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**U.S. Citizenship
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Services**

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FILE: EAC 05 219 51175 Office: VERMONT SERVICE CENTER Date: **NOV 07 2007**

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 therapy and instruction for children with disabilities. It seeks to employ the beneficiary as a "Clinical Fellow – Language Pathology." Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On February 14, 2006, the director denied the petition determining that: (1) the petitioner had not provided the beneficiary's required certification as a speech language pathologist in accordance with section 212(a)(5)(C) of the Act; and (2) the petitioner had not provided evidence that the beneficiary had complied with the New York State requirements regarding licensure. The director concluded that the beneficiary did not qualify for H-1B classification.

The record of proceeding before the AAO contains: (1) the Form I-129 filed August 3, 2005 with supporting documentation; (2) the director's August 25, 2005 request for further evidence (RFE); (3) the petitioner's October 25, 2005 response to the RFE; (4) the February 14, 2006 denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (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.

Pursuant to 8 C.F.R. 214.2(h)(4)(v):

- (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.

In a July 21, 2005 letter appended to the petition, the petitioner described the duties of the proffered position as:

Working under the supervision of a Speech-Language Pathologist licensed in New York State, provide speech and language remediation services implementing individualized service plans for assigned cases to habilitate and rehabilitate communicative efficiency of children with speech language disorders; provide preliminary screening and evaluations; review individual files to obtain background information prior to evaluation to determine appropriate tests; administer and review speech and language tests; provide counseling and consultation, and make referrals if needed; determine effective communication techniques and strategies; evaluate and monitor children's progress and review remediation plans; attend fellowship supervision meetings and training workshops on a regular basis; maintain supervision contact records; prepare daily sessions notes and progress reports on a regular basis; maintain effective and consistent communication with the supervisor.

The petitioner noted that the term "Clinical Fellow-Speech Language Pathology" was widely used to designate individuals who are obtaining supervised, post-graduate clinical experience, experience necessary to fulfill the requirements for a state Speech Language Pathologist license or Certificate of Clinical Competence from the American Speech-Language and Hearing Association. The petitioner further explained that in New York State, a Clinical Fellow must hold a Master's degree or the equivalent thereof and must work under the supervision of a Speech-Language Pathologist who is licensed in New York.

To determine whether the proffered position in this matter requires a license to provide the duties of the position and any other requirements imposed upon the position, the AAO must review the laws and regulations of the State of New York. The pertinent portions of the New York State Statute regarding the Education Department Office of Professions states at:

Article 159, Speech-Language Pathology and Audiology

§8200. Introduction.

This article applies to the professions of speech-language pathology and audiology. The general provisions for all professions contained in article one hundred thirty of this title apply to this article.

§8201. Definition of practice of speech-language pathology.

The practice of the profession of speech-language pathology shall mean the application of principles, methods and procedures of measurement, prediction, non-medical diagnosis, testing, counseling, consultation, rehabilitation and instruction related to the development and disorders of speech, voice, swallowing, and/or language for the purpose of preventing, ameliorating or modifying such disorder conditions in individuals and/or groups of individuals.

§8202. Practice of speech-language pathology.

Only a person licensed or otherwise authorized under this article shall practice speech-language pathology or use the title of speech-language pathologist.

§8206. Requirements for a professional license.

To qualify for a license as a speech-language pathologist or audiologist, an applicant shall fulfill the following requirements.

1. Application: file an application with the department;
2. Education: have obtained at least a Masters degree in speech-language pathology and/or audiology or its equivalent, as determined by the department, in accordance with the commissioner's regulations;
3. Experience: have experience satisfactory to the board and in accordance with the commissioner's regulations;
4. Examination: pass an examination satisfactory to the board and in accordance with the commissioner's regulations;
5. Age: be at least twenty-one years of age;
6. Character: be of good moral character as determined by the department; and

Fees: pay a fee of one hundred forty dollars to the department for admission to a department conducted examination and for an initial license, a fee of seventy dollars for each reexamination, a fee of one hundred fifteen dollars for an initial license for persons not requiring admission to a department conducted examination, and a fee of one hundred fifty-five dollars for each triennial registration period.

§8207. Exempt persons.

This article shall not be construed as prohibiting:

3. Any 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, as provided in this article and in rules or regulations approved by the board of regents with the advice of the state board for speech-language pathology and audiology.

