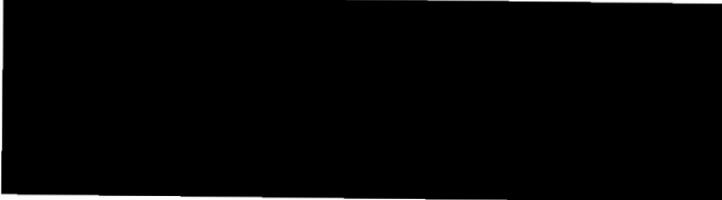


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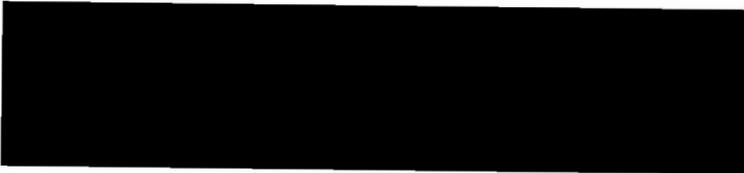
FILE: EAC 04 033 50727 Office: VERMONT SERVICE CENTER Date: **SEP 12 2006**

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 recruitment and staffing agency that seeks to continue its employment of the beneficiary as a physical therapist. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 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 brief. The AAO reviewed the record in its entirety before issuing its decision.

According to the petitioner's November 5, 2003 letter of support, the duties of the proposed position would consist of the following:

- Evaluating the functional abilities of patients, applying tests and measurements and obtaining supporting data;
- Planning individualized programs of treatment;
- Planning and instructing patients in programs of home exercises;
- Utilizing a variety of modalities including hydrotherapy, cryotherapy, ultrasound, electrical stimulation, and isokinetics;
- Monitoring equipment so as to ensure optimal operating conditions, safety, or need for repairs;
- Performing muscle strength evaluations and soft tissue mobilizations so as to enhance muscle elasticity;
- Evaluating muscle hypotonicity and providing exercises so as to normalize motor control;
- Restoring joint ranges of motion through mobilization techniques and exercises;
- Providing exercises to increase strength, endurance, and coordination for specific muscle groups;
- Performing auscultation to lung fields and rendering percussion and vibration, breathing exercises, and postural drainage;
- Instructing patients in the use of orthotic and prosthetic devices;
- Supervising and instructing physical therapy assistants and other staff in the provision of therapy to patients; and
- Preparing reports for doctors, insurance companies, and lawyers.

As a preliminary matter, counsel and the petitioner are advised that the AAO will not address the findings of the director regarding possible fraudulent activity by the petitioner, as the director relied on information contained outside this record of proceeding for his conclusions.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The instant petition was received at the service center on November 11, 2003, and contained a labor condition application certified for employment in New York, New York.

In response to the director's request for additional evidence, counsel submitted a new Form I-129 and LCA, certified on June 1, 2004, for employment in Fairlawn, New Jersey.¹

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The petitioner's submission of a certified LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1).

Further, 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).

Therefore, the petition may not be approved without an LCA certified prior to the date the petition was filed. The certified LCA for employment in Fairlawn, New Jersey was obtained subsequent to the filing of the petition on November 11, 2003, and the regulations contain no provision for discretionary relief from the LCA requirements. The petitioner's failure to procure a certified LCA for the location of intended employment prior to filing the H-1B petition precludes its approval.

Beyond the decision of the director, the AAO notes that the beneficiary is unqualified to perform the duties of a specialty occupation. Section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), requires that certain healthcare workers obtain a certificate that verifies (1) that the alien's education, training, licensure, and experience meet all applicable statutory and regulatory requirements for entry into the United States under the requested classification, are comparable to those required for American healthcare workers of the same type, and are authentic; (2) that the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate to the type of healthcare work in which the alien will be engaged; and (3) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the success on the profession's licensing or certification examination, that the alien has passed such a test or such an examination.

In a September 22, 2003 memorandum,² CIS noted that, in the case of physical therapists, two organizations are authorized to issue these certificates: (1) the Commission on Graduates of Foreign Nursing Schools (CGFNS) and (2) the Foreign Credentialing Commission on Physical Therapy (FCCPT).

¹ Although counsel stated that the petitioner was amending its petition, the AAO notes that the regulation provides no avenue for amending a petition other than through the filing of a new petition, with a certified LCA and filing fee, at the appropriate regional service center. *See* 8 C.F.R. § 214.2(h)(1)(i)(E).

² Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator's Field Manual Update AD 03-31* (September 22, 2003).

The record does not contain the requisite certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the AAO notes that the beneficiary would not be performing services at the petitioner's place of business, but would rather be working at various locations as established by contractual agreements between the petitioner and its clients.

The evidence of record, including the Employment Agreement between the petitioner and the beneficiary, which states that the beneficiary accepts employment with the petitioner so as "to render physical therapy services for the Clinic contracted by the [petitioner]," establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.³ See 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his request for evidence, the director asked for contracts of work to be performed. Pursuant to the Aytes memorandum cited at footnote 3, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised her discretion to request a contract. The "Staffing Agreement" submitted by the petitioner does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of employment requested by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition must be denied.⁴

Moreover, the AAO also notes that the record contains no evidence to demonstrate that an itinerary for the position existed at the time the petition was filed. The only contract contained in the record did not exist at the time the petition was filed, which precludes the petitioner from using it to establish that an itinerary for the position in fact existed at the time the petition was filed. As noted previously, the Form I-129 was received at the service center on November 11, 2003, and the "Staffing Agreement" is dated January 30, 2004. The petitioner, therefore, cannot use this agreement to demonstrate that an itinerary for the position existed on November 11, 2003.

CIS regulations 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 visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The record fails to establish that the petitioner had an itinerary of employment for the beneficiary at the time the instant petition was filed.

³ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

⁴ The period of authorized employment requested on the Form I-129 was November 29, 2003 through November 29, 2006. The "Staffing Agreement" between the petitioner and the [REDACTED] for whom the beneficiary would work, covers the period February 9, 2004 through February 8, 2005, so it does not cover the entire period of requested employment.

The AAO acknowledges that the director's denial was not based upon the petitioner's failure to demonstrate that the beneficiary was qualified for the position based upon section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), its failure to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), or its failure to demonstrate that an itinerary for the position existed at the time the petition was filed. However, remanding this case to the director to request those items now would have no effect, as the petitioner's failure to obtain a certified LCA for the location of intended employment precludes the petition's approval.

The petitioner's failure to obtain a certified LCA for the location of intended employment precludes the petition's approval. Moreover, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the position, the "Staffing Agreement" submitted by the petitioner does not cover the entire period of employment requested by the petitioner, and the petitioner has not demonstrated that an itinerary for the position existed at the time the petition was filed. For all of these reasons, the petition may not be approved. 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.