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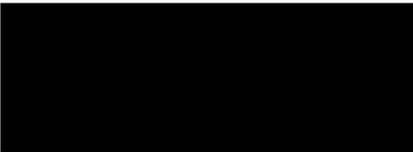


FILE: EAC 07 147 54126 Office: VERMONT SERVICE CENTER Date: **OCT 06 2009**

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a health care services provider 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 director denied the petition, concluding that the beneficiary is not qualified for the proffered position because the petitioner had not submitted the health care certification required by section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C).

On appeal, counsel contends that the director's denial is erroneous, and contends that the decision was misplaced in that it was unsupported by federal regulations or United States Citizenship and Immigration Services (USCIS) policy.

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

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 admission 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. The regulation at 8 C.F.R. § 212.15(d) requires that the alien who is seeking to enter the United States to perform services in a covered health care occupation must present a certificate of admissibility.

The requirement of 8 C.F.R. § 212(a)(5)(C) covers the following seven health-care occupations as listed at 8 C.F.R. § 212.15(c): licensed practical nurses, 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 physicians' assistants.

The regulation at 8 C.F.R. § 212.15(e) lists three organizations that are authorized to issue health care worker certifications: CGFNS, which is authorized to issue certificates to all 7 health care occupations shown above;

the National Board for Certification in Occupational Therapy (NBCOT), which is authorized to issue certificates for occupational therapists; and the Foreign Credentialing Commission on Physical Therapy (FCCPT), which is authorized to issue certificates for physical therapists.

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 new chapter addressed the implementation of the new regulation as follows:

(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 [of] 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.

In the September 22, 2003 memorandum, USCIS noted that, in the case of physical therapists, two organizations are authorized to issue these certificates: (1) CGFNS and (2) FCCPT.

Noting that the record did not contain a certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act, the director requested the certification in his request for additional evidence. The petitioner did not submit the certification in its response to the director's request for additional evidence, nor is it submitted on appeal.

On appeal, counsel contends that the director's request for the certification was erroneous and argues that the petitioner was not required to present the certification with the petition. Counsel asserts instead that the beneficiary must present the certification to a Consular Officer when he is requesting admission to the United States. Counsel concludes that the director's request for certification was premature and not applicable to the current 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.

Based on the above, the AAO generally concurs with counsel's contentions and agrees that the requisite certificate need not be presented at this time. The beneficiary, however, will be required to present the requisite certificate "to a consular officer at the time of visa issuance and to the Department of Homeland Security (DHS) at the time of admission." 8 C.F.R. § 212.15(d)(1).¹ Therefore, the director's comments pertaining to this issue are hereby withdrawn.

Beyond the decision of the director, the AAO finds that the record does not establish that as of the filing date of the petition, the beneficiary possessed licensure in physical therapy. 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:

¹ The AAO notes that the issue of the beneficiary's inadmissibility in this instance 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.

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

A November 20, 2001 memorandum from [REDACTED] discussing social security cards and the adjudication of H-1B petitions for public high school teachers is relevant here. It states that:

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly

stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. . . .

The petitioner intends to employ the beneficiary in North Carolina. According to a letter dated March 21, 2007 from [REDACTED] at the North Carolina Board of Physical Therapy Examiners (Board), the beneficiary's application for licensure in the State of North Carolina was approved by endorsement of the beneficiary's Michigan license. However, the letter indicates that the Michigan license was due to expire on July 31, 2008. According to this letter, upon which conditional approval of the beneficiary's North Carolina license is based, the beneficiary was required to submit a social security number to the Board prior to the expiration of the Michigan license in order to obtain licensure. Since the expiration date of the Michigan license has since passed, the beneficiary must demonstrate that it has reactivated the Michigan license or is otherwise eligible for licensure in the State of North Carolina.

Therefore, the matter is remanded to the director in order to determine whether the beneficiary currently possesses a valid Michigan license and, therefore, is eligible for licensure by endorsement in the State of North Carolina. The director may request such additional evidence as she deems necessary in rendering her decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.