The Department of Education Commissioner's regulations pertaining to Speech-Language Pathology and Audiology indicates at Part 75:

§75.1 Professional study of speech-language pathology and/or audiology

- a. To meet the professional education requirement for admission to the licensing examination, the applicant shall present evidence of:
 1. the completion of a program in speech-language pathology and/or audiology registered by the department or determined by the department to be the equivalent of a registered program; and
 2. having received a master's degree in speech-language pathology or audiology, or the equivalent as determined by the department.
- b. To be considered the equivalent of a master's degree in speech language pathology and/or audiology, the applicant's educational program must culminate in a graduate degree from a college acceptable to the department and shall include a practicum and 60 semester hours of courses as specified in paragraph (b)(1) or (2) of this subdivision, of which not less than 30 semester hours shall have been at the graduate level.
 1. For speech-language pathology:
 - i. basic communication processes: 12 semester hours;
 - ii. professional areas in speech-language pathology: 24 semester hours, six of which shall be in language;
 - iii. professional areas in audiology: six semester hours;
 - iv. additional courses in the above or related areas: 18 semester hours; and
 - v. a practicum in speech-language pathology of not less than 300 clock hours under supervision, at least 150 clock hours of which shall be on the graduate level and at least 20 but not more than 50 of the 300 hours shall be in audiology.

§75.2 Experience

- a. An applicant for licensure shall have completed not less than nine months of supervised experience of a scope and nature satisfactory to the State Board for Speech-Language Pathology and Audiology after all requirements for the master's degree are completed.
- b. Duration.
 1. Within any two-year period following completion of an educational program that meets the requirements of section 75.1 of this Part, an applicant must accrue nine months of acceptable experience with not more than two employers.
 2. Credit toward the experience requirement may be given for part-time employment accumulated at the rate of not less than two days per week and consisting of not less than 15 hours per week for continuous periods of not less than six months.
- c. Supervision.
 1. Supervision shall include meeting with and observing the applicant on a regular basis to review and evaluate the supervised experience and to foster professional development.
 2. Supervision shall be provided by the organization in which the applicant is working, and by an individual who is licensed in New York in the field for which the applicant seeks licensure, except that supervision of experience acquired in another state or in an exempt setting may be provided by a person holding the Certificate of Clinical Competence of the American Speech-Language Hearing Association.

The New York State Education Department Office of the Professions website at www.op.nysed.gov lists the required forms to apply to begin the licensure process. The Forms and instructions include:

Form 1- Application for Licensure and First Registration - All applicants for licensure must complete this Form and submit it with the \$270 licensure and registration fee directly to the Office of the Professions at the mailing address at the end of Form 1. Make checks payable to the New York State Education Department. NOTE: Your cancelled check is your receipt.

You must answer all questions and provide all information requested unless otherwise indicated.¹ Failure to complete all required parts of the application will delay its review. Your signature on Form 1 must be notarized by a Notary Public. Upon receipt of your completed application, we will send you an acknowledgement letter.

¹ A review of Form 1 reveals a space for a social security number to be inserted into the Form. However, the Form also indicates: "Leave this blank if you do not have a U.S. Social Security Number."

Form 2 – Certification of Professional Education - If you received your graduate degree before April 1, 1976 you should **not** use this Form. Have your school(s) send undergraduate and graduate transcripts to the Office of the Professions. Verification from school(s) must also include practicum information.

This form must be submitted directly by the educational institution you attended.

Section I: Complete this section of the form before sending it to your school. Be sure to sign and date item 9.

Section II: The registrar or appropriate school official must complete this section, sign and date and return the form in an official school envelope directly to the Office of the Professions at the address at the end of the form.

An official transcript must be attached for all graduates of non-registered or non-accredited programs. When studies were completed at more than one school, official transcripts must be sent to the Department from each school. Please photocopy the form as needed. **In addition, graduates of these programs must also have official undergraduate transcripts sent in an official school envelope to the address on the form.** (Emphasis in original.)

Form 4A – Identification of Supervisor and Setting - This form should be submitted at the beginning of your supervised experience. When the Application for Licensure and First Registration (Form 1), the fee, Certification of Professional Education (Form 2), and Identification of Supervisor and Setting (Form 4A) are received and approved, you will receive verification (Form 6) once your experience is approved. The Form 6 is required in some settings; therefore, it is important to submit Form 4A as soon as your experience setting has been established.

