



U.S. Citizenship  
and Immigration  
Services

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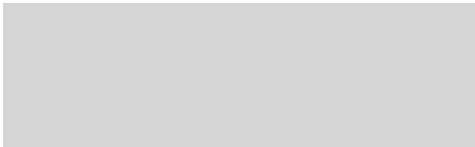
DATE: **JUN 02 2015**

PETITION RECEIPT #: [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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

## I. INTRODUCTION

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "therapeutic interventions in Applied Behavior Analysis" firm. To employ the beneficiary in a position it designates as a "Supervisor of Applied Behavior Analysis Services" position, the petitioner seeks 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 evidence of record did not establish that the beneficiary is qualified for the proffered position. On appeal, the petitioner asserted that the Director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, the petitioner submitted a brief and additional evidence.

We base our decision upon our 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 the petitioner's submissions on appeal. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

## II. PROCEDURAL AND FACTUAL BACKGROUND

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a "Supervisor of Applied Behavior Analysis (ABA)" position and that it corresponds to SOC code and title 29-1122, Occupational Therapists, from the Occupational Information Network (O\*NET). It states that the beneficiary would work in [REDACTED] New York.

With the visa petition, the petitioner submitted evidence that the beneficiary received a master's degree in applied behavior analysis from [REDACTED].

On May 14, 2013, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the beneficiary is qualified to work in the proffered position. Specifically, the RFE states:

The proffered position appears to be based on an occupation that may require a license for an individual to fully perform the duties of the occupation. Submit the

<sup>1</sup> We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

license or evidence from the appropriate licensing authority that the beneficiary may perform the duties of the position with no license.

In response, the petitioner submitted various sections of New York law and a letter, dated July 29, 2013, from the petitioner's president. The petitioner's president asserted that the proffered position did not require licensure.

The Director denied the petition on September 9, 2013, finding, as was noted above, that the petitioner had not demonstrated that the beneficiary is qualified to work in the proffered position. In that decision, the Director assumed that the proffered position is an occupational therapist position, the occupational category asserted on the LCA by the petitioner. The Director concluded that the record did not contain evidence that the beneficiary is a licensed occupational therapist in the State of New York.

On appeal, the petitioner submitted a letter, dated September 18, 2013, in which it asserted, *inter alia*, that the "petitioner never claimed that the proffered position is that of an Occupational Therapist" and the "position of [an applied behavior analyst] does not currently require a license."

Subsequently, the State of New York enacted New York Education Law Article 167, Applied Behavior Analysis, including Section 8803, which states, *inter alia*: "Only a person licensed, certified or exempt under this article shall practice applied behavior analysis [in New York]." That law took effect on July 1, 2014.

On August 28, 2014, we issued an RFE, noting the change in New York law, and requesting that the petitioner provide a copy of the beneficiary's license or certification to practice applied behavior analysis in the state of New York or evidence from the licensing authority that the beneficiary may perform the duties of the proffered position without a license. In a response dated September 24, 2014, the petitioner conceded that the proffered position now requires licensure or certification as an applied behavior analyst and asserted that the beneficiary would take the licensure examination shortly.

On October 16, 2014, we issued a second RFE, acknowledging the petitioner's letter of September 24, 2014, and accorded the petitioner 84 days (plus 3 days for service by mail) to provide a copy of the beneficiary's license or certification to practice applied behavior analysis. In a response dated January 6, 2015, the petitioner stated that the beneficiary had taken the examination for licensure but that the results were pending. The petitioner provided what appeared to be a notice from the Behavior Analyst Certification Board (BACB) confirming that the beneficiary had taken that examination in November 2014.

In our third RFE dated January 22, 2015, we observed that the BACB's website indicated that the results of BACB examinations taken in November of 2014 were released no later than January 15, 2015. We again accorded the petitioner 30 days (plus 3 days for service by mail) to provide a copy of the beneficiary's license.

In a response dated February 27, 2015, the petitioner stated that the "license is still pending and the beneficiary is doing everything she can to have that secured." The petitioner observed that Volume 9 of the Foreign Affairs Manual 41.53 N4.6, indicates that a petitioner is obliged to show, *inter alia*, that the beneficiary was eligible to work in the proffered position as of the date it filed the LCA. The petitioner noted that, when the LCA was filed, New York law did not require licensure for the proffered position, and asserted that the beneficiary was then qualified for the proffered position.

The petitioner stated that the beneficiary would be supervised by [REDACTED] until she received her license. The petitioner requested that the visa petition be granted for one year, during which time the beneficiary might receive her license, asserting that the same policy is practiced with regard to other positions requiring licensure.

