

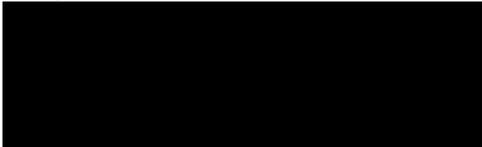
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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: LIN 01 231 55525 Office: NEBRASKA SERVICE CENTER Date: JUN 12 2003

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 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office ("AAO") on appeal. The appeal will be dismissed.

The petitioner is a company engaged in patient rehabilitation and health care services. Through contracts, the petitioner provides therapy services in-house and to area medical centers requiring specific physical therapy rehabilitation programs and assistance. It has five employees and a projected gross annual income of \$200,000. The petitioner seeks to employ the beneficiary as a physical therapist for a period of three years. The director determined that the petitioner had failed to submit a Form ETA 9035 Labor Condition Application ("LCA") that was properly certified by the Department of Labor ("DOL") prior to the filing date of the petition. The director further determined that the petitioner had not complied with the terms of the LCA because the beneficiary would not be working at the location listed on the I-129 petition.

On appeal, counsel submits a brief.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section,

The petitioner submitted an uncertified LCA with the I-129 petition, along with a statement that it would comply with the terms of the LCA. According to the I-129 petition and the uncertified LCA submitted with the petition, the beneficiary was scheduled to work in Clifton, Illinois.

In response to a Bureau request for additional evidence ("RFE"), counsel submitted an LCA that was certified by the DOL on January 16, 2002, a date subsequent to July 30, 2001, the filing date of the petition. The petitioner identified the beneficiary's work location on the LCA as "Metro Detroit, Michigan." Counsel stated in his response to the RFE that the petitioner had erroneously identified the beneficiary's work site as the company address in Illinois on the I-129 petition and the uncertified LCA that accompanied the petition. Counsel indicated that the beneficiary would actually be assigned to provide rehabilitation services to ABC Rehab Services, 11876 Concord Drive, Madison Heights, MI 48071.

The director concluded that neither LCA contained in the record was valid and denied the petition.

On appeal, counsel asserts that the petition should not be denied simply because of an error in the beneficiary's designated work location on the initial LCA. Counsel further asserts that the petitioner is fully in compliance with the terms of the LCA.

In this case, the initial LCA cannot be considered to be valid as it was not certified by the DOL. The second LCA was certified by the DOL after the filing date of the petition, and the beneficiary's intended work location does not conform to the work location specified on the I-129 petition. That LCA cannot be considered to be valid as it has not been properly filed, completed, and endorsed by the Department of Labor. The petitioner has not overcome the objections of the director because the record as it is presently constituted does not contain a valid and properly certified labor condition application. For this reason the petition may not be approved.

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 decision of the director will not be disturbed.

ORDER: The appeal is dismissed.