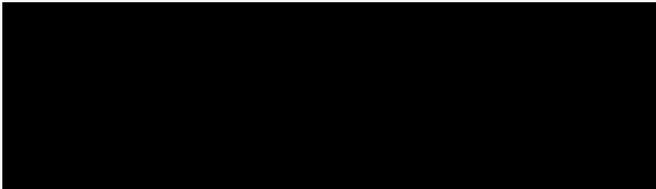




U.S. Citizenship  
and Immigration  
Services



FILE: LIN 03 108 53640 Office: NEBRASKA SERVICE CENTER

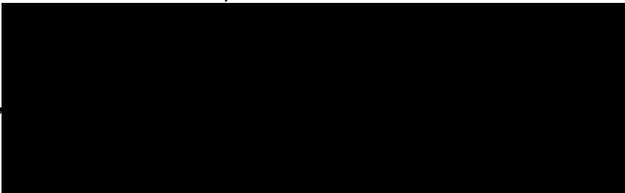
Date: AUG 04 2004

IN RE: Petitioner:  
Beneficiary:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of rehabilitation services and staffing that seeks to employ the beneficiary as a physical therapist. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 director denied the petition because the petitioner failed to establish the existence of the required employer-employee relationship between the petitioner and the beneficiary, the evidence did not establish the bona fides of the job offer at the location listed on the Labor Condition Application (LCA) Form ETA 9035, and the petitioner failed to show that the beneficiary had maintained valid nonimmigrant status since entry to the United States.

On appeal, counsel submits a brief. The documentation counsel refers to as attached to the brief is not found in the record. Counsel contends that since Citizenship and Immigration Services (CIS) previously granted an H-1B petition from the same petitioner for the same beneficiary, the instant petition should be granted. Counsel also states that, despite the lack of specificity in the contracts on the record, the evidence demonstrates the required employer-employee relationship between the petitioner and the beneficiary, as well as the bona fides of the job offer. Counsel also refers to enclosed copies of the beneficiary's W-2 and pay statements as proof of the beneficiary's maintenance of nonimmigrant status. However, as noted, such documentation appears not to have been included with counsel's brief on appeal.

Regarding counsel's assertion that the instant petition should be granted because CIS has already approved another similar petition, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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). Although the AAO may attempt to hypothesize as to whether the prior case was approved in error, no such determination may be made without review of the original record in its entirety. If the previous nonimmigrant petition was approved based on facts similar to those found in the current record, the approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

According to 8 C.F.R. § 214.2(h)(4)(ii), the term "United States employer" means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The director determined that the evidence on the record was too vague to establish the existence of the requisite employer-employee relationship between the petitioner and the beneficiary. In response, counsel states, in part, that because this beneficiary has previously held H-1B status, it must follow that the employer-employee relationship exists. The AAO is not persuaded by such circular logic; as noted above, each petition requires a separate determination, and the petitioner carries the burden of proof to establish eligibility in each and every petition.

The petitioner's place of business is in Springfield, Missouri, and the beneficiary's job site is listed as being in Indianapolis, Indiana, at another staffing company. Nowhere does the record specify any health care facility where the beneficiary would actually carry out the duties of a physical therapist. The evidence on the record does not clarify the "chain of command" between the petitioner and the beneficiary's ultimate work place, wherever that may be. The petitioner has not demonstrated how it would supervise or otherwise control the beneficiary's work. The AAO, thus, concurs with the director's finding that the submitted documentation fails to establish that the petitioner has an employer-employee relationship with the beneficiary pursuant to 8 C.F.R. § 214.2(h)(4)(ii) and also fails to establish the bona fides of the job offer at the location stated on the LCA.

Moreover, beyond the decision of the director, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the beneficiary's actual workplace. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform at such workplace will qualify as a specialty occupation. For this additional reason, the petition cannot be granted.

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.