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FILE: EAC 03 067 55004 Office: VERMONT SERVICE CENTER Date: **AUG 15 2006**

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 of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked the approval on the ground that the petitioner had altered numerous documents and made a number of misleading statements in response to the notice of intent to deny, so that no determination could be made as to authenticity of the documents and the validity of the petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be remanded for entry of a new decision.

The petitioner is an employment/staffing agency. It seeks to employ the beneficiary as a physical therapist and to classify her 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).

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien must have the following credentials to be qualified to perform the services of a specialty occupation:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the notice of intent to revoke (NOIR), (3) the petitioner's response to the NOIR; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the Form I-129 and an accompanying letter, filed in December 2002, the petitioner described itself as a business that staffs the needs of professional service corporations such as retail companies, out-patient rehabilitation clinics, hospitals, and nursing homes with such personnel as office managers, physical therapists, registered nurses, and nurse assistants. The petitioner stated that its business was established in 1999, has 45 employees, and earns gross annual revenues of over \$2 million. To meet the growing demand of its clients the petitioner stated that it needed the beneficiary's services as a physical therapist for three years and would pay her an annual salary of \$40,000. The duties of the proffered position were listed as follows:

- Evaluate physician referral and patient medical records to determine physical therapy treatment required.

- Plan and administer medically prescribed physical therapy treatment programs for patients to restore function, relieve/ease pain, and prevent disability caused by disease, injury, or loss of body parts.
- Perform patient tests, measurements, and evaluations, such as range of motion and manual muscle tests, gait and functional analysis, and body parts measurements.
- Record and evaluate findings/results to aid in establishing or revising specifics of treatment programs.
- Instruct, motivate, and assist patients in non-manual exercises and functional activities.
- Administer treatment to an extent necessary to achieve maximum benefit, and record patient's treatments, response and progress.

The minimum requirements for the job, the petitioner stated, are a bachelor's degree in physical therapy and the requisite license from the State of New York. At the time of filing, the record indicates, the beneficiary had a bachelor of science in physical therapy from the Liceo de Cagayan in the Philippines, granted on March [REDACTED] as well as a letter from New York's Bureau of Comparative Education, dated [REDACTED] advising the beneficiary that the education portion of her application for a physical therapy license had been approved and that she was eligible to schedule a computerized examination.

The instant H-1B petition was filed on December 30, 2002 and approved on January 3, 2003. By letter dated May 26, 2004, however, the acting director advised the petitioner of her intention to revoke the approval on multiple grounds. As explained in the NOIR, the record contained no evidence that the beneficiary had completed her application for licensure in the State of New York by taking the required examination. The petitioner was requested to submit a copy of the beneficiary's license or other documentary evidence that the beneficiary was eligible to practice physical therapy in New York. The petitioner was also advised to submit copies of its contract with the facility where the beneficiary would be working and the contract between the facility and the beneficiary. In addition, the acting director noted that the petitioner's employment agreement with the beneficiary, dated December 18, 2002, contains a paragraph providing for a \$3,000 salary deduction as a sponsorship fee for the petitioner's filing of an immigrant petition on behalf of the beneficiary. After remarking that "[t]his fee will reduce the wage paid as indicated on the Labor Condition Application [LCA]," the acting director declared that the fee did not appear to qualify as an "authorized deduction" under the Department of Labor (DOL) regulation at 20 C.F.R. § 655.731(c)(9).

In response to the NOIR, the petitioner submitted a copy of the beneficiary's license from the State of New York to practice physical therapy, issued [REDACTED] the staffing agreement between the petitioner and the facility (First Medicare in Brooklyn, New York) where the beneficiary would be assigned, dated [REDACTED] and an updated employment agreement between the petitioner and the beneficiary, dated [REDACTED] that omits the paragraph providing for a \$3,000 salary deduction to pay for an immigrant petition.

On January 6, 2005, the director issued a decision revoking the approval of the petition on multiple grounds. The director referred to the removal of the immigrant sponsorship fee in the petitioner's new contract with the beneficiary. The director also referred to "pay statements" in which "[t]he total deductions . . . equal more than the federal, state, and social security deductions, therefore indicating that an additional deduction had in fact been made by the petitioner to recoup the cost of filing." The director stated that the deductions reduced the beneficiary's actual salary below the prevailing wage indicated on the LCA. According to the director, the foregoing "alterations call into question the authenticity of any and all documents submitted to this office

by your company.” In addition, the director cited “discrepancies” between the varying employee totals listed on other H-1B petitions filed by the petitioner and the income tax statements filed by the petitioner in 2004. Lastly, the director noted that the petitioner had filed ten H-1B petitions for in-house accountants which had been approved, though the petitioner never acknowledged employing that many accountants at one time and the number of accountants appeared greater than a company of the petitioner’s size would need. The director concluded that:

Due to the large number of obvious and intentional alterations to various documents submitted by you as well as a number of misleading statements made by you, this Service cannot determine the validity of any positions offered or claims made, or the authenticity of any documents submitted by your company. Therefore, you have failed to establish eligibility for the benefit sought.

