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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN 01 210 54249 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

JAN 13 2003

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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The extension of the nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a community-based hospital in southeastern Washington State. The petitioner has 267 employees and a gross annual income of \$21,974,131. It seeks to extend its employment of the beneficiary for the position of Pharmacist Intern for a period of July 1, 2001 to April 1, 2002. The director determined that the petitioner had not established that the beneficiary had obtained the necessary license to work in the State of Washington.

On appeal, the petitioner asserts that the beneficiary presently has an active intern license from the State of Washington. The petitioner also requests an extension until March 31, 2002 to coincide with the Labor Condition Application (LCA) previously submitted with the original request to extend the beneficiary's H-1B status.

The issue in this proceeding is whether the petitioner has established that the beneficiary has the necessary license to perform work as a Pharmacist Intern.

With regard to licensure for H classification, 8 C.F.R. 214.2 (h)(4)(v), states the following:

(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.

In the initial filing for the H-1B extension submitted on June 29, 2001, the petitioner indicated the beneficiary had a bachelor's degree in Pharmacy and would work as a Pharmacist Intern. Her duties were described as "assist hospital pharmacist with dispensal, formulating, mixing drugs, patient education, preparing intravenous solutions and stock maintenance." Her occupation and prior work experience were described as "bachelor in pharmacy. Experience in formulations and dispensing by virtue of working in a hospital as a hospital pharmacist." The petitioner stated the initial H-1B petition was approved on May 23, 2001, and the beneficiary joined the petitioner on June 19, 2001. The petitioner submitted a certified Labor Condition Application (LCA) that was valid from July 1, 2001 to April 1, 2002. The petitioner further stated that the beneficiary would apply to the State of Washington to become a licensed pharmacist prior to the completion of her nine months of training.

On August 21, 2001, the director requested more information with regard to the petition. In particular, the director requested that the petitioner submit evidence to establish that the beneficiary holds an unrestricted state license, registration or certification which authorizes her to fully practice as a pharmacist intern and be immediately engaged in that occupation in the State of Washington, or evidence from the state that a license was not required.

In response, on November 8, 2001, the petitioner submitted documents with regard to the status of the beneficiary's application for registration as a pharmacy intern. A letter from the Department of Health of the Washington State Board of Pharmacy dated September 9, 2001 stated that the board could not process the application for the Pharmacy Intern registration because no copy of the Foreign Pharmacy Graduate Examination Committee (FPGEC) score or copy of the FPGEC certificate were enclosed in the application. A letter from the National Association of Boards of Pharmacy in Illinois dated September 28, 2001 verified that the beneficiary was qualified to take the Foreign Pharmacy Graduate Equivalency Exam (FPGEE) and the test was scheduled for November 11, 2001. The letter further explained that the beneficiary had to pass the FPGEE with a scaled score of 75 or higher, and pass both the test of English as a Foreign Language (TOEFL) with a total score of 550 or higher on the paper based TOEFL, or 213 or higher on the computer-based TOEFL. The Test of Spoken English (TSE) had to be passed with a total score of 50 or higher, within two years of passing the FPGEE.

Another document indicated that the beneficiary passed the computer-generated Test of English as a Foreign Language (TOEFL) on September 9, 2001 with a score of 220. The petitioner submitted no other documentation or evidence that the State of Washington permitted pharmacy interns to work without the required certification. The petitioner further stated that it is located in an area of the State of Washington that has been designated by the Department of Health as a medically underserved area with a significant medically indigent population.

On December 27, 2001, the director denied the petition stating that the petitioner had submitted evidence from the Washington State Board of Pharmacy indicating that the beneficiary was working on obtaining a license; however, she had not yet received the license. Without evidence that the beneficiary had the appropriate licensure, the petition could not be approved.

On appeal, counsel submits a document from the State of Washington Health Professions Quality Assurance Division that certifies that the beneficiary is authorized to perform the work of "Intern." The certificate was issued on January 14, 2002 and expired March 31, 2002. Based on this evidence, the petitioner asked that the beneficiary's H-1B extension be approved.

Upon review of the record, the petitioner has not established that at the time of filing the instant petition, the beneficiary possessed the necessary license or permit to perform the duties of pharmacist intern. The petitioner is aware of this fact as evidenced by its comments in response to the director's request for further information. The petitioner stated: "[w]e understand the need for proof of state registration as a part of the requirement to approve the H1B application and we are confident that [the beneficiary] will obtain the registration before she will work with us as Pharmacist Intern." It is also clear from the record that at the time of filing the appeal, the beneficiary did possess a State of Washington Health Profession Quality Assurance Division certificate to perform the work of an intern. Nevertheless the statutory requirement is that the beneficiary be eligible for the visa classification sought at the time of filing the visa petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Michelin Tire Corporation, 17 I&N Dec. 248 (Comm. 1978). 8 C.F.R. 103.2 (a) (12).

Alternatively, 8 C.F.R. 214.2 (h) (4) (v) outlines circumstances in which a beneficiary may work with a temporary license or without a license when the state permits such work under supervision. The petitioner did not establish that these circumstances existed with regard to the instant petition. While the petitioner indicated that the beneficiary would be working under the supervision of a fully licensed pharmacist, it is not clear from the record whether the State of Washington would permit the

beneficiary to work with a temporary license or without a license but under supervision. Without more compelling evidence, the petitioner has not established that the beneficiary is qualified to perform the work of pharmacist intern.

Beyond the decision of the director, the petitioner does not appear to have established that the proffered position of pharmacist intern would qualify as a specialty occupation. The record indicates that the beneficiary possesses a pharmacy degree from India, although no documentation was submitted to establish this fact in the instant petition.¹ Nevertheless, the petitioner has not established for the record the professional qualifications for the proffered position, or the connection between the proffered position and a pharmacist position. To date, the petitioner has not established that the proffered position of pharmacy intern would be a specialty occupation. Since the appeal will be dismissed on other grounds, this issue need not be examined further.

The petitioner has failed to establish that the beneficiary possessed the required license in order to perform the proffered position at the time of filing of the instant petition. Accordingly, it is concluded that the petitioner has not demonstrated that the beneficiary is qualified to perform the specialty occupation.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹ Since the instant petition is for an extension of the original H1B petition, the petitioner may have presented this documentation in the original petition.