

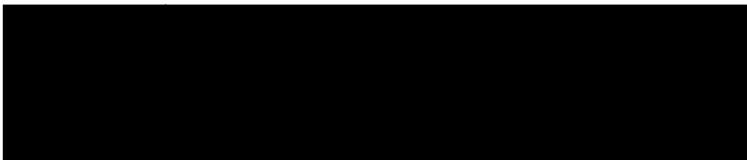


U.S. Citizenship  
and Immigration  
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FILE: EAC 04 046 51855 Office: VERMONT SERVICE CENTER Date: FEB 26 2007

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 dismissed. Approval of the petition will be revoked.

The petitioner is an employment staffing company that 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 December 6, 2003 Form I-129 with supporting documentation; (2) the director's May 19, 2004 notice of intent to revoke approval of the petition (NOIR); (3) counsel's June 8, 2004 response to the director's NOIR; (4) the director's August 12, 2005 revocation letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner submitted the petition on December 6, 2003. The petitioner included a description of the beneficiary's duties in the petitioner's October 20, 2003 letter in support of the petition; an evaluation of the beneficiary's foreign education that concluded that the beneficiary possessed the equivalent of a bachelor's of science degree in physical therapy; and a September 10, 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.

On May 19, 2004 the director notified the petitioner that it had approved the petition in error. The director requested a copy of the beneficiary's license to practice physical therapy in the State of New York and if the beneficiary would be receiving a limited license to practice physical therapy, the name of the beneficiary's on-site supervisor. The director also requested a copy of the petitioner's contract with the specific facility where the beneficiary would be working; a legible copy of the employment contract between that facility and the beneficiary indicating who would be paying, hiring, firing, and promoting the beneficiary; and any written contracts or work orders between the petitioner and the beneficiary.

In a June 8, 2004 response, counsel provided a February 2, 2004 letter from the principal clerk of the New York State Education Department indicating that the beneficiary had provided an application for licensure with appropriate fee, evidence of acceptable education, a permit application signed by a prospective employer with appropriate fee, and that a limited permit to practice physical therapy in New York State may be issued upon receipt of evidence that the beneficiary had received a valid status to work in the United States. Counsel also submitted a June 1, 2004 staffing agreement between the petitioner and a third party located in Woodside, New York covering the placement of four physical therapists, including the beneficiary. Counsel also included an employment contract dated November 25, 2003 between the petitioner and the beneficiary.

On August 12, 2005, the director revoked approval of the petition determining, in part, that the petitioner's initial filing of a Department of Labor's Labor Condition Application (LCA) indicated that the beneficiary's work location would be in New York, New York but that the staffing agreement with the third party utilizing the beneficiary's services was located in Woodside, New York. The director noted that the record did not contain evidence of an amended petition changing the beneficiary's work location or that the petitioner had an approved

LCA for the location of intended employment. In addition, the director observed that the staffing agreement between the petitioner and the Woodside, New York third party was signed almost six months after the petitioner had filed the Form I-129 on behalf of the beneficiary. The director determined that the petitioner had not established that it had a position available for the beneficiary when the petition was filed. The director further determined that at the time of filing the petition, the beneficiary was not authorized to practice physical therapy in the State of New York. The director then indicated that the approval would also be revoked pursuant to section 274(C)(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."

On appeal, counsel for the petitioner asserts that the Woodside, New York area is within the normal commuting distance of the New York, New York area. Counsel referenced the portions of the director's revocation decision regarding alleged inconsistencies, alterations of documents, and misleading statements but noted that this basis did not apply to the beneficiary of the matter at hand and that the director's statements were part of a pro forma blanket denial to petitions filed by the petitioner on behalf of different beneficiaries. Counsel also contends that the beneficiary is eligible to receive a limited permit to practice physical therapy in the State of New York upon submission of evidence that she has a valid status to work in the United States. Counsel asserts that CIS has allowed in the past and should continue to allow individuals whose only obstacle to obtaining a visa is the lack of physical presence to take a licensing exam.

The AAO finds that the director erred when revoking approval of the petition based on a perceived inconsistency between the beneficiary's intended location of employment on the LCA and the beneficiary's actual place of employment. The AAO finds that Woodside, New York is within normal commuting distance of New York, New York.

The AAO also finds that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. 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 for the reasons stated or an opportunity to rebut this information.

However, the record is insufficient to establish that the beneficiary was qualified to practice physical therapy when the petition was filed. The beneficiary's letter from the State of New York is dated February 2, 2004, almost two months after the Form I-129 was filed on December 6, 2003. The memorandum cited by counsel on appeal does not relieve the petitioner from establishing that the beneficiary had fully complied with all the necessary requirements other than her physical presence to take the licensing exam. In this matter, as observed above, the New York State eligibility letter, to take the licensing exam, is dated subsequent to the filing date of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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. 1978).

Moreover, the staffing agreement that indicates the beneficiary will be placed at JP Medical Clinic for one year to perform physical therapy is dated June 1, 2004 and the letter noting that the beneficiary will perform physical therapy under supervision is dated May 28, 2004, both subsequent to the dates of filing the petition. The petitioner cannot use this agreement and letter to demonstrate that a position existed at the time the petition was filed. CIS regulations require a petitioner to establish eligibility for the beneficiary it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Again, 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. In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The petitioner has not established that as of the date of filing the petition on December 6, 2003, the beneficiary was qualified to practice physical therapy in the State of New York.

Further, the evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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.

The evidence of record, including the June 1, 2004 third party agreement, establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.<sup>1</sup> See 8 C.F.R. § 214.2(h)(4)(ii). However, 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.

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<sup>1</sup> See also 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).

In her notice of intent to revoke, the director asked for the beneficiary's employment itinerary. In the Aytes memorandum cited at footnote 1, 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 staffing agreement submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it was not in effect when the petition was filed and further 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), approval of the petition must be revoked.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation in that the beneficiary was not qualified to perform the services of a physical therapist as of the filing date of the petition, and the petitioner failed to submit an itinerary covering the dates and locations of employment; thus approval of the petition constituted gross error. No evidence has been offered to overcome the grounds for revocation, and the AAO will not withdraw the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed. Approval of the petition is revoked.