On appeal counsel asserts that the petitioner did not alter any documents submitted in connection with this or other H-1B petitions and that the number of employees in the company constantly varies. As evidence thereof copies have been submitted of the petitioner’s 2004 quarterly tax filings in the State of New York which list 135 employees in the first quarter of the year, 145 in the second quarter, 174 in the third quarter, and 243 in the fourth quarter. These numbers, counsel explains, reflect the company’s rapid growth rate of almost 50% a year, which has produced gross annual revenues of \$5.8 million. The petitioner has not hired an overabundance of H-1B accountants, counsel contends, since most of the employees have transferred to other companies or been terminated. The petitioner submits a list of seven accountants it hired, three of whom moved on to other companies and four of whom currently work for the petitioner in various capacities including an accountant, an accounting consultant, an internal auditor, and a budget officer. With respect to the deductions from employee paychecks, counsel asserts that such deductions did not reduce employee salaries below LCA specifications and that they were recruitment fees that covered the company’s out-of-pocket expenses, not a reimbursement for CIS filing fees. The petitioner has since revised its pay system, counsel states, to eliminate deductions for recruitment fees. As evidence thereof a copy has been submitted of a pay stub issued to the beneficiary in February 2005. Counsel asserts that the instant petition should be adjudicated on its own merits, not on the basis of other H-1B petitions filed by the petitioner and unproven allegations of wrongdoing in those petitions. The instant petition should be approved, counsel concludes, because the petitioner has made a bona fide offer of employment to the beneficiary, the proffered position is a specialty occupation, and the beneficiary is qualified for the position.

The AAO determines that the director failed to comply with applicable regulations in revoking the approval of the instant petition. The regulation at 8 C.F.R. § 214.2(h)(11)(iii) establishes the procedure for revocations on notice of the director. It reads as follows:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
  - (2) The statement of facts contained in the petition was not true and correct; or
  - (3) The petitioner violated terms and conditions of the approved petition; or

(4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director did not comply with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii) because the grounds for revocation in his decision of January 6, 2005 did not comport with the grounds for revocation discussed in the NOIR of May 26, 2004. The director did not revoke the approved petition on the ground that the beneficiary does not have a license to practice physical therapy, or on the ground that the petitioner failed to provide its contract with the facility where the beneficiary would be working or the contract between the facility and the beneficiary. Those were the grounds for revocation discussed in the NOIR. As for the other ground of revocation discussed in the NOIR – the director's determination that the petitioner's \$3,000 deduction from the beneficiary's salary would reduce the wage indicated in the LCA and was not an authorized deduction under the regulation at 20 C.F.R. § 655.731(c)(9) – the AAO notes that enforcement of this regulation resides in the Department of Labor. Accordingly, the director's concerns regarding the LCA filed by the petitioner are beyond the purview of Citizenship and Immigration Services (CIS) in adjudicating the instant H-1B petition and are not a basis for revoking the petition.

Thus, the director erred in revoking the approval of the instant petition. The director's decision is not in compliance with the notice provision of 8 C.F.R. § 214.2(h)(4)(iii)(B), which requires that the decision to revoke be based on the "detailed statement of the grounds for revocation" in the NOIR. The petitioner responded to the NOIR by submitting additional documentation addressing the grounds for revocation discussed by the acting director, but this evidence was not discussed by the director in his revocation decision. Accordingly, the director's decision will be withdrawn.

The petition will not be approved, however, as the director has raised serious questions about the authenticity of the petitioner's evidence in connection with the alleged alteration of documents and misrepresentations of fact in other petitions it has filed. The regulation at 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if the decision will be adverse to the . . . petitioner and is based on derogatory information considered by [CIS] and of which the . . . petitioner is unaware," and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The AAO notes that each petition filed 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). Thus, in a new notice of intent to revoke under 8 C.F.R. § 214.2(h)(11)(iii), the director must include a detailed statement citing specific alterations of documents and misrepresentations of fact by the petitioner in the instant record of proceeding, whether they derive from the instant proceeding or other petitions, and give the petitioner the opportunity to submit rebuttal evidence addressing those issues. The director may properly revoke the petition if, after a notice of intent to revoke has been issued informing

the petitioner of the specific reasons why the petition should not have been approved, the petitioner is found to have committed fraud or is unable to resolve the inconsistencies in the record.

The petition will be remanded for the director to reinstitute revocation proceedings that comply with the notice requirements of 8 C.F.R. § 214.2 (h)(11)(iii)(A) and (B).

As always, the petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision of January 6, 2005 is withdrawn. The petition is remanded to the director for entry of a new decision. If adverse to the petitioner, the decision shall be certified to the AAO for review.