



U.S. Citizenship  
and Immigration  
Services

FILE: EAC 03 225 51097 Office: VERMONT SERVICE CENTER Date: AUG 18 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 manpower resources company 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 beneficiary is not qualified to perform the duties of a specialty occupation. In particular, the beneficiary does not have a license to practice physical therapy in the State of New York.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a physical therapist. The petitioner indicated in a December 23, 2002 letter that it wished to hire the beneficiary because she possessed a bachelor's degree in physical therapy.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary did not possess a valid license to practice physical therapy in New York State. The regulations state at 8 C.F.R. § 214.2(h)(4)(v)(A):

If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

In the director's request for evidence, the petitioner was asked:

Please submit a copy of the beneficiary's license to practice the occupation of Physical Therapist in New York, NY. . . . You must submit either evidence of a license, a letter from the licensing authority stating that licensure will be granted upon arrival, or an original letter from the appropriate licensing authority stating that licensure is not required.

In response, the petitioner provided a barely legible photocopy of an April 21, 2003 letter indicating that the beneficiary's application for licensure was forwarded by the Bureau of Comparative Education to the Physical Therapy Licensing Unit of the New York State Department of Education. Although the petitioner submitted the requested letter on appeal indicating that the beneficiary met the requirements for a limited permit, which would be issued once the beneficiary had received valid status from Citizenship and Immigration Services (CIS) to work in the United States, that evidence may not be considered. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Beyond the decision of the director, there is no evidence in the record that a bona fide position exists and that the petitioner is a U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii). While the petitioner states that the beneficiary will be placed in a full-time position in New York, it is clear that the beneficiary will not be working at the employer's place of business. The petitioner states that it supplies medical, information technology and education professionals to clients in New York, New Jersey and Connecticut. Therefore, the

petitioner must establish that it has a specific contract, with a particular position based in New York, in which the beneficiary will be placed for the duration of her three-year visa, should it be granted, and that the petitioner will have the ability to hire, pay, fire, supervise, or otherwise control the work of the beneficiary. For these additional reasons, 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.

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