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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

b2

[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: **FEB 03 2011**

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:

[REDACTED]

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 \$630. 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,

for Michael F. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a national food and drug retailer that seeks to employ the beneficiary as a Graduate Pharmacist Intern. Accordingly, the petitioner 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 initially denied the petition on October 6, 2006 on the basis that the proffered position is not a specialty occupation. The petitioner appealed this decision to the AAO on November 7, 2006. On December 20, 2007, the AAO withdrew the director's decision. However, based upon its finding that the record of proceeding lacked evidence that the beneficiary is qualified to perform the duties in the pertinent specialty occupation, the AAO also remanded the petition to the director for the entry of a new decision after issuing an RFE affording the petitioner an opportunity to establish that the beneficiary is qualified to perform the duties of the specialty occupation. On April 7, 2008, the director issued a request to the petitioner for evidence that the beneficiary is eligible to perform the duties of the specialty occupation in California. The petitioner was given 33 days to respond, but did not submit any response to the director's request. The record therefore reflects that the director issued an RFE in compliance with the terms of the AAO's remand, but that the petitioner failed to respond.

On February 6, 2009, the director denied the petition and certified that decision to the AAO, in compliance with the AAO's instruction to certify the decision to the AAO if it would be adverse to the petitioner. The AAO notes that, although the Notice of Certification, Form I-290C, properly informed the petitioner of its right to submit a brief to the AAO within 30 days, none has been received. Accordingly, the AAO deems the record closed and bases its review on the record as presently constituted, which includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision to deny the petition on October 6, 2006; (5) the petitioner's Form I-290B with counsel's brief; (6) the AAO's decision on December 20, 2007; and (7) the director's Notification of Certification, with a copy of the director's decision denying the petition attached. The AAO reviewed the record in its entirety before issuing this decision.

Upon review of the entire record of proceeding encompassing the petition from its filing through the director's certification to the AAO of his denial of the petition after remand, the AAO has determined that the director correctly denied the petition. The evidence of record does not establish that the beneficiary satisfies the regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C) for service 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)(iii)(C), 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.

In addition, pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), 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."

Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(B), 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.

Where licensure is required in any occupation, 8 C.F.R. § 214.2(h)(4)(v)(E) specifies that 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. This regulation also provides that 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 (1) obtained a permanent license in the

state of intended employment, or (2) continues to hold a temporary license valid in the same state for the period of the requested extension.

The petitioner failed to demonstrate that the beneficiary is eligible to perform the duties of a graduate pharmacist intern as the record does not contain evidence that the beneficiary had continued to pursue his application for his intern pharmacist registration in the State of California at the time the H-1B petition was filed. Instead, the evidence shows that the beneficiary's application for intern pharmacist registration in California had been abandoned prior to the H-1B petition being filed. Consequently, the petitioner failed to demonstrate that the beneficiary is eligible to perform the services of the specialty occupation in the State of California, for the requested period of time.

As discussed above, the director correctly denied the petition because the evidence of record establishes that, prior to the H-1B petition being filed, the beneficiary abandoned the registration application that California requires as a prerequisite for the position in which the petitioner seeks to employ him.

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.

ORDER: The director's February 9, 2009 decision is affirmed. The petition is denied.