Based on the above New York State law, regulations, and forms, the AAO finds that the beneficiary would be exempt from obtaining a license, if as the petitioner states, she would be practicing under the supervision of a licensed speech-language pathologist to complete the practical experience portion of the requirements to obtain a professional license. However, the petitioner must still provide evidence that the alien who is accorded H-1 classification is able to engage in the profession immediately upon entering the United States. 8 C.F.R. § 214.2(h)(4)(v)(A). The AAO finds that compliance with New York State's application and registration process to begin the experience portion of the speech pathology license would be similar to obtaining a temporary license to practice this profession. In order for the beneficiary to be found eligible for the H-1B classification, the petitioner must submit evidence establishing that the alien has been found qualified by the state to perform the experience portion of the speech pathology license immediately upon entry into the United States. The H-1B approval period would necessarily be limited to one year, during which time the alien would be able to complete the practical experience requirements and to obtain a license. The record in this matter, however, does not contain sufficient evidence to establish that the State of New York finds the beneficiary qualified to perform the duties of an individual in a clinical fellow-speech language pathology position, a position that is a necessary precursor to obtaining a full license, in the State of New

York. Thus, the beneficiary is not qualified to perform the duties of a clinical fellow-speech language pathologist.

The record does not contain Form 1, a form that shows that the beneficiary has begun the registration process. The AAO acknowledges counsel's assertion on appeal that a social security number is necessary to begin the registration process. However, although Form 1 has a place for a social security number, the instructions indicate that if the applicant does not have a social security number, the line should be left blank. The record does not contain a statement from the New York State Educational Department, Division of Professional Licensing confirming that the education portion of the beneficiary's application has been approved and that the applicant is eligible to begin the required nine months of full-time, supervised experience. Thus, the record does not establish that the New York State licensing authority has approved the beneficiary's education, a necessary component to begin the practical experience portion of the licensing process. The record also does not identify the beneficiary's proposed supervisor or the setting for the beneficiary's experience as reported to and accepted by the appropriate licensing division of New York State. Accordingly, the record does not contain evidence that the beneficiary has complied with the necessary application and registration processes in order to work as a clinical fellow-speech language pathologist in the State of New York. The record does not contain any official statements from the appropriate licensing authorities in the State of New York establishing that the State of New York finds the beneficiary qualified to perform the duties of a clinical fellow as described by the petitioner. Without such information, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation,² upon entry into the United States. For this reason, the petition will be denied.

The petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation in the State of New York. Thus, the failure of the petitioner to provide a certificate of foreign health care worker is not at issue. The certificate of foreign health care worker is required at the time the appropriate official determines whether the beneficiary is admissible to the United States. Foreign health care worker certification is decided by the consular official at the time of the beneficiary's visa interview, and by an officer of the Department of Homeland Security when the beneficiary is admitted to the United States. 8 C.F.R. § 212.15(d)(1).³ The AAO notes that a finding that the beneficiary does not have the required health care worker certification is a finding that the beneficiary is inadmissible to the United States; the beneficiary's admissibility is not a proper ground to deny an H-1B petition.⁴ As the director's decision incorrectly denied the petition, in part, because the beneficiary is subject to the foreign health care worker certification, e.g. is inadmissible, the AAO will briefly address this issue.

The regulation at 8 C.F.R. § 212.15 in pertinent part provides:

² The AAO notes counsel's assertion that the clinical fellow speech language pathologist is not the same as a speech language pathologist. The AAO also observes that the director did not determine whether the proffered position as described is a specialty occupation.

³ The director may also determine whether the beneficiary has the foreign health care worker certification, e.g. whether the beneficiary is admissible to the United States, at the time any application for extension of status is adjudicated. 8 C.F.R. § 214.1(a)(3)(i).

⁴ The AAO notes further that the issue of whether or not the beneficiary is admissible may not be appealed to the AAO.

(a) General certification requirements.

- (1) Except as provided in paragraph (b) or paragraph (d)(1) of this section, 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 health care occupation listed in paragraph (c) of this section is inadmissible unless the alien presents a certificate from a credentialing organization, listed in paragraph (e) of this section.

(b) Inapplicability of the ground of inadmissibility. This section does not apply to:

- (3) Aliens coming to the United States to receive training as an H-3 nonimmigrant,⁵ or receiving training as part of an F⁶ or J⁷ nonimmigrant program.

(c) Covered health care occupations. With the exception of the aliens described in paragraph (b) of this section, this paragraph (c) applies to any alien seeking admission to the United States to perform labor in one of the following health care occupations, regardless of where he or she receives his or her education or training:

- (4) Speech Language Pathologists and Audiologists.

The above regulation does not directly address the situation of an individual coming to the United States to participate in a practical experience program required by one of the United States to satisfy a provision of the licensing process to practice the profession in that state.⁸ The primary goal of the beneficiary in the present

⁵ The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E) describes an H-3 classification as applicable to an alien who is coming temporarily to the United States: (1) as a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution, or (2) as a participant in a special education exchange visitor program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

⁶ The regulation at 8 C.F.R. § 214.2(f) sets forth the eligibility requirements for F-1 students in colleges, universities and other academic institutions.

