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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 162 52666 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 to employ the beneficiary to perform as a physical therapist for one or more of the petitioner's client organizations, unidentified in the record. 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.

Although no specific job duties were listed on the H Classification Supplement to Form I-129 or the petitioner's April 27, 2004 letter of support, the Form I-129 identifies the proposed position as "Physical Therapist." In its letter of support, the petitioner stated that it is "engaged in the business of providing Physical Therapists to various health facilities," and the April 9, 2004 employment agreement between the petitioner and the beneficiary, submitted on appeal, indicates that the beneficiary would "render physical therapy services to a facility/clinic contracted by [the petitioner]."

Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

(A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.

(E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

In her August 12, 2004 request for additional evidence, the director requested evidence that the beneficiary possesses licensure to practice physical therapy in the State of New York. The director stated the following:

You must submit either evidence of a license, a letter from the licensing authority stating that licensure will be granted upon approval, or an original letter from the appropriate licensing authority stating that licensure is not required.

In response, counsel submitted a September 29, 2004 letter from the Federation of State Boards of Physical Therapy entitled "Authorization to Test." Counsel did not explain how this document satisfied the director's request; he simply stated that this document was a "[c]opy of the authorization to test for the beneficiary."

The director denied the petition on January 6, 2005 and stated the following with regard to this document:

This is not acceptable evidence that the beneficiary is licensed to practice physical therapy or that he will receive a license immediately upon arrival to the United States.

The record does not include evidence that the beneficiary is a licensed physical therapist in New York, or other evidence that he is immediately eligible to practice his profession in New York.

On appeal, counsel submits a letter from the New York Office of the Professions, Bureau of Comparative Education. This letter, dated April 4, 2003, states the following:

Please be advised that [the beneficiary] has met the following requirements for the issuance of a limited permit to practice Physical Therapy in New York State: submission of an application for licensure with appropriate fee and evidence of acceptable education, permit application, signed by a prospective employer, with appropriate fee.

The limited permit to practice Physical Therapy in New York State may be issued upon receipt of evidence that [the beneficiary] has received a valid status from the Immigration and Naturalization Service to work in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. Licensure would not preclude

the granting of a petition if the only bar to licensure is the fact that a beneficiary is not yet present in the United States.¹

However, this letter does not satisfy 8 C.F.R. § 214.2(h)(v)(A), as the beneficiary is already physically present in the United States, in H-1B status. Thus, the Cook memorandum cited at footnote 1 offers no relief in this case. The record reflects that the beneficiary obtained an H-1B visa in Manila on September 3, 2003, and entered the United States in H-1B status shortly thereafter. While this letter would have been acceptable evidence of licensure in that petition, such is not the case here, as the instant petition is an extension. The beneficiary should have obtained her license shortly after entering the United States. If she did not, it is unclear to the AAO how she could have been working as a physical therapist and therefore maintaining her nonimmigrant status.

Accordingly, the director properly denied the petition on this ground.

Moreover, even if the AAO were to accept this letter as evidence of licensure, the evidence of record would still be insufficient to establish that the beneficiary is qualified to perform the services of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(v)(B), if a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

The April 4, 2003 correspondence from the State of New York indicates that, as of that date, the beneficiary was qualified for temporary licensure in physical therapy. However, there would be restrictions on the temporary license. The duration of the license would be six months – renewable, for proper cause, for only an additional six months – and the temporary licensee would be subject to supervision. Office of the Professions, New York State Education Department, Education Law, Article 136, section 6735 on limited permits states:

- a. The department of education shall issue a limited permit to an applicant who meets all requirements for admission to the licensing examination.
- b. All practