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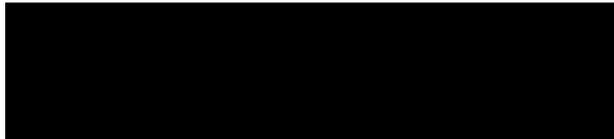
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: NOV 02 2011 Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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:

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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, 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 remain denied.

The petitioner is a therapy service provider with 150 employees and a gross annual income of over \$5 million. It seeks to employ the beneficiary as a speech and language pathologist 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, determining that the petitioner had not established that the beneficiary is a licensed speech language pathologist in New York State or other evidence establishing that the beneficiary was eligible to practice his profession in New York State.

The record of proceeding before the AAO contains: (1) the Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether petitioner has established that the beneficiary is eligible and thus qualified to perform the duties of the proffered position. 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 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)(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.
- (D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.
- (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.

Based upon the Labor Condition Application and the petitioner's letter in support, the petitioner intends to employ the beneficiary in the State of New York. In an RFE issued to the petitioner on June 19, 2009, the director requested that the petitioner provide evidence that the beneficiary was admissible under section 212(a)(5)(C) of the Act relating to individuals entering the United States to practice in a health care occupation and evidence that the beneficiary had submitted his application for licensure to practice in the State of New York pursuant to the State of New York's requirements. In response to the director's RFE, the petitioner submitted evidence that the beneficiary had been issued a Commission on Graduates of Foreign Nursing Schools (CGFNS) certification pursuant to section 212(a)(5)(C) of the Act. The petitioner did not provide the requested evidence regarding the beneficiary's eligibility to practice or temporarily practice his intended position while obtaining the required experience in the State of New York.

On appeal, counsel for the petitioner submits information indicating that the beneficiary will work under a licensed New York State Supervisor and evidence of the licensed supervisor's license. Counsel also submits the State of New York's licensing requirements including Article 159, Speech-Language Pathology and Audiology - section 8207 which states:

8207. Exempt persons. This article shall not be construed as prohibiting:

- (1) The practice of any other professions licensed or registered under this title.
- (2) Any person employed by the federal, state or a local government or by a public or non- public elementary or secondary school or an institution of higher learning from performing the duties of a speech-language pathologist, an audiologist, a teacher of the speech and hearing handicapped, or a teacher of the deaf in the course of such employment.
- (3) Any person from engaging in clinical or academic practice under the supervision of a licensed speech-language pathologist or audiologist for such period of time as may be necessary to complete an experience requirement for a professional license, as provided in this article and in rules or regulations approved by the board of regents with the advice of the state board for speech-language pathology and audiology.

* * *

- (6) A student from engaging in clinical practice, under the supervision of a licensed audiologist or a licensed speech-language pathologist as part of a nationally accredited program or a state licensure qualifying program in speech-language pathology or audiology, pursuant to subdivision three of section eighty-two hundred six of this article.

The New York State Education Department Office of the Professions website at www.op.nysed.gov lists the required forms to apply to begin the licensure process. Based on New York State law, regulations, and forms, the AAO observes that the beneficiary would be exempt from obtaining a license, if as the petitioner states, the beneficiary would be practicing under the supervision of a licensed speech-language pathologist to complete the practical experience portion of the requirements to obtain a professional license. However, the petitioner must still provide evidence that the alien who is accorded H-1B classification is able to engage in the profession immediately upon entering the United States. 8 C.F.R. § 214.2(h)(4)(v)(A). The AAO finds that compliance with New York State's application and registration process to begin the experience portion of the speech pathology license would be similar to obtaining a temporary license to practice this profession. In order for the beneficiary to be found eligible for the H-1B classification, the petitioner must submit evidence establishing that the alien has been found qualified by the State of New York to perform the experience portion of the speech pathology license immediately upon entry into the United States. The record, however, does not contain evidence that the beneficiary has begun the registration process. The record does not include evidence that the New York State Educational Department Division or other agency has approved the beneficiary's education and that the beneficiary is qualified to begin the required supervised experience. Similarly, the record does not include evidence that the appropriate agencies in New York have approved the beneficiary's proposed supervisor or the setting for the beneficiary's experience. Accordingly, the record in this matter does not contain sufficient evidence to establish that the State of New York finds the beneficiary qualified to perform the duties of an individual in a speech-language pathology position, a position that is a necessary precursor to obtaining a full license in the State of New York. Thus, the beneficiary is not qualified to perform the duties of a speech and language pathologist.

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Page 5

For the reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to immediately work under the laws of the State of New York as a speech-language pathologist. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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