

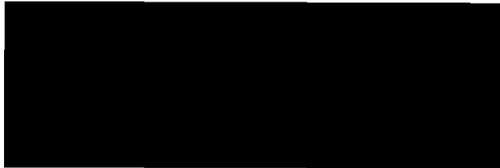
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Date: **MAR 06 2012**

Office: CALIFORNIA SERVICE CENTER

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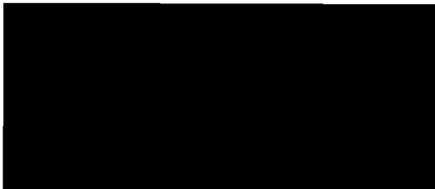
IN RE:

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:

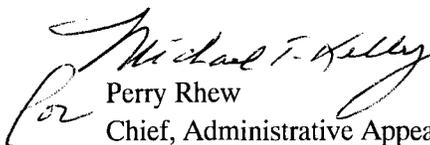


INSTRUCTIONS:

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 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.

On the visa petition the petitioner stated that it is a rehabilitation services provider. To employ the beneficiary in a position it designates as a Clinical Fellow – Speech Language Pathologist position, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that the beneficiary is qualified for the proffered position in that it had not established that the beneficiary has the appropriate licensure or is exempt from licensure. The director also found that the petitioner had failed to demonstrate that it would abide by the terms and conditions of H-1B employment. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

One basis of the decision of denial, as was noted above, was the director's finding that the petitioner had failed to demonstrate that it would abide by the terms and conditions of H-1B employment. The evidence cited in support of that finding included a discrepancy between statements made by counsel and an officer of the petitioner that the petitioner was experiencing rapid growth and indications in the evidence that the petitioner has declined in size; and the director's observation that the company that claims to be the petitioner's landlord shares an address with the petitioner. The AAO finds that evidence to be only of very limited relevance to the issue of whether the petitioner would abide by the terms and conditions of H-1B employment. The AAO therefore withdraws, as a basis for the decision of denial, the finding that the petitioner has not demonstrated that it would abide by the terms and conditions of H-1B employment.

The AAO will, however, address the discrepancies pertinent to the petitioner's alleged rapid growth. In a letter dated April 6, 2009 and submitted with the visa petition the petitioner's officer characterized the petitioner as a "fast growing [c]ompany." On the visa petition, submitted April 7, 2009, the petitioner stated that it has "10+" employees. Subsequently, on its application for a business license for its new location, which the petitioner's director signed on July 6, 2009, however, the petitioner stated that it has three employees. In a letter dated July 31, 2009 and submitted in response to an RFE in this matter, to explain a change in address, counsel stated, "Due to the rapid growth of the company, the Petitioner found it necessary to obtain a larger facility"

In the decision of denial, the director noted the apparent discrepancy. The director also noted, citing *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) that doubt cast on any aspect of the petitioner's

proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition; that the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence; and that absent competent objective evidence pointing to where the truth, in fact, lies, attempts to explain or reconcile inconsistencies, would not suffice.

In the appeal brief, counsel stated that the apparent discrepancy is easily reconciled, and explained that the petitioner's director stated that the petitioner has three employees because it has three officers. Counsel did not explain, however, why the petitioner did not include its employees within the number of employees it stated on its business license application.

Even if counsel's unsupported assertion were deemed a feasible explanation, it would certainly not constitute the competent objective evidence required by *Matter of Ho, supra*. The discrepancy noted by the director has not been adequately resolved and, in accordance with *Matter of Ho*, the aforementioned discrepancy undermines the petitioner overall credibility.

The director also commented upon another apparent conflict in the record. In response to the June 27, 2009 RFE, counsel submitted what purports to be a lease for the petitioner's new premises on

The landlord identified in that lease is [REDACTED]. A letter in the record from [REDACTED] dated July 15, 2009, states, [REDACTED] as a separate entity and landlord, is authorized to lease this suite to [the petitioner]," and identifies [REDACTED] address as [REDACTED] in Fishers, Indiana.

The record contains a copy of the beneficiary's employment contract, which is on the petitioner's letterhead. That letterhead gives addresses for the petitioner's head office, its branch office, and its corporate office. The address given for the petitioner's branch office is [REDACTED] in Fishers, Indiana.

