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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



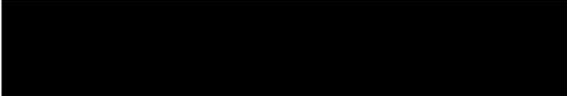
**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 08 080 51751 OFFICE: VERMONT SERVICE CENTER DATE: **JAN 08 2010**

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 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 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 avers that it is a full-care hospital that was established in 1971 and has 532 employees. It seeks permission to employ the beneficiary as a physician in obstetrics and gynecology and, 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 because the beneficiary was not qualified to perform the duties of the proffered position when the petition was filed. On appeal, counsel submits a brief and additional evidence.

When filing the petition on January 24, 2008, the petitioner indicated that it sought to hire the beneficiary due to her exceptional educational and clinical backgrounds. The petitioner stated that the beneficiary had an unrestricted license to practice medicine in the State of Delaware and “has applied for a license to the [S]tate of Kentucky on the basis of reciprocity.”

In a May 5, 2008 request for evidence (RFE), the director asked the petitioner to submit, in part, a copy of the beneficiary’s license to practice in the State of Kentucky. In response, the petitioner submitted a copy of the beneficiary’s temporary license from the Kentucky Board of Medical Licensure, valid from February 4, 2008 until August 4, 2008. Counsel stated in a cover letter attached to the RFE response that: “The permanent license will be available later in the month.”

When denying the petition on August 7, 2008, the director noted that the evidence failed to establish that the beneficiary was qualified to practice medicine in the State of Kentucky on January 24, 2008, the date that the petition was filed. The director cited to regulations at 8 C.F.R. §§ 103.2(b)(1) and (12) to support his conclusion that eligibility for a requested benefit must be established as of the filing date of the petition.

On appeal, counsel states that the director’s decision was erroneous and submits additional evidence. Counsel submits a copy of an email message from the licensure coordinator for the State of Kentucky who states that the beneficiary’s application for licensure was received on January 10, 2008 and concludes that “there was not gap in licensure.” According to counsel, the ground for denial has been overcome because the beneficiary applied for her license in the State of Kentucky before January 24, 2008, the date on which the petition was filed.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines a specialty occupation as one that requires (1) the theoretical and practical application of a body of highly specialized knowledge, and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to section 214(i)(2), 8 U.S.C. § 1184(i)(2), to be qualified to perform the duties of a specialty occupation, a beneficiary 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.

The regulations further define how to determine whether a beneficiary is qualified to perform the duties of a specialty occupation. The specific regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states the following:

- (C) Beneficiary qualifications. To qualify to perform services in a specialty occupation, the 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 evidence in the record indicates that the beneficiary was issued a temporary license to practice medicine in the State of Kentucky on February 4, 2008. According to the State of Kentucky's Board of Medical Licensure website, temporary licensure is "offered to allow physicians whom are eligible the opportunity to practice prior to receiving approval by the full Board."¹ Although the email message from the licensure coordinator at the Kentucky Board of Medical Licensure confirms that it received the beneficiary's licensure application on January 10, 2008, the mere filing of an application does not entitle a physician the ability to practice medicine in the State of Kentucky; only upon issuance of a temporary license may a physician begin to practice medicine. The statement by the licensure coordinator that there was no gap between the issuances of the beneficiary's temporary and permanent licenses does not support a finding that the beneficiary could have started to practice

¹ <http://kbml.ky.gov/physician/FAQ.htm> (accessed on December 11, 2009). A search of the beneficiary's name in this website reveals that she is currently an "inactive physician" and that her permanent medical license was issued on June 3, 2008.

medicine in the State of Kentucky when she filed her application for licensure on January 10, 2008. The licensure coordinator was only confirming that the beneficiary was licensed to practice medicine in the State of Kentucky from February 4, 2008 until the issuance of her permanent license in June 2008.

As stated on the State of Kentucky's Board of Medical Licensure website, and confirmed by the licensure coordinator, the beneficiary was not able to practice medicine until February 4, 2008, which is when her temporary license was issued and is a date after the H-1B petition was filed. As noted by the director in his decision, the regulations at 8 C.F.R. §§ 103.2(b)(1) and (12) require a petitioner to establish that a beneficiary is fully able to practice his or her profession as of an H-1B petition's filing date. Here, the petitioner has not met its burden of proof because the beneficiary was not issued her licensure in the State of Kentucky until 11 days after the H-1B petition was filed on her behalf. For this reason, the petition may not be approved.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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