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U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 210 50135 Office: VERMONT SERVICE CENTER Date: FEB 05 2007

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:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed. The approval of the petition will be revoked.

The petitioner is a recruitment agency that places employees in health care positions. It seeks to employ the beneficiary as a physical therapist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 record of proceeding before the AAO contains: (1) the July 9, 2003 Form I-129 with supporting documentation; (2) the director's October 15, 2003 request for further evidence (RFE); (3) counsel's October 20, 2003 response to the director's RFE; (4) the director's June 25, 2004 notice of intent to revoke approval of the petition (NOIR) wherein the director requested evidence of a contract or work orders between the petitioner and the facility where the beneficiary would work; (5) the petitioner's July 22, 2004 response to the director's NOIR; (6) the director's August 12, 2005 denial letter; and (7) the Form I-290B, Notice of Appeal. Although the Form I-290B indicates that a brief and/or additional evidence would be submitted to the AAO within 30 days, careful review of the record reveals no subsequent submission of a brief or evidence; all of the petitioner's documentation in the record predates the issuance of the notice of decision.

The record contains: a June 18, 2003 letter from the Bureau of Comparative Education indicating that the beneficiary's education had been approved and that she could apply for a physical therapy license; a September 24, 2003 letter advising that the beneficiary had met the requirements for the issuance of a limited permit to practice physical therapy in New York State; an employment agreement between the beneficiary and the petitioner dated July 6, 2003; and a June 14, 2004 staffing agreement that indicated the beneficiary would begin work for a third party clinic in Brooklyn, New York on June 14, 2004 for the term of one year.

On August 12, 2005, the director revoked approval of the petition determining, in part, that the petitioner had provided a staffing agreement with a third party that had been signed after the petitioner had filed the petition on behalf of the beneficiary. The director concluded that the petitioner did not have an opening for the beneficiary's services when the petition was filed. In addition, the director revoked approval, citing section 274C)(a) because Citizenship and Immigration Services (CIS) was unable to make a determination of the "validity of any positions offered or claims made, or the authenticity of any documents submitted by [the petitioner]" due to "the large number of obvious and intentional alterations to various documents submitted by [the petitioner]" as well as "a number of misleading statements made by [the petitioner], " in other matters. In particular, the director found that "contracts between [the petitioner] and the beneficiary as well as pay statements for several beneficiaries ... had been obviously altered" to remove sponsorship or filing fee deductions. The director also noted inconsistencies in the number of employees the petitioner listed in the various petitions it had filed and in income tax statements submitted with these petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants," "financial analysts," and "strategic management analysts."

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Counsel's statement on the Form I-290B reads:

The Service erred in concluding that the September 24, 2003 letter from the State Education Department of the University of the State of New York was not a limited permit nor a license to practice physical therapy in New York State. The Service likewise, erred in finding that the petitioner, a staffing agency did not have an opening for beneficiary's services at the time of filing of the petition. There are other matters raised by the Service in the decision which need to be rebutted by the petitioner in an appeal brief.

The AAO reviewed the record in its entirety before issuing its decision. As observed above, the record does not contain an appeal brief. Accordingly, the record is considered complete.

The AAO observes that the director's revocation of approval of the petition based on altered evidence in other proceedings is in error. The record does not contain obvious alterations in the contract between the petitioner and the beneficiary. With regard to the other matters noted by the director, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the ... petitioner and is based on derogatory information considered by the Service and of which the ... petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." Neither the RFE nor the NOIR sent by the director in this matter gave the petitioner adequate notice of the director's intention to revoke approval based on alleged misrepresentations in other proceedings and did not provide the petitioner an opportunity to rebut this information. Thus, the director's determination regarding derogatory information in other proceedings is withdrawn.

The director's decision correctly notes that the only contract for the beneficiary's services is for one year and was not in effect when the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. As the record does not contain a description of the services to be performed by

the beneficiary from the location(s) of the proposed employment, CIS cannot determine whether performance of the duties requires the theoretical application of a body of highly specialized knowledge, or whether the position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the Aytes memorandum,¹ cited below, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her discretion to request contracts reflecting the dates and locations of employment. The June 14, 2004 staffing agreement submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of the beneficiary's employment by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.

Neither counsel nor the petitioner provides evidence of the beneficiary's proposed employment for the time period requested in H-1B status. As neither the petitioner nor counsel presents additional evidence or argument on appeal, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v). Further, the AAO observes that the record does not contain the underlying documentary evidence, such as an evaluation of the beneficiary's foreign education, sufficient to establish that the beneficiary is qualified to perform services in a specialty occupation. See section 212(a)(5)(C) of the Act.

The burden of proof in this proceeding rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

¹ See Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).