



U.S. Citizenship
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FILE: EAC 04 240 51036 Office: VERMONT SERVICE CENTER

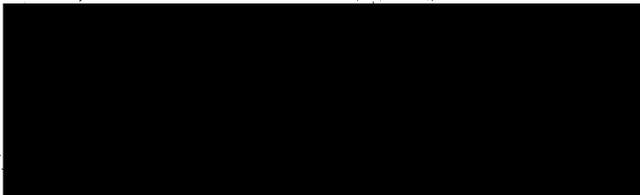
Date: DEC 04 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 provides medical staffing services to health care facilities. In order to employ the beneficiary as an occupational therapist, the petitioner 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 on the basis that the beneficiary was not qualified to perform the services of the occupation, in that the petitioner failed to establish that the beneficiary held the license that the Commonwealth of Pennsylvania, the location of the proposed employment, requires for performance in the pertinent specialty occupation of occupational therapist. In pertinent part, the director's denial states:

The record shows that on November 17, 2004, you were requested to submit a copy of the beneficiary's license to practice the profession of occupational therapist from the state of intended employment, or other evidence, to establish that the beneficiary is immediately eligible to engage in his profession.

In response, you submitted a notice from the Commonwealth of Pennsylvania dated January 26, 2004 regarding "OT Licensure Application" which states that disclosing a social security number on the application is mandatory. This notice does not state that his application for licensure has been approved and that he will be licensed and be immediately eligible to practice occupational therapy upon entry to the United States.

The record does not include evidence that the beneficiary is a licensed occupational therapist in Pennsylvania, or other evidence that he is immediately eligible to practice his profession in Pennsylvania.

On appeal, the petitioner asserts that lack of licensure is not a proper basis for denying the petition in this proceeding. The petitioner contends that the evidence of record establishes that the beneficiary is qualified to receive a Pennsylvania occupational therapist license, and that this eligibility for licensure is sufficient to qualify him to serve in the proffered position.

For reasons discussed below, the AAO finds that the director's decision to deny the petition was correct. The AAO bases its determination upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, the petitioner's July 1, 2005 letter, and the other documents submitted on appeal.

The AAO will first review material facts established in the record of proceeding with regard to the processing of the petition and the beneficiary's licensure status.

On October 17, 2003, the National Board for Certification in Occupational Therapy, Inc. (NBCOT) issued a letter informing the beneficiary of his eligibility to take the certification examination for Occupational Therapist Registered OTR (certification examination). On May 4, 2004, the Administrator of the Pennsylvania State Board of Occupational Therapy issued a "Confirmation of Examination Registration and Eligibility to Examine" letter attesting that the beneficiary has successfully completed the academic courses and fieldwork required to practice as an occupational therapist in Pennsylvania, and that the beneficiary is authorized, until November 5, 2004, to take the certification examination.

The petition was filed on August 19, 2004. The RFE was issued on November 17, 2004.

On December 10, 2004, NBCOT issued a Visa Credential Verification Certificate establishing that the beneficiary has met the educational and training requirements required to practice as an occupational therapist. That the beneficiary passed the certification examination is established by a September 25, 2004 certificate from the NBCOT Board of Directors attesting that the beneficiary has satisfied the requirements for certification as Occupational Therapist Registered OTR and would remain certified until March 31, 2007. A January 26, 2005 letter from NBCOT confirms that the beneficiary "passed the Certification Examination and became certified as an OTR on September 25, 2004" and that the certification is "due for renewal on March 31, 2007." On February 11, 2005 the Pennsylvania State Board of Occupational Therapy issued a letter informing the beneficiary that a social security number is required in order to "complete your application for the temporary and/or permanent license." The director denied the petition on June 6, 2005.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), 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.

Citizenship and Immigration Services (CIS) policy addresses situations where the lack of a social security number is the sole reason that a necessary license has not been issued. The CIS policy is described in the 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 "Cook Memo"), which states, in part:

Certain states require that an H-1B nonimmigrant be issued a social security card before the state or local licensing authority will issue a professional license to the alien to work in that jurisdiction. According to the regulations of the Social Security Administration (SSA), an H-1B alien is not able to obtain a social security card unless they are physically present in the United States. Some H-1B petitions in these cases have been denied because the alien beneficiary has not yet received his or her license.

Most recently, this issue has arisen regarding the adjudication of H-1B petitions filed for certain public high school teachers. In the case of the teachers, the Immigration and Naturalization Service (INS) has been receiving H-1B petitions filed on behalf of public school teachers that are not supported by the required license. The teachers are unable to obtain licensure solely because they cannot obtain a social security card because they are not physically present in the United States.

In order to avoid this situation and accommodate the needs of H-1B petitioners, INS [now CIS] officers involved in the adjudication of H-1B petitions are instructed to use the following guidance. 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. At the time an extension application is filed by the alien, the adjudicator should determine that the required license was obtained. If it has not been obtained at that time the application should be denied.

According to section 11 of Pennsylvania's Occupational Therapy Practice Act, the beneficiary was not eligible for licensure until he passed the certification examination.¹

The evidence of record does not establish that the petitioner had passed the certification examination by the time the petition was filed, in August 2004; and the record does not 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. Therefore, lack of a social security number was not the only impediment to the issuance of a license to the beneficiary, at the time when the petition was filed. 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 the evidence of record does not establish that at the time the petition was filed the beneficiary had attained all the requirements for licensure except a social security number, the director's decision was correct and shall not be disturbed. The appeal will be dismissed, and the petition will be denied.

¹ The AAO accessed the Act at the Internet site of the Pennsylvania State Board of Occupational Therapy at www.dos.state.pa.us/bpoa/lib/bpoa/20/otbd/ot_act_updated052604.pdf.

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. Accordingly, the appeal will be dismissed.

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