⁷ The regulation at 8 C.F.R. § 214.2(j) sets forth the eligibility requirements for the J-1 visa classification for nonimmigrant exchange visitors.

⁸ At first glance, it appears the alien in this matter may not be coming to the United States to practice a specialty occupation but rather is coming temporarily to the United States as a trainee, student or exchange visitor; however, upon close review of the record, the beneficiary will not be a trainee, student or exchange visitor. New York State requires a licensure applicant to complete nine months of supervised experience, not training, after completing an approved educational program. Further, the licensure applicant must be supervised by an individual licensed in New York in the profession or if in an exempt setting (as determined by the State of New York) a person holding the Certificate of Clinical Competence of the American Speech-Language Hearing Association. Accordingly, although the situation of an individual exempt from obtaining a license in the State of New York pursuant to section 8107 of the New York statute is comparable

case is to gain the necessary supervised experience to be able to perform the duties of a health care worker as a speech language pathologist, not to perform labor as a speech language pathologist. In this instance, there is a distinction between obtaining practical experience under supervision and performing labor in the specific health care occupation. New York State, in this matter, recognizes that supervised experience in pursuit of authorization to perform the labor of a speech-language pathologist is not the same as the authorization to perform the labor and thus necessarily provides an exemption from licensing for the individual to obtain the practical experience in pursuit of a license. When a state requires practical experience, supervised by a state licensee or other individual approved by that state, as a precursor to obtain a license, CIS cannot prohibit access to that practical experience by requiring a certificate of foreign health care worker that verifies the alien's licensure.

The AAO has reviewed the regulation at 8 C.F.R. § 212.15(f) for issuance of health care certification to understand the purpose for requiring a certificate of foreign health care worker. Section 212.15(f) requires:

- (1) Prior to issuing a certification to an alien, the [certifying] organization must verify the following:
 - (i) That the alien's education, training, license, and experience are comparable with that required for an American health care worker of the same type;
 - (ii) That the alien's education, training, license, and experience are authentic and, in the case of a license, unencumbered;
 - (iii) That the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States. This verification is not binding on the DHS; and
 - (iv) Either that the alien has passed a test predicting success on the occupation's licensing or certification examination, provided such a test is recognized by a majority of states licensing the occupation for which the certification is issued, or that the alien has passed the occupation's licensing or certification examination.

The regulation at 8 C.F.R. § 212.15(g) adds a requirement for English proficiency appropriate to the position in which the alien will be employed unless exempted.

These requirements confirm that the general purpose underlying the requirement of a certification of foreign health care worker is to standardize and establish a level of competency for foreign health care workers entering into the United States to provide health care. While a potential licensee continues to fulfill the requirements to obtain full licensure by a state, CIS cannot expect that person to have obtained the foreign health care worker certification. The underlying purpose of the certification requirement will be satisfied by the state's implementation and oversight of its program requirements to obtain licensure.⁹

to the situation of an individual coming to the United States to receive training pursuant to 8 C.F.R. § 212.15(b)(3), the New York State licensure applicant's experience requirement is not covered by the exemptions for F-1, J-1 or H-3 classifications provided for at 8 C.F.R. § 212.15(b)(3).

⁹ New York State, for example, requires a master's degree in speech language pathology for entry into the

The director erred by denying the petition, in part, because the beneficiary did not have the foreign health care worker certification and was thus not admissible to the United States. The foreign health care worker certification requirement is not applicable to an individual obtaining practical experience under supervision and not performing labor in a health care occupation. The beneficiary in this case is not subject to the foreign health care worker certification until full licensure. Further, the H-1B petition may not be denied when the alien is found to be inadmissible. For the beneficiary in this case, who is outside the United States, that determination will be made at the consular interview by the Department of State and by the Department of Homeland Security at the time of admission. The portion of the director's decision to deny the petition on the grounds that the beneficiary lacks the certificate of foreign health care worker and is thus inadmissible, is withdrawn.

The petition may not be approved, however, as the petitioner did not establish that the beneficiary is qualified to immediately work under the laws of the state of New York as a clinical fellow-speech language pathologist. Thus, the decision of the director will not be disturbed.

The burden of proof in this proceeding 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 is denied.

licensing process and issues regulations detailing specific requirements to apply and register for a license (including supervised experience). The state has thus provided the necessary controls to maintain the competency of foreign health care workers entering the United States at the preliminary stage of the licensing process.