In the decision of denial, the petitioner observed that the petitioner and its landlord sharing the same address suggests that they may not be separate entities, and cited *Matter of Ho, supra*, for the proposition that this discrepancy casts additional doubt on all of the petitioner's evidence and all of its assertions in support of the visa petition.

On appeal, rather than explain the relationship, if any, between Saianvi Investments and the petitioner, counsel stated, "The fact that the companies share a common address does mean that Saianvi and the petitioner are the same entity." [sic] The AAO suspects that counsel meant to state that proposition in the negative. In any event, though, even if counsel had provided a feasible explanation of the two entities having the same address, that would not qualify as the competent objective evidence necessary to satisfy the requirement of *Matter of Ho*, and would not be sufficient to reconcile the apparent conflict noted by the director.

Again, pursuant to *Matter of Ho, supra*, doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the

visa petition, that the petitioner is obliged to resolve any inconsistencies in the record by independent objective evidence. Absent competent objective evidence pointing to where the truth, in fact, lies, attempts to explain or reconcile inconsistencies, would not suffice. Counsel has provided no such independent objective evidence to reconcile the discrepancy pertinent to the apparently decreasing number of workers the petitioner employs and its claim that it is rapidly growing; or to explain the significance, or lack of significance, of the petitioner sharing an address with its putative landlord.

The AAO will now address the director's finding that the petitioner has not demonstrated that the beneficiary has the appropriate licensure for the proffered position, or is exempt from licensure.

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.

The California Speech-Language, Pathology, and Audiology Board Practice Act states at Article 3, Section 2532:

Requirement of license

No person shall engage in the practice of speech–language pathology or audiology or represent himself or herself as a speech–language pathologist or audiologist unless he or she is licensed in accordance with this chapter.

Therefore, unless the petitioner demonstrates that the beneficiary is licensed under that act, or is exempt from licensure, or that the requirement for licensure does not extend to the beneficiary, the visa petition may not be approved.

With the petition, counsel submitted no evidence that the beneficiary is licensed to practice in the proffered position in California, or is exempt from licensure, or that the licensure requirement does not apply to the beneficiary. Further, the beneficiary's résumé does not indicate that she is licensed in California. Counsel did provide a letter, dated April 6, 2009, from an officer of the petitioner. That letter states:

To become a Speech Language Pathologist in California, a candidate must hold a Master's degree in Speech Language Pathology or Audiology or its equivalent, and

subsequently complete a supervised clinical experience period. In California, the experience period is referred to as the Speech-Language Pathology Clinical Fellowship (SLPCF) experience. The SLPCF is under the mentorship of an individual holding ASHA certification. This experience must consist of the equivalent of 36 weeks (9 months) of full-time clinical practice. Time spent not gaining actual experience, such as during holidays or school breaks, is excluded from the nine months calculation.

In an RFE issued on June 27, 2009, the service center requested the following:

Submit a copy of the beneficiary's permanent California Speech Language Pathologist license. If the beneficiary is not in possession of a permanent unrestricted license, submit a temporary license, interim permit or other authorization issued by the agency that authorizes the beneficiary to practice the profession. If the petitioner contends that the beneficiary is exempt from the usual licensing requirements, provide a letter from the appropriate State Licensing agency attesting to the beneficiary's exemption.

If the state where the beneficiary will work allows an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation, provide evidence of such and a copy of the senior or supervisor's license to practice as a member of the profession.

In a response dated July 31, 2009 counsel stated:

As per the California Speech Language and Audiology Board, a social security number must be submitted before a temporary license is issued. Social security number is obtained upon entering the United States on a nonimmigrant visa. Enclosed please find . . . a copy of the electronic mail from the Board confirming the same.

However, as per your request, please find . . . a copy of [REDACTED] Speech Language Pathology license. [REDACTED] will be supervising the Beneficiary for the duration of her stay in the United States as a Clinical Fellow – Speech Language Pathologist.

The E-mail message from the California Board to which counsel referred is dated July 2, 2009, and states:

In order [for the Board] to issue any type of license the applicant must have a social security number. They may apply for a license, but it will not be issued until they provide a copy of their social security card.

