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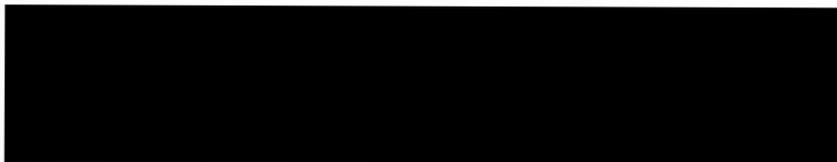
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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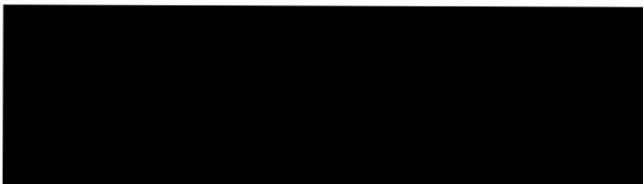
FILE: EAC 07 149 55289 Office: VERMONT SERVICE CENTER Date:

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).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 corporation engaged in the healthcare staffing business. To employ the beneficiary as a physical therapist in the State of Florida, the petitioner endeavors to classify him 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 one issue on appeal is whether the director was correct in denying the petition on the basis that the beneficiary had not fulfilled all of the requirements set by the State of Florida for the issuance of a license to practice as a physical therapist.¹

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.

¹ In noting that the State of Florida's requirement for a social security number "was not the only requirement that the beneficiary had left," and in focusing on other unfulfilled licensure requirements, the director indicated, correctly, that the lack of a social security number by the alien beneficiary in this proceeding would not be a basis for denial if it were the only impediment to the beneficiary's licensure. For the relevant U.S. Citizenship and Immigration Services (USCIS) policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the alien beneficiary's lack of a social security number, *see* 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 referred to as the Cook Memo). Its continuing applicability is acknowledged in the Memorandum from Donald Neufeld, Deputy Associate Director, Domestic Operations, *Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization*, HQISD 70/6.2.8 (March 21, 2008) (hereinafter referred to as the Neufeld Memo).

As is evident from the following excerpts from the Cook and the Neufeld Memos referenced at footnote 1, USCIS allows for provisional approval of a petition for a one-year period, in order to allow a beneficiary to travel to the United States to obtain licensure, in the very limited circumstances where the beneficiary has met all of the pertinent State's licensure requirements except possession of a social security number or possession of a valid immigration document to establish his or her authorization to work in the United States. The Cook Memo 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 USCIS] 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.

The Neufeld Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition. The Neufeld Memo states, in part:

This AFM update instructs adjudicators to approve an H-1B petition for a **one-year** validity period if a State or local license to engage in the profession is required and

the appropriate licensing authority will not grant such license to an alien absent evidence that the alien has been granted H-1B status. As a condition to approving such a petition, the alien must demonstrate that he or she has filed an application for such license in accordance with State or local rules and procedures. Further, prior to approving an H-1B petition under such circumstances, adjudicators should verify that the alien beneficiary is fully qualified to receive the State or local license, meaning that all educational, training, experience, and other substantive requirements must be met (where appropriate, the adjudicator may issue a request for evidence). It should be noted that the approval of any such H-1B petition shall not constitute approval by USCIS for the alien beneficiary to engage in any activity requiring possession of such State or local license. Any petition that requests an extension of stay on behalf of an alien who has been granted H-1B status under this provisional measure must show that the alien has obtained the requisite license. If the alien has not obtained the requisite license at the time the petition and extension are filed, such petition will be denied.

The circumstances addressed in the Memos are not present in the proceeding on appeal.

