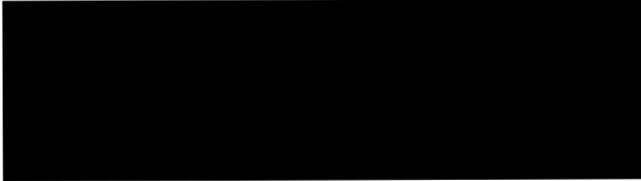


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FILE: EAC 04 260 53866 Office: VERMONT SERVICE CENTER Date: **JUN 26 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved for six months.

The petitioner is a homecare service agency providing home healthcare, therapy and health care management services. It seeks to employ the beneficiary as a physical therapist. The petitioner, therefore, 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 was in violation of section 212(n) of the Act, 8 U.S.C. § 1182(n), Section 274C(a) of the Act, 8 U.S.C. § 1324c(a), and because the petitioner misrepresented itself as a health care provider when it was a staffing agency. Therefore, the petitioner failed to establish eligibility for the benefit sought. On appeal, counsel submits a brief and previously submitted evidence.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (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 (RFE); (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 director determined that the petitioner was in violation of section 212(n) of the Act, 8 U.S.C. § 1182(n), in that the employer intended to recoup administrative expenses from the prevailing wage in violation of 20 C.F.R. § 655.73(c)(9). The AAO agrees that the administrative expenses may not be deducted from the prevailing wage under the law. Violations of the labor condition application wage requirements, however, should be reported to the Secretary of Labor for investigation as set forth in section 212(n) of the Act. Such violations are not grounds for denying eligibility under an H-1B petition.¹

The director also indicated that the petitioner violated Section 274C(a) of the Act, 8 U.S.C. § 1324c(a), stating that the petitioner intentionally altered documents in order to obtain an immigration benefit. The petitioner indicated that it changed the contract with the beneficiary, with her consent, to its own financial detriment in order to comply with the law. The petitioner provided a reasonable and consistent explanation for its actions, and has not violated section 274C(a) of the Act by modifying the employment contract with the beneficiary. This finding of the director is withdrawn.

The director stated that the petitioner is a staffing agency, and is not a home healthcare provider. The AAO disagrees with the director. The petitioner provided evidence that it is licensed as a home healthcare agency. The petitioner submitted with the Form I-129, and in its response to the RFE, a letter issued by the State of New York Department of Health, dated July 12, 2004, as evidence that effective July 6, 2004, it is authorized to operate a Home Care Service Agency, pursuant to New York regulations, 10 NYCRR parts 700, 765, and 766. The letter specifically states that the petitioner has authority to operate a Home Care Service Agency.²

The petitioner has overcome the decision of the director. The AAO will now review the eligibility requirements for a specialty occupation.

The petitioner is seeking the beneficiary's services as a physical therapist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail:

- Administer medically prescribed physical therapy treatment program for patients to restore function, relieve pain, and prevent disabilities following disease, injury or loss of part;
- Establish work schedules for personnel;

¹ The record reflects that petitioner revised the contract with the beneficiary's consent, to indicate that administrative expenses would not be deducted from the proffered wage in this case. Any violations reported to the Secretary of Labor should be for past violations by the petitioner.

² The AAO confirmed the validity of the license, No. 1100L, with the State of New York Department of Health.

- Interview, instruct, demonstrate and supervise personnel on all aspects of physical therapy;
- Evaluate prospective applicants for treatment;
- In consultation with physician and, upon approval by physician, develop and implement a physical therapy plan of care;
- Record weekly progress notes of patient care and reevaluation as needed;
- Participate in developing overall care plan;
- Supervise the orientation of all newly employed personnel to the main aspects of the Physical Therapy Department;
- Conduct periodic training programs for all personnel;
- Assist with other departments in developing overall patient care programs, such as walking programs and exercise classes;
- Serve as a member of Infection Control Committee; and
- Any other duties as assigned by supervisor

The petitioner requires a bachelor's degree in physical therapy for the proposed position.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The evidence in the record establishes that the proposed position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds that the proposed position qualifies as a specialty occupation requiring a baccalaureate degree in physical therapy, based on the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) description of a physical therapist. The *Handbook* states:

Physical therapists provide services that help restore function, improve mobility, relieve pain, and prevent or limit permanent physical disabilities of patients suffering from injuries or disease. They restore, maintain, and promote overall fitness and health. Their patients include accident victims and individuals with disabling conditions such as low-back pain, arthritis, heart disease, fractures, head injuries, and cerebral palsy.

