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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: **JAN 03 2012** Office: VERMONT SERVICE CENTER FILE:

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:**

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 operates a health clinic with eight employees and a gross annual income of \$800,000. It seeks to employ the beneficiary as a physical therapist 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) in the State of Florida. The director denied the petition, determining that the petitioner had not established that the beneficiary is a licensed physical therapist in Florida or other evidence establishing that the beneficiary was eligible to practice her profession in the State of Florida.

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 of the petition, the petitioner intends to employ the beneficiary in the State of Florida. On the Form I-129, the petitioner requested that the petition be approved for the dates of intended employment from October 1, 2009 until April 1, 2012. The LCA was certified on March 23, 2009 and covered the same time period.

In an RFE issued to the petitioner on June 24, 2009, the director requested that the petitioner provide evidence that the beneficiary was licensed to practice the occupation of physical therapy in the State of Florida.

In response, the petitioner through counsel noted that the beneficiary had passed the United States National Physical Therapy Examination (NPTE) and had been awarded a full license in the United States by the State of New York. The record included: a copy of the beneficiary's registration and license as a physical therapist in the State of New York issued December 29, 2009; and a registration certificate issued by the University of the State of New York Education Department registering the beneficiary to practice in New York through May 31, 2011. Counsel also indicated that the beneficiary could not obtain a Florida physical therapy license until she was admitted into the United States in H-1B status. Counsel asserted that the beneficiary was unable to obtain a Florida license

because she did not have a social security number, valid immigration documents, and because she was not physically in the United States.

The director denied the petition on September 14, 2009.

On appeal, counsel for the petitioner acknowledges that the State of Florida requires the beneficiary to take the Florida laws and rules exam prior to being able to practice in the State of Florida.<sup>1</sup> Counsel asserts that the exam may be taken only after the beneficiary is admitted into the United States.

Title XXXII Chapter 456 of the Florida State Statutes provides in pertinent part:

#### HEALTH PROFESSIONS AND OCCUPATIONS: GENERAL PROVISIONS

(1)(a) Any person desiring to be licensed in a profession within the jurisdiction of the department shall apply to the department in writing to take the licensure examination. The application shall be made on a form prepared and furnished by the department. The application form must be available on the World Wide Web and the department may accept electronically submitted applications beginning July 1, 2001. The application shall require the social security number of the applicant, except as provided in paragraph (b). The form shall be supplemented as needed to reflect any material change in any circumstance or condition stated in the application which takes place between the initial filing of the application and the final grant or denial of the license and which might affect the decision of the department. If an application is submitted electronically, the department may require supplemental materials, including an original signature of the applicant and verification of credentials, to be submitted in a nonelectronic format. An incomplete application shall expire 1 year after initial filing. In order to further the economic development goals of the state, and notwithstanding any law to the contrary, the department may enter into an agreement with the county tax collector for the purpose of appointing the county tax collector as the department's agent to accept applications for licenses and applications for renewals of licenses. The agreement must specify the time within which the tax collector must forward any applications and accompanying application fees to the department.

(b) If an applicant has not been issued a social security number by the Federal Government at the time of application because the applicant is not a citizen or resident of this country, the department may process the application using a unique personal identification number. If such an applicant is otherwise eligible for

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<sup>1</sup> Florida does not have reciprocity with other states; thus, a licensee in one state may not transfer her license to the State of Florida.

licensure, the board, or the department when there is no board, may issue a temporary license to the applicant, which shall expire 30 days after issuance unless a social security number is obtained and submitted in writing to the department. Upon receipt of the applicant's social security number, the department shall issue a new license, which shall expire at the end of the current biennium.

The record of proceeding in this matter does not reflect that the beneficiary has begun the application process to obtain a license to perform the occupation of physical therapy in the State of Florida. Upon review, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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'r 1978). As the beneficiary in this matter did not have a valid license to practice physical therapy when the petition was filed on April 7, 2009 and the record does not include probative evidence that the beneficiary had begun the application process pursuant to Florida law when the petition was filed, the petition may not be approved. The petitioner failed to establish that the beneficiary was qualified to immediately work under the laws of the State of Florida as a physical therapist when the petition was filed. The record also does not include evidence that the beneficiary had started the application process by obtaining a unique personal identification number according to Florida law. The petitioner has not established that the beneficiary has complied with the State of Florida's laws and regulations; thus, she is not eligible to perform the duties of the occupation in the State of Florida.

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.