That E-mail does not demonstrate that the beneficiary has a license to practice in the proffered position, or that she is exempt from licensure, or that licensure is not required for the proffered position. Further, it does not show that the beneficiary has applied for licensure, although the California Board indicated that the lack of a social security card is not a bar to applying. Further still, the petitioner did not demonstrate that a license is available to the beneficiary upon entering the United States and obtaining a social security number.

Counsel did provide a copy of the California Speech Language Pathologist license of [REDACTED]. That evidence also does not demonstrate that California allows an individual to fully practice the occupation of Speech Language Pathologist under the supervision of a licensed senior or supervisory speech language pathologist.

In the decision of denial, the director noted that the evidence does not demonstrate that the beneficiary is permitted to practice in California as a Clinical Fellow – Speech Language Pathologist, or that the beneficiary has applied for such a license. She further observed that the record contains no evidence that [REDACTED] is qualified pursuant to California to act as the beneficiary's mentor or that the petitioner has hired [REDACTED] to serve in that capacity.¹ The director found that the petitioner had not demonstrated that beneficiary is qualified to practice in the proffered position, and denied the visa petition.

On appeal, counsel provided no evidence that the beneficiary has applied for licensure. Counsel asserted that a temporary license would have been issued to the beneficiary but for her lack of a social security number, but provided no new evidence in support of that assertion. Counsel cited the July 2, 2009 E-mail from the California Board as "clearly stating that the only obstacle to [licensure] is the lack of a social security card." That cited E-mail, however, contains no such statement.

A November 20, 2001 memorandum from [REDACTED] then the INS Acting Assistant Commissioner, Office of Adjudications, discussing social securing cards and the adjudication of H-1B petitions for public high school teachers is relevant here. It states that:

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. . . .

In the instant case, the record contains an E-mail indicating that the lack of a social security card is a bar to obtaining licensure in any regulated profession in California. That is true, not only as to the

¹ In this regard, the AAO notes that, per the documentation submitted into the record, [REDACTED] would have to jointly apply, with the beneficiary, and, again, there is no evidence of the filing of any application.

beneficiary, but universally. It does not indicate that the only bar to the beneficiary receiving a license to practice in California as a Speech Language Pathologist is her lack of a social security card.

The evidence provided fails to establish that the beneficiary is qualified to practice in the proffered position. For this reason, the appeal will be dismissed and the visa petition denied.

The other basis of the director's decision of denial was her finding that the petitioner has not demonstrated that it would abide by the terms and conditions of H-1B employment. That finding was based on the following facts.

The LCA submitted to support the visa petition indicates that the beneficiary would work in Anaheim, California. It is certified for employment in Anaheim. Subsequently, the petitioner provided evidence that it had moved to leased premises [REDACTED]. As both [REDACTED] are within the Los Angeles, Long Beach, Santa Ana Metropolitan Statistical Area, the move from [REDACTED] does not prevent the petitioner from using the same LCA to support the visa petition.

The record contains a document entitled, "Itinerary of Definite Employment for [the Beneficiary]," that was submitted in response to the June 27, 2009 RFE. That itinerary states that the petitioner would employ the beneficiary during the entire one-year period of requested employment, from October 1, 2009 to October 1, 2010, at Diamond Bar, California.

However, the beneficiary's employment contract, signed by both the petitioner's president and the beneficiary, and describing the terms of the beneficiary's proposed employment, that was submitted in response to the same RFE, states: "You shall use your best energies and abilities on a full[-]time basis to perform, *at locations designated by the [petitioner]* [Emphasis provided.], the employment duties assigned to you from time to time." That sentence in the contract, proposed by the petitioner and consented to by the beneficiary, strongly suggests that the location to which the petitioner would assign the beneficiary is subject to change.

The visa petition states that the beneficiary would work in Anaheim, California and the LCA is approved employment in Anaheim. It is valid for employment only in Anaheim and its commuting area. 20 C.F.R. §655.715. The AAO cautions that assignment of the beneficiary to some other area, not within Anaheim's location commuting area, would necessitate a new visa petition supported by a new LCA and a new itinerary.

Further, the employment agreement also suggests that the petitioner may change the beneficiary's duties. The AAO notes that, had the petition been approved based on a description of duties found to demonstrate that the proffered position qualified as a specialty occupation position, then, changing those job duties would also necessitate filing a new visa petition.

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



Page 8

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. The appeal will be dismissed and the petition denied.

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