The record reveals the following undisputed facts material to the disposition of this appeal. On March 3, 2006, the Foreign Credentialing Commission on Physical Therapy issued a Comprehensive Credential Evaluation Certificate attesting that the beneficiary “has met all of the requirements of section 212(a)(5)(C) of [the Act], as specified at Title 8, Code of Federal Regulations [C.F.R.] section 212.15(f) for the Profession of: Physical Therapy.”² On April 2, 2007, the Board of Physical Therapy Practice of the Florida Department of Health (BPTPFL) issued a letter of notification to the beneficiary, at his address in the Philippines, that includes these relevant paragraphs:

Congratulations on your successful passage of the physical therapist examination. Your license will not be processed further until this office receives the items marked below.

- A copy of your U.S. social security card is required
- Passing laws and rules score
- Proof of medical errors [course]

Please send the required materials directly to this office. . . .

² The provision at section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), on the inadmissibility of uncertified health care workers, states that any alien seeking to enter the United States to perform labor in a non-physician healthcare occupation there described, including physical therapy, is inadmissible unless he or she presents to the consular officer (or in the case of an adjustment of status, the Attorney General) a certificate from CGFNS, or an equivalent independent credentialing organization approved by the Attorney General in consultation with the Secretary of Health and Human Services. The implementing regulations, at 8 C.F.R. § 212.15, specify FCCPT as a credentialing organization for physical therapists.

Section 456.013(a), Florida Statutes, states an incomplete application shall expire one year after initial filing. Your current application will expire on December 28, 2007. If we do not receive the above item(s) before your application expires, you will be required to complete another application and application fee.

After issuance, your license will expire [on] 11/30/2007. Licenses are renewed on a biennial basis. . . .

You may visit our DOH website at <http://www.doh.state.fl/maqa> for newsletters, continuing education requirements, [to] submit electronic address changes, and receive important information regarding your profession or request current copies of the laws and rules.

Thank you for applying for licensure in Florida. . . .

The petitioner filed the petition on April 2, 2007, the same date that BPTPFL issued the above quoted notification. In her September 11, 2007 reply to the service center's request for additional information (RFE), counsel for the petitioner (hereinafter, counsel) submitted documentation indicating that on August 17, 2007 the beneficiary completed the medical errors course specified in the BPTPFL notification of April 2, 2007. Counsel's letter of reply to the RFE states, in part, with boldfacing and underlying that which appears below:

[T]he FL laws and rules exam is only offered in the United States and consists of 50 questions[.] it does not require completion of any academic program and can be completed in one day. Please note that [the beneficiary] cannot obtain a social security number or take the FL laws exam until he enters the United States. He will be immediately eligible for a social security number and to complete the brief FL law exam upon entry to the United States and the license will be issued immediately thereafter.

The director's decision to deny the petition for lack of required licensure rests upon his findings, supported by the record, that the beneficiary (1) had not completed the required course on medical errors until more than a month after the petition was filed and (2) still had not completed the required examination on Florida law and rules. On appeal, counsel contends that the beneficiary "had substantially completed the requirements for a license" by the time the petition was filed. Counsel asserts that the medical errors course and the laws and rules examination are administrative rather than substantive requirements. Counsel also asserts that the laws and rules examination is available only in the United States and that, therefore, the beneficiary would be foreclosed from obtaining licensure unless the petition is approved.

At the time when the petition was filed, lack of a social security number was not the only impediment to the issuance of a physical therapist license to the beneficiary. The evidence of record establishes that, at the time the petition was filed, the beneficiary had not completed the course on medical errors and had

not taken and passed the required examination on Florida law and rules, and therefore had not completed requirements that the State of Florida has set as preconditions to its completion of processing of an application for a license as a physical therapist in that jurisdiction. The AAO accords no weight to counsel's contention that these two licensure requirements are administrative rather than substantive requirements and that they should therefore not preclude USCIS from approving the petition. Counsel provides no documentary evidence and cites no statutory, regulatory, or precedent decisions for this proposition. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, the fact that the State of Florida will not further proceed with the processing of a license until these two requirements are satisfied is indicative that the State of Florida regards them as substantive.

USCIS 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)(1). 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 or an approved H-1B petition, the director's decision was correct and shall not be disturbed. The appeal will be dismissed, and the petition will be denied.

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.