In our fourth RFE dated April 3, 2015, we requested clarification of the assertion that the beneficiary's license is pending. We again requested that the petitioner either provide a copy of the beneficiary's license or evidence that the beneficiary had passed the licensure test. We explained in that RFE that "we cannot by law approve the petition for the entire period requested now that a license is required, absent evidence that the beneficiary possesses this license." We accorded the petitioner another 33 days to provide a copy of the license or the results of the November 2014 examination.

In a response dated May 4, 2015, the petitioner stated that the beneficiary had not passed the licensure examination and is not licensed. The petitioner asserted that the visa petition should be approved for one year to permit the beneficiary to retake the licensure test and to obtain the requisite license.

### III. LICENSURE TO PRACTICE IN THE OCCUPATION

#### A. Legal Framework

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.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (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 [a] 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 [b] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

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

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) addresses situations where the beneficiary has been issued temporary licensure. It states:

*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.

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

*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.

#### B. Discussion

In the instant case, the petitioner concedes that the proffered position currently requires licensure in New York, the state of intended employment. The petitioner also concedes that the beneficiary does not have the requisite license. The petitioner asserts, however, that the visa petition should be granted for one year to permit the beneficiary an opportunity to obtain the requisite license.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), 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 credential prior to approval of the petition. There are, however, regulatory exceptions for situations where a jurisdiction allows for temporary but full performance of duties pending the award of a full license. As the petitioner has not indicated, or provided any evidence, to suggest that a temporary license is available to the beneficiary, this provision is not relevant to the appeal.

We acknowledge the U.S. Citizenship and Immigration Services (USCIS) policy of provisionally approving H-1B petitions for a one-year period where the only impediment to required licensure is the overseas alien beneficiary's lack of a social security number, *see* Memorandum from Thomas E. Cook, Acting Assistant Commissioner, INS Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions*, HQ 70/6.2.8 (November 20, 2001) (hereinafter referred to as the Cook Memo). The Cook Memo's continuing applicability is acknowledged in the Memorandum from Donald Neufeld, Deputy Associate Director, Domestic Operations, *Adjudicator's Field Manual Update: Accepting and Adjudicating H-1B Petitions When a Required License Is Not Available Due to State Licensing Requirements Mandating Possession of a Valid Immigration Document as Evidence of Employment Authorization*, HQISD 70/6.2.8 (March 21, 2008) (hereinafter referred to as the Neufeld Memo). The Neufeld Memo amends the *Adjudicator's Field Manual (AFM)* to instruct adjudicators to approve an H-1B petition for a one-year validity period if the object of the petition is a specialty occupation that requires licensure and the beneficiary has met all of the licensing jurisdiction licensure requirements except USCIS approval of the H-1B petition.

In this matter, however, the record of proceeding does not establish that a lack of a social security number or a valid immigration document is the only impediment to the beneficiary attaining the licensure required to practice as an applied behavior analyst in the State of New York. Therefore, the beneficiary does not qualify for a one-year provisional approval as described in the Cook Memo and the Neufeld Memo.

Further, we will briefly address the petitioner's assertion that the petitioner is able to practice under the supervision of the petitioner's president. The petitioner asserted that this course is permitted

pursuant to 8 C.F.R. § 214.2(h)(4)(v)(C).<sup>2</sup> The regulation at 8 C.F.R. § 214.2(h)(4)(v)(C) only applies, however, in situations where stated law permits an individual supervised by licensed senior personnel to fully practice in the position. The petitioner provided no evidence that New York law permits the beneficiary to fully practice applied behavior analysis under such circumstances and, further, provided no evidence that Mr. [REDACTED] under whose supervision the beneficiary would practice, is a licensed applied behavior analyst.

Thus, upon review of the record of proceeding, we find that the petitioner (1) has not demonstrated that the beneficiary is licensed to perform the duties of the job offered or is exempt from the requirement; or (2) submitted sufficient evidence to demonstrate that a license is not required for the petitioner's proffered position. Absent the requisite licensure or certification, the visa petition may not be approved. The appeal will be dismissed and the visa petition will be denied for this reason.

#### IV. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

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<sup>2</sup> We also note that the petitioner also implied that although the petitioner was obliged to show eligibility when the LCA was filed, it is not obliged to show eligibility now. While the petitioner is correct that it is obliged to show that the beneficiary is eligible to work in the proffered position as of the date it filed the LCA, the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), set out above, makes explicit that, if licensure is required, the beneficiary must have the requisite licensure *before* the visa petition may be approved.