



U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 133 54167 Office: VERMONT SERVICE CENTER Date: APR 30 2004

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:

SELF-REPRESENTED

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.

Mari Johnson

to Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 health care facility with home care services. It seeks to employ the beneficiary as a staff physical therapist. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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, and the record does not contain a certified labor condition application for the location of the beneficiary's actual employment. On appeal, the petitioner submits a letter.

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. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in physical therapy for the proffered position.

The director found that the beneficiary was not qualified for the proffered position because the record does not include evidence that the beneficiary is a licensed physical therapist in the state of the intended employment. The director further found that the record does not contain a properly filed labor condition application for the location where the beneficiary will actually be employed.

On appeal, the petitioner states, in part, that the beneficiary will be working at the Primary Care [REDACTED] as a physical therapist and not at Kindred Healthcare. The petitioner submits evidence to support its claim that the beneficiary is qualified for a physical therapist position in New York.

In its *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the Department of Labor finds that all states require physical therapists to pass a licensure exam before they can practice, after graduating from an accredited physical therapist educational program. Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in physical therapy and state licensing. In the petitioner's January 20, 2003 letter, the petitioner indicated that the beneficiary would be working for [REDACTED]. A search of [REDACTED] website at <http://www.kindredhealthcare.com> finds that Kindred Healthcare has no facilities in the State of New York. Although the petitioner indicates on appeal that the beneficiary would be working in New York, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A petitioner cannot materially change a position's title or its associated job responsibilities after the filing of the petition. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, as have occurred here, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. As such, for the purposes of this proceeding, the location of the beneficiary's intended employment does not appear to be the state of New York.

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. . . .

Although the petitioner's January 20, 2003 letter indicates that the beneficiary would be working at [REDACTED] Healthcare, which has no facilities in New York, the petitioner's labor condition application contains the petitioner's New York address. Furthermore, the record contains no comprehensive description of the beneficiary's proposed duties from an authorized representative from the facility where the beneficiary will ultimately perform the proposed duties, in this case, a facility of [REDACTED]. As such, the petitioner

has not demonstrated that a labor condition application has been properly filed for the location of the beneficiary's intended employment or that the petitioner has complied with the terms of the labor condition application that was certified by the Department of Labor on November 21, 2001. Further, although the petitioner has submitted documentation related to the beneficiary's limited permit to practice as a physical therapist in New York, it is again noted that Kindred Healthcare has no New York facilities.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position and that it has complied with the terms of the labor condition application. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.