Therapists examine patients' medical histories and then test and measure the patients' strength, range of motion, balance and coordination, posture, muscle performance, respiration, and motor function. They also determine patients' ability to be independent and reintegrate into the community or workplace after injury or illness. Next, physical therapists develop plans describing a treatment strategy, its purpose, and its anticipated outcome. ...

...

Treatment often includes exercise for patients who have been immobilized and lack flexibility, strength, or endurance. Physical therapists encourage patients to use their own muscles to increase their flexibility and range of motion before finally advancing to other exercises that improve strength, balance, coordination, and endurance. The goal is to improve how an individual functions at work and at home.

Regarding education, training, and licensure of physical therapists, the *Handbook* states:

All States require physical therapists to pass a licensure exam before they can practice, after graduating from an accredited physical therapist educational program.

According to the American Physical Therapy Association, there were 205 accredited physical therapist programs in 2004. Of the accredited programs, 94 offered master's degrees, and 111 offered doctoral degrees. All physical therapist programs seeking accreditation are required to offer degrees at the master's degree level and above, in accordance with the Commission on Accreditation in Physical Therapy Education.

The *Handbook* establishes a degree and licensing requirement for physical therapists. Upon review of the record, the petitioner has established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The AAO next turns to the issue of the beneficiary's qualifications. The record reflects that the beneficiary is qualified to perform the duties of the proposed position for a limited time.

The record contains a copy of the beneficiary's B.S. degree in physical therapy and transcript of courses. The petitioner submitted evidence showing that the beneficiary has completed the educational requirements, and that the beneficiary has met the requirements for the issuance of a limited permit to practice physical therapy in the State of New York, and that the license may be issued upon receipt of evidence that the beneficiary has received valid status from CIS to work in the United States.

The record contains the certification issued to the beneficiary from the International Commission on Healthcare Professions, a division of the Commission of Graduates of Foreign Nursing Schools (CGFNS), which indicates that the beneficiary met the requirements of section 212(a)(5)(c) of the Act, 8 U.S.C. § 1182(a)(5)(c) as specified in 8 C.F.R. § 212.15(f) for the profession of physical therapist.

The AAO notes that the letter from the New York State licensing board clearly states that the only obstacle to the issuance of a limited permit to the beneficiary to practice physical therapy in the United States is evidence that the beneficiary has received valid immigration status in the United States.

A memorandum from Lawrence Weinig, Acting Assistant Commissioner, *Temporary Licensure for H-1B nonimmigrants* (May 4, 1992) indicates that CIS should approve initial H-1B petitions where the alien is otherwise qualified but lack of physical presence in the United States is the sole bar to obtaining temporary licensure. This policy was confirmed by memorandum from Thomas Cook, Acting Assistant Commissioner, Office of Adjudications, *Social Security Cards and the Adjudication of H-1B Petitions* (November 20, 1991), stating that CIS officers should continue to approve H petitions that require state licensure when the only obstacle to obtaining the license is the alien's lack of physical presence.

As the sole obstacle to the beneficiary's obtaining a limited permit in this case is the beneficiary's lack of the nonimmigrant visa, which would allow her to be physically present in the United States, the petition may be approved.

The regulation at 8 C.F.R. § 214.2(h)(4)(v)(B) indicates that an H-1B petition may be approved for an alien with temporary licensure, if a temporary license is available. The regulation at 8 C.F.R. § 214.2(h)(4)(v)(E) limits the period of the H-1B petition to the amount of the time granted under the temporary license. New York State Physical Therapy Law, Article 136 § 6735, indicates that a limited permit to practice physical therapy shall be for 6 months. As the petitioner is approved to practice with a limited permit, the visa petition shall be approved for 6 months.

Upon review of the record, there is sufficient evidence to determine that the beneficiary is qualified to perform the duties of a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).

For the reasons related in the preceding discussion, the petitioner has established that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and that the beneficiary is qualified to perform the duties of the specialty occupation for a limited period.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved for six months.