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FILE: EAC 04 256 54170 Office: VERMONT SERVICE CENTER Date: **OCT 05 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 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 medical services provider that 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 on the basis of her determination that a provision of the “Employment and Non-Competition Agreement” violated 20 C.F.R. § 655.731(c).

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2) states that the petitioner shall submit “[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.”

The regulation at 20 C.F.R. § 655.731(c) states the following:

(c) Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. . . .

Thus, only deductions which are specifically authorized by 20 C.F.R. § 655.731(c)(9) may reduce the beneficiary’s salary below the level of the prevailing wage. The regulation at 20 C.F.R. § 655.731(c)(9) permits three types of deductions:

- (9) “Authorized deductions,” for purposes of the employer’s satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--
  - (i) Deduction which is required by law (e.g., income tax; FICA); or
  - (ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of

LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or

- (iii) Deduction which meets the following requirements:
  - (A) Is made in accordance with voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);
  - (B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status);
  - (C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
  - (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and
  - (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

Section 3 of the "Employment and Non-Competition Agreement" between the petitioner and beneficiary states the following:

Therapist acknowledges that [the petitioner] has paid for the cost of Therapist's emigration from his/her country and entry into the United States, and for the legal and administrative services required to obtain authorization for Therapist to work in the United States. This cost has amounted to \$5,000.00 (five thousand dollars), as itemized in the attached Appendix. Therapist acknowledges that [the petitioner] has advanced these costs as an interest-free Loan to Therapist for Therapist's benefit. This loan shall be repaid to [the petitioner] in full.

The director found this clause a direct violation of 20 C.F.R. § 655.731(c)(9) and denied the petition on that basis. On appeal, counsel contends that the director erred in denying the petition.

In his appellate brief, counsel notes the shortage of qualified physical therapists in the United States; states that before utilizing the contract clause quoted above the petitioner had had trouble with sponsored physical therapists violating their contracts; states that the loan referenced in the quoted contract clause "is not to be deducted from the salary of the therapists"; contends that the director's citation of 20 C.F.R. § 655.731(c)(9) is "misplaced"; and states that the petitioner has amended the contract so as to ensure compliance with the regulation.

Counsel's reference to the shortage of physical therapists in the United States is not material to the outcome of this proceeding; demonstration of a labor shortage is not required for H-1B nonimmigrant petitions. In a similar vein, the petitioner's past experience with contract violations is not relevant either; it must still comply with the regulations.

Counsel's statement that the loan referenced in the quoted contract clause "is not to be deducted from the salary of the therapists" is not supported by the record. The quoted passage from the contract specifically states the \$5,000 loan "shall be repaid" to the petitioner.

Counsel's assertion that the director's reliance on the quoted regulation is "misplaced" is incorrect. While counsel is correct that "[t]he above law talks about salary deductions authorized by the collective bargaining agreement," counsel fails to take into account the text of the entire regulation. The deductions "authorized by a collective bargaining agreement" noted by counsel are merely one type of acceptable deduction from an employee's salary mentioned in 20 C.F.R. § 655.731(c)(9). The petitioner is bound by the requirements of this regulation.

Pursuant to 20 C.F.R. § 655.731(c), the salary paid to the beneficiary must be equal to, or higher than, the prevailing wage listed on the certified labor condition application (LCA). No deductions from the amount paid to the beneficiary by the petitioner that would take the beneficiary's salary below that amount are permitted, unless the deduction falls under one of the three categories permitted by 20 C.F.R. §§ 655.731(c)(9)(i), (ii), or (iii).

The issue to be addressed on appeal is whether the deduction to be taken for the loan from the beneficiary's salary violates 20 C.F.R. § 655.731(c).

The deduction to be taken for the loan does not qualify under the first exception, set forth at 20 C.F.R. §§ 655.731(c)(9)(i), as the deduction is not "required by law."

