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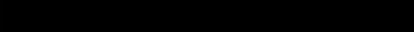
**U.S. Citizenship  
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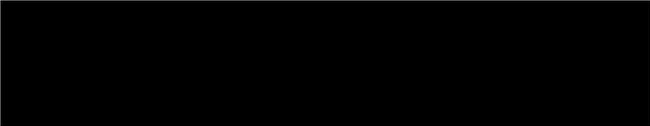
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FILE: EAC 03 010 53642 Office: VERMONT SERVICE CENTER Date: **JAN 26 2005**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director of the 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 health services provider employing 22 workers that seeks to hire the beneficiary to perform the services of a licensed physical therapist. It petitions 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 based upon a lack of evidence that the beneficiary meets the qualifications for the proffered position because she does not have the necessary state license to practice as specified by the regulation at 8 C.F.R. § 214.2(h)(4)(v).

Section 214(i)(2) of the Immigration and Nationality Act (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. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (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 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 have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(v) states, in pertinent part:

*Licensure for H classification –*

(A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien . . . 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 place 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 [sic] which generally require a license, a state may allow an individual to fully practice the occupation under the supervision of a 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.

\* \* \*

(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.

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

The evidence on the record shows that the duties of the proffered position entail those typical for physical therapists: planning and administering physical therapy treatments to restore bodily functions, relieving pain and prevent disability.

The petitioner filed a Form I-129 petition on October 1, 2002, along with:

- An August 19, 2002 letter from the New York State Education Department Office of Professions certifying that the beneficiary had met the office's education requirements for licensure;
- An eligibility notice from the Federation of State Boards of Physical Therapy (Federation) advising the beneficiary that she could sit for the physical therapist licensure exam before an October 28, 2002 deadline;
- A Bachelor of Science in Physical Therapy diploma from a college in the Philippines;
- A transcript of college coursework;
- A Form I-94 showing a B-2 status stamped August 5, 2002; and
- A legacy Immigration and Naturalization Service (INS) receipt for the beneficiary's application for a change or extension of status.

On January 5, 2003, the director sent a request for evidence (RFE) asking for a copy of any of the following: the beneficiary's license to practice in New York; proof of an agency's intent to grant the license upon the beneficiary's arrival into this country; or proof of the beneficiary's exemption from the licensure requirement. In response the petitioner submitted the following:

- A Form I-797A extending the beneficiary's B-2 status to February 5, 2003;
- A Form I-797C seeking a further extension or change of status; and
- A copy of a completed application to take the permanent licensing exam that the beneficiary had sent to the Federation in March 2003.

On appeal, counsel also submitted copies of the following:

- A July 1, 2003 letter advising the legacy INS that the beneficiary had applied to the state of New York on October 1, 2002 for a limited permit to practice as a physical therapist;
- A signed New York Division of Professional Licensing Services Form 5 application dated October 1, 2002, by which the beneficiary had applied for a limited permit to practice in New York under the supervision of a licensed physical therapist pending the beneficiary's own full licensure; and
- Three letters from New York licensing services dated August 20, 2002, October 18, 2002, and February 3, 2003, stating the beneficiary's limited permit applications were incomplete. Each letter asks the beneficiary to document her current visa status and that as an alien she is authorized to work or holds an "alien registration card" (Form I-551).

The director denied the petition, saying the record includes no license exam results or evidence the beneficiary has obtained licensure or is otherwise eligible to practice in New York. He thus found the beneficiary did not meet the job qualifications of the proffered position.

On appeal counsel contends that the decision errs by placing the petitioner in a double bind, with the service center demanding proof of licensure, on the one hand, and, on the other, with the state insisting a "valid H-1B1 status" as a pre-condition to licensure. Counsel asserts that the dueling requirements leave the petitioner "in a very untenable position." Counsel asserts that under New York law, the beneficiary could be eligible to practice with a limited state permit, valid for six-month intervals, and that therefore the director should approve the petition in spite of the state's agency's refusal to license her under its own limited permit law. The petitioner adds that she has been in this country as a legal, B-2 visitor through August 4, 2003.

New York's Education Laws, § 6735, states in part, with respect to the issuance of limited permits to practice physical therapy in New York:

- a. The department of education shall issue a limited permit to an applicant who meets all requirements for admission to the licensing examination.
- b. All practice under a limited permit shall be under the supervision of a licensed physical therapist in a public hospital, an incorporated hospital or clinic, a licensed proprietary hospital, a licensed nursing home, a public health agency, a recognized public or non-public school setting,

the office of a licensed physical therapist, or in the civil service of the state or political subdivision thereof.

c. Limited permits shall be for six months and the department may for justifiable cause renew a limited permit provided that no applicant shall practice under any limited permit for more than a total of one year.

d. Supervision of a permittee by a licensed physical therapist shall be on-site supervision and not necessarily direct personal supervision except that such supervision need not be on-site when the supervising physical therapist has determined, through evaluation, the setting of goals and the establishment of a treatment plan, that the program is one of maintenance as defined pursuant to title XVIII of the federal social security act [sic].

Upon review of the record, the AAO agrees with counsel that the beneficiary appears to be entitled to a New York state limited-permit license to practice as a physical therapist. However, the petitioner has not met its burden of proof to show the beneficiary is eligible for H-1B classification.

Section 214(i)(2) of the Immigration and Nationality Act (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 required, in addition to any minimum required degree in the specialty. *See also* 8 C.F.R. §214.2(h)(4)(iii)(C)(3) and 8 C.F.R. §214.2(h)(4)(v), (A) and (B). The AAO finds the beneficiary holds the required bachelor's degree in physical therapy, but that she does not possess a license, temporary or permanent, with which to practice.

While it appears that the beneficiary has met all the requirements for state licensure, and but for the state's inaction, would hold a state limited-permit license to practice, the record does not warrant favorable action on the petition. The AAO may not ignore the governing federal regulations based upon what appears to be a failure by the professional licensing agency for the state of New York to honor state law.

Even though the director did not analyze whether the beneficiary could perform the duties of the proffered position under a temporary license from the New York Education Department, instead finding that "[n]o evidence regarding the results of the test was submitted," that is the province of New York state government, which apparently does not require, for a limited permit, an applicant to have passed the licensing exam. Instead, the law appears only to require that she be able to show "she meets all requirements for admission to the licensing examination." § 6735, N.Y. Ed. Laws.

The record indicates that by letter on August 19, 2002, the state-licensing agency advised the beneficiary that she had met the education requirements to take the licensing exam. Also by an August 28, 2002 letter, the Federation of Boards of Physical Therapy had issued her an examination number entitling her to sit for the state physical therapists examination in the succeeding two months. However, in three subsequent letters the New York licensing agency informed the beneficiary that her application was incomplete because it lacked proof of the beneficiary's permanent residency or a CIS document authorizing her to work. This the agency did in spite of the federation's letter authorizing her to take the exam.<sup>1</sup>

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<sup>1</sup>"When the [education] department finds that the application is complete and the requirements for admission to an examination have been met, it will issue to the application an admission card which will include the date, time and place of the examination and entitle the applicant to admission thereto." New York Regs. Ed. Comm, § 59.5.

Nevertheless, as indicated above, the alien may not be granted an H-1B visa in an occupation requiring licensure without first obtaining the full or temporary license from the state of intended employment.

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 met that burden.

**ORDER:** The appeal is dismissed. The petition will be denied.