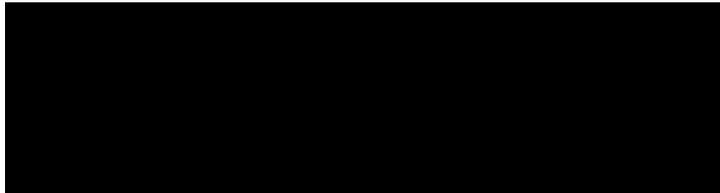


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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



PUBLIC COPY

FILE: LIN-02-131-55231 OFFICE: NEBRASKA SERVICE CENTER

DATE:

IN RE: Petitioner:
Beneficiary:



NOV 21 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:



**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

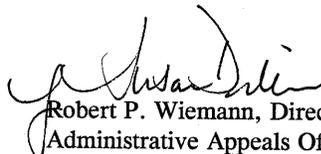
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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 rehabilitation service firm that employs 39 persons and has a gross annual income of \$1.2 million. It seeks to employ the beneficiary as physical therapist. The director denied the petition because the petitioner had failed to submit a timely certified labor condition application.

On appeal, counsel submits a certified labor condition application, and states that the petitioner had provided a timely certified labor condition application in response to the director's request for evidence.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the petitioner filed a timely certified labor condition application.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to at 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

On July 24, 2002, the director denied the petition, finding that the petitioner failed to provide a certified labor condition application. The director stated that, on April 9, 2002, the petitioner was requested to submit a certified labor condition

application. In response to the request, the director stated that the petitioner submitted a labor condition application that the Department of Labor had certified on March 14, 2002, a date subsequent to March 12, 2002, the filing date of the petition. Because the labor condition application was filed subsequent to the filing of the visa petition, the director denied the petition.

On appeal, counsel alleges that the denial of the I-129 petition was an abuse of discretion and not based on the evidence. Counsel states that the petitioner had submitted the certified labor condition application before the expiration of the response's due date, and that the labor condition application was certified by the Department of Labor on March 12, 2002, and was filed with the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), on March 12, 2002. Counsel submits copies of the certified labor condition application and Form I-797C.

The record contains two certified labor condition applications. The labor condition application that the petitioner submitted in response to the request for evidence shows the employer's name as "Professional Therapy & Rehab"; the labor condition application certification date of March 14, 2002; the location of employment as West Palm Beach, Florida; and the ETA Case Number of T-02073-00536. The labor condition application submitted on appeal shows the employer's name as "Rehabilitation Specialist of"; the location of employment as Warren, Michigan; the ETA Case Number of T-02071-00020; and the labor condition application certification date of March 12, 2002. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, the record contains the Form I-797C (Receipt Notice), which reflects that CIS received the petitioner's I-129 petition on March 12, 2002.

Regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provide that, before filing a petition for H-1B classification, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Based on the evidence in this proceeding, the petitioner did not satisfy this regulation. The labor condition application that the petitioner submitted in response to the director's request for evidence didn't represent the petitioning entity, Rehabilitation Specialist of Michigan: it was for Professional Therapy & Rehab, and the labor condition application's certification date of March 14, 2002 is two days

subsequent to the petition's filing date of March 12, 2002. The record reveals that the labor condition application that counsel submits on appeal is different from the labor condition application that was submitted by the petitioner in response to the request for evidence. Consequently, the petitioner fails to establish that it satisfies the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1).

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.

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