Nor does the deduction to be taken for the loan qualify under the second exception, set forth at 20 C.F.R. §§ 655.731(c)(9)(ii), as it is to recoup a business expense of the employer. As stated in the

regulation, attorney fees and other costs connected to the performance of H-1B program functions, such as the preparation and filing of the LCA and H-1B petition, are required to be performed by the employer and therefore constitute a "business expense of the employer."

Nor does the deduction to be taken for the loan qualify under the third exception, set forth at 20 C.F.R. §§ 655.731(c)(9)(iii), as it does not meet all five conditions of that exception. Recovering sums spent on attorney fees and other costs connected to the performance of H-1B program functions, such as the preparation and filing of LCA and H-1B petition, is considered recoupment of a business expense.

Accordingly, the deduction to be taken for repayment of the loan satisfies none of the exceptions set forth at 20 C.F.R. §§ 655.731(c)(9). Accordingly, the AAO's next line of inquiry is to determine whether the deduction of the \$5,000 from the beneficiary's salary would reduce her salary to a level below the prevailing wage.

According to the certified LCA, the prevailing wage for this position is \$19.23 per hour, or \$39,998.40 per annum. The LCA states that the proffered salary is also \$19.23 per hour. Taking into account the \$5,000 to be deducted for repayment of the loan, her salary would be \$34,998.40 per hour, or \$5,000 below the prevailing wage.

The AAO notes that the Form I-129 states that the beneficiary's salary would be \$45,000 per annum. Although a \$5,000 deduction from this figure would reduce the salary to \$40,000, and therefore would be higher than the prevailing wage, this figure conflicts directly with the figure the petitioner certified as the prevailing wage to the Department of Labor.

Therefore, the AAO is unable to determine the salary actually offered to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The "Addendum to Employment Agreement" submitted by the petitioner on appeal does not cure the deficiency in the contract. According to this addendum, the petitioner would forgive one four-thousandth of the amount of the loan for each hour that the beneficiary works for the petitioner. Thus, if the beneficiary were to remain under the employ of the petitioner for two years, the loan would be forgiven. According to counsel, this addendum was written and signed "in order to avoid any semblance or appearance of violating Department of Labor regulations."

However, this addendum implicitly requires payment of a portion of the loan to the petitioner (based upon a mathematical calculation of the total number of hours worked) should she leave the employ of the petitioner prior to completion of 4,000 hours of employment.

The regulation at 8 C.F.R. § 655.731(c)(10) states the following:

- (10) A deduction from or reduction in the payment of the required wage is not authorized (and is therefore prohibited) for the following purposes (i.e., paragraphs (c)(10)(i) and (ii):

- (i) A penalty paid by the H-1B nonimmigrant for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer. . . .
- (ii) A rebate of the \$500/\$1,000 filing fee paid by the employer, if any, under section 214(c) of the INA. The employer may not receive, and the H-1B nonimmigrant may not pay, any part of the \$500 additional filing fee (for a petition filed prior to December 18, 2000) or \$1,000 additional filing fee (for a petition filed on or subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. Thus, no deduction from or reduction in wages for purposes of a rebate of this fee is permitted. . . .

Thus, the contract addendum submitted on appeal violates 8 C.F.R. § 655.731(c)(10).

As provided by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner shall certify at the time of filing the petition that it will comply with the terms of the LCA. As the petitioner's contract with the beneficiary clearly indicates that it is not in compliance with the terms of the LCA, the petition must be denied.

Beyond the decision of the director, the petition may not be approved, as the petitioner has not demonstrated that it will employ the beneficiary in a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 proposed position.

The evidence of record establishes that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies. The petitioner, however, has provided no contracts, work orders or statements of work describing the duties the beneficiary would perform for its clients and, therefore, has not established the proffered position as a specialty occupation.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner’s clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). For this additional reason, the petition may not be approved.

The petitioner has not demonstrated that it will comply with the terms of the LCA or that it will employ the beneficiary in a specialty occupation. Accordingly, the AAO will 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.