

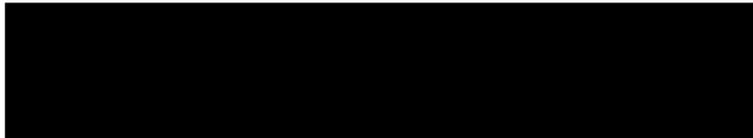
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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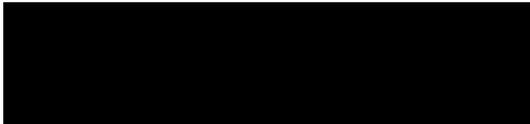
Petitioner:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 identifies itself as an “organization [that] provides placements of Physical Therapist[s] to various clinics and hospitals.” To employ the beneficiary in a position that it has designated as a physical therapist, 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).

According to the Form I-129, the related Labor Condition Application (LCA), and the petitioner’s March 30, 2008 letter in support of the petition, the beneficiary would perform his services as a physical therapist in [REDACTED] and it is undisputed that the beneficiary could not perform the proffered position without a license issued by the State of [REDACTED] for the practice of physical therapy. The director denied the petition on finding that the petitioner failed to establish that the beneficiary was so licensed. The director’s decision states the basis of the denial as follows:

Evidence submitted indicates that you wish to hire the beneficiary as a physical therapist.

The record shows that on July 22, 2008, you were requested to submit a copy of the beneficiary’s license to practice the profession of physical therapy in the state of intended employment, or other evidence, to establish that the beneficiary is immediately eligible to engage in his profession.

In response, you sent a copy of a letter from the state licensing authority stating [that] the beneficiary has educational documents and they were evaluated and approved. The letter further states that the beneficiary is eligible for the computerized format of the licensing examination. This letter is not stating [that] the beneficiary is otherwise immediately eligible to receive his license and[,] in fact[,] he is still lacking at least one examination.

The record does not include evidence that the beneficiary is a licensed physical therapist in [REDACTED] or other evidence that he is immediately eligible to practice [the] physical therapy profession in [REDACTED]

Therefore, the record does not include evidence that the beneficiary qualifies for classification under section 101(a)(15)(H)(i) of the Act.

The crux of counsel’s brief on appeal is the argument that the appeal should be sustained and the petition approved because (a) the documents submitted in response to the service center’s July 22, 2008 request for additional evidence (RFE) established that the beneficiary had substantially complied with [REDACTED] State’s licensing requirements for physical therapists, and (b) the copy of the Physical

Therapist license issued to the beneficiary by the State of [REDACTED] on October 2, 2008 established that the beneficiary obtained the requisite licensure before the director issued his decision denying this petition on February 3, 2009.

As will be discussed below, the AAO will dismiss the appeal and deny the petition because the beneficiary did not obtain the requisite licensure until after the petition was filed.

The AAO first finds that the evidence that the beneficiary obtained licensure in October 2008 is not a matter for consideration on appeal. The AAO finds that, as asserted by counsel on appeal, the documentary evidence of the beneficiary's licensure to practice as a physical therapist as of October 8, 2008 was submitted to the service center in the interim between the petitioner's response to the RFE in August 2008 and the issuance of the director's decision in February 2009. However, as this is a type of evidence that was encompassed by the RFE, but not submitted as part of the RFE response, the director was precluded from considering it prior to his decision, and the AAO is precluded from considering it now.

The regulation at 8 C.F.R. § 103.2(b)(11) provides, in part, that materials responsive to the RFE must be submitted together at one time, along with the original RFE, and they must be filed within the period afforded in the RFE. Further, the regulation at 8 C.F.R. § 103.2(b)(8)(iv) states that additional time to respond may not be granted. Thus, the petitioner is afforded only one opportunity to file materials in response to the RFE. Operation of this provision precludes the AAO from now considering the license issued to the beneficiary.

However, even if the AAO were to consider the fact of the beneficiary's licensure as of October 8, 2008, the appeal must still be dismissed, because the beneficiary did not possess the licensure at the time that the petition was filed.

Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation."

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(A) states that, 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.

U.S. Citizenship and Immigration Services (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). More specifically, the regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

*Demonstrating eligibility at time of filing.* An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

It has also been established that 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).

Further, the following language at 8 C.F.R. § 103.2(a)(1) states the rule that the USCIS instructions regarding the official form specified for filing a particular type of application or petition are incorporated into the regulations regarding that type of application or petition:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

The Form I-129 instructions themselves state, in part, that a petition must be filed with whatever the Form I-129 instructions for the relevant type of nonimmigrant petition designate as initial evidence.<sup>1</sup> Where, as here, full and unrestricted licensure is required to fully perform a proffered H-1B position, the section of the Form I-129 instructions for H-1B petitions identifies proof of licensure as initial evidence to be filed with the H-1B petition. The pertinent portion of those instructions states:

The petition . . . must be filed with:

1. Evidence that a labor condition application has been filed with the U.S. Department of Labor;
2. Evidence showing that the proposed employment qualifies as a specialty occupation;
3. Evidence showing that the alien has the required degree. . . .
4. *A copy of any required license . . . to practice in the State of intended*

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<sup>1</sup> The Form I-129 instructions may be accessed at the Internet site <http://www.uscis.gov/files/form/i-129instr.pdf>

- employment*; and
5. A copy of any written contract between you and the alien or a summary of the oral agreement under which the alien will be employed.

(Emphasis added.)

Pursuant to the aforementioned regulations at 8 C.F.R. §§ 103.2(a)(1) and 103.2(b)(1), the Form I-129 instructions' requirement that proof of licensure be filed with an H-1B petition for a position requiring licensure has the force and binding effect of regulation. This regulatory requirement compels the denial of an H-1B petition for a position requiring full and unrestricted licensure if that licensure was not obtained by the time of the petition's filing. Therefore, even if the beneficiary's licensure as of October 8, 2008 was a proper subject for consideration in this appeal, it would not affect the appeal's outcome.

Beyond the decision of the director, the AAO also finds that the petition must be denied on several additional grounds arising from the facts that the record of proceeding indicates that (1) the beneficiary would be assigned to clients who are as yet unidentified, and (2) that, as stated at paragraph 5 of the Employment Agreement between the petitioner and the beneficiary, the beneficiary would be subject to assignment, at the petitioner's sole discretion, "to any locale where [the petitioner] wishes to conduct operations." The AAO will briefly delineate the separate grounds for denial of the petition that reside in these aspects of the record.

The petitioner has failed to establish that the petition was filed on the basis of definite, non-speculative specific work that would be available for the beneficiary for the period specified in the petition. Again, the regulation at 8 C.F.R. § 103.2(b)(1) states, in part: "An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition." Likewise, the regulation at 8 C.F.R. § 103.2(b)(12) states in part the following:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Next, the petitioner failed to provide the itinerary that the regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) requires when a proffered H-1B position is to be performed at more than one location. That regulation states, in pertinent part:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the

petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The language of the regulation, with its use of the mandatory "must," indicates that an itinerary is a material and necessary document for a petition involving employment at multiple locations, and that such a petition may not be approved for any employment for which there is not submitted at least the employment dates and locations.

Finally, as an itinerary has not been provided, the petitioner has also failed to establish that the submitted Labor Condition Application encompasses all of the locations where the beneficiary would be assigned, and the petition must also be denied for this reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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