2008, the beneficiary’s education, credentials, and experience were licensure qualifying, but the beneficiary did not have a license for the position offered.**

The USCIS regulation cited by counsel on appeal is not applicable to the matter at hand. As the petitioner is not petitioning for a clinical fellowship position in the speech language pathology field, but rather is petitioning for a licensed speech language pathologist position, the beneficiary must be licensed when the petition is filed. In this matter, although the beneficiary eventually obtained licensure on July 10, 2008, the beneficiary was not eligible to practice the position when the petition was filed. United States Citizenship and Immigration Services (USCIS) cannot approve a petition on facts not yet in existence and that may not come to fruition. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence

---

<sup>1</sup> The AAO has reviewed the licensing requirements and exemptions from licensing requirements set out in Article 159 – Speech-Language Pathology and Audiology of the New York State Statutes. Section 8202 of Article 159 states: “Only a person licensed or otherwise authorized under this article shall practice speech-language pathology or use the title of speech-language pathologist.” Section 8207 of Article 159 provides for exemptions to the licensing requirements indicating that Article 159 shall not be construed as prohibiting “[a]ny person from engaging in clinical or academic practice under the supervision of a licensed speech-language pathologist or audiologist for such period of time as may be necessary to complete an experience requirement for a professional license.”

submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. 8 C.F.R. § 103.2(b)(1)

Upon review of the evidence before the director and on appeal, the petitioner did not establish that the beneficiary was eligible to practice the position of licensed speech language pathologist when the petition was filed.

The petition will be denied and the appeal dismissed for the above stated reason. 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.