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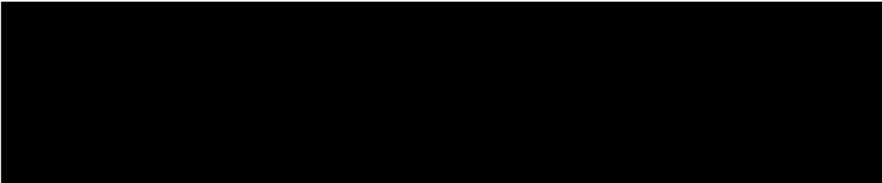
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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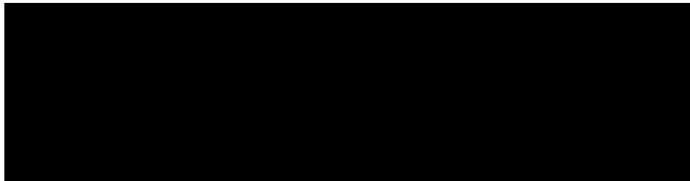


FILE: EAC 08 156 50759 Office: VERMONT SERVICE CENTER Date: APR 19 2010

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).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the immigrant 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 operates a rehabilitation center and seeks to employ the beneficiary as a physical therapist graduate intern in the State of New York. 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 on the basis of her determination that the petitioner had failed to demonstrate that the beneficiary is qualified to perform the duties of the proposed position. Specifically, the director found that the petitioner had failed to establish that state licensure is not required in order to perform the duties of the proposed position. Accordingly, since the beneficiary lacks such licensure, the director found that he does not qualify to perform the duties of the proposed position.

The record of proceeding before the AAO contains the following: (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In its March 26, 2008 letter of support, the petitioner described the scope of the proposed position as follows:

The Physical Therapist Graduate Intern will gain valuable experience in inpatient acute care and outpatient care. The Physical Therapist Graduate Intern will aide Licensed Physical Therapists by assisting in providing services that help restore function, improve mobility, relieve pain, and prevent or limit permanent physical disabilities . . . They will help restore, maintain, and promote overall fitness and health . . . [the beneficiary's] patients include accident victims, and individuals with disabling conditions. . . .

The petitioner also noted that the proposed position is "open to graduate[s] of Bachelor, Masters, or Doctorate of Physical Therapists programs" and that "[t]hese graduates are either contemporaneously waiting for the results of their National Physical Therapy Examination (NPTE) examination, or are studying to take the exam." The initial record also included an offer letter to the beneficiary providing the same description of job duties as listed in the letter of support.

Counsel emphasizes in his November 26, 2008 appellate brief that the proposed position is not that of a licensed physical therapist or physical therapist aide. According to counsel, the beneficiary "will perform no tasks that require licensure." Counsel states further that the position "was designed to provide an opportunity to experience the practical job functions of physical therapy while, at the same time, preparing for the licensing examination," and that it "serves as a 'bridge' or 'internship' between graduation and examination." Counsel states that physical therapist graduate

internships are a growing occupation, noting that many occupations, including the field of physical therapy, require clinical internships for those who wish to enter graduate school. Counsel indicates that the petitioner could not find any evidence of a graduate internship in any occupation which required a degree less than that of a bachelor's degree, that a degree requirement is the industry standard, that although this is a new position, the petitioner limits the position to those that hold a bachelor's degree, and since the position is only open to recent graduates who are learning about the profession and preparing for and sitting for the NPTE, the nature of the duties is so specialized as to demand a bachelor's degree.

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:

- (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.
- \* \* \*
- (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.

As noted previously, the sole issue on appeal is whether licensure is required to perform the duties of the proposed position. If so, then it is clear from the record that the beneficiary does not satisfy the criteria at 8 C.F.R. § 214.2(h)(4)(v), and the petition must be denied.

The practice of physical therapy in the State of New York is governed by Title 8, Article 136, section 6730 et seq. of the New York Education Law, as well as Part 77 of the New York Commissioner's Regulations. Upon review of the record, the AAO finds that the duties of the proposed position require New York licensure, as the duties of the proposed position as set forth in the initial filing clearly indicate that the beneficiary would be practicing physical therapy.

Title 8, Article 136, section 6732 of the New York Education Law provides that persons may use the title "physical therapist" only if licensed, or otherwise authorized to do so, under Article 136. As the beneficiary's proposed position encompasses the phrase "physical therapist," the AAO finds that, absent specific guidance from the State of New York indicating otherwise, the beneficiary must, pursuant to section 6372, be licensed or otherwise authorized to practice the duties of the proposed position under Article 136.

Having made that determination, the AAO turns to the text of Article 136. The beneficiary does not possess full, limited, or temporary licensure, so there must exist within Article 136 an exception to the licensing requirements that would apply to the beneficiary's situation. In full part, section 6736 of Article 136 states the following:

**§ 6736. Exempt persons.**

- a. This article shall not be construed to affect or prevent the administration of physical therapy or the use of modalities by a person employed by a licensed physician or physical therapist in his office, or in the civil service of the state or any political subdivision thereof, or in a hospital or clinic, or in an infirmary maintained by a person, firm or corporation employing one or more full-time licensed physicians or physical therapists, provided that such person was so employed for a period of at least two years prior to April tenth, nineteen hundred fifty, and has been issued a written authorization by the department.
- b. This article shall not be construed to affect or prevent:
  1. a physical therapy student from engaging in clinical practice under the supervision of a licensed physical therapist as part of a program conducted in an approved school of physical therapy or in a clinical facility or health care agency affiliated with the school of physical therapy and supervision of a physical therapy student by a licensed

physical therapist shall be on-site supervision and not necessarily direct personal supervision;

2. a physical therapist graduate of an approved program from engaging in clinical practice under the on-site, but not necessarily direct personal supervision of a licensed physical therapist provided the graduate has: (a) applied and paid a fee for the licensing and examination, (b) applied and paid a fee for the temporary permit. This exemption shall not extend beyond ninety days after graduation;
3. a physical therapist licensed in another state or country from conducting a teaching clinical demonstration in connection with a program of basic clinical education, graduate education, or post-graduate education in an approved school of physical therapy or in its affiliated clinical facility or health care agency, or before a group of licensed physical therapists who are members of a professional society;
4. a physical therapist who is serving in the armed forces or the public health service of the United States or is employed by the veterans administration from practicing the profession of physical therapy, provided such practice is limited to such service or employment.

The petitioner has submitted no evidence to indicate that any of the exemptions contained at section 6736 apply here. Although section 6736(b)(2) appears to relate the most closely to this case, the record contains no evidence indication that, as of the date the petition was filed, the beneficiary had (1) applied for applied and paid a fee for the licensing and examination; and (2) applied for and paid a fee for the temporary permit

Nor does the AAO accept counsel's contention made on appeal that the beneficiary "will perform no tasks that require licensure." When it initially filed the petition, the petitioner stated that the beneficiary would, among other duties, "gain valuable experience in inpatient acute care and outpatient care"; that he would assist in "providing services that help restore function, improve mobility, relieve pain, and prevent or limit permanent physical disabilities"; that he would "help restore, maintain, and promote overall fitness and health"; and that his "patients" would include "accident victims and individuals with disabling conditions." On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The AAO finds counsel's attempt to amend the duties of the position on appeal an attempt at materially altering the duties of the position rather than merely clarifying or offering new details.

The petitioner's explanation of the duties of the proposed position at the time the petition was filed clearly involve the practice of physical therapy. As noted by section 6731 of Article 136, the practice of physical therapy in the State of New York includes "the evaluation, treatment or prevention of disability, injury, disease, or other condition of health using physical, chemical, and mechanical means including, but not limited to heat, cold, light, air, water, sound, electricity, massage, mobilization, and therapeutic exercise with or without assistive devices, and the performance and interpretation of tests and measurements to assess pathophysiological, pathomechanical, and developmental deficits of human systems to determine treatment, and assist in diagnosis and prognosis." The duties of the proposed position as set forth initially clearly encompass those duties.

The record of proceeding establishes that, in performing the duties of the proposed position, the beneficiary would be engaging in the practice of physical therapy. The beneficiary, however, does not possess a license to practice physical therapy in the State of New York. Nor has the petitioner established that he is exempt from that requirement. As the duties of the proposed position require licensure, and the beneficiary does not possess such licensure, the record does not demonstrate that the beneficiary would be able to fully perform the duties of the proposed position. Accordingly, the petition was properly denied.

The petitioner has not established that the beneficiary meets the licensure requirements as set forth at 8 C.F.R. § 214.2(h)(4)(v), and the AAO will not disturb the director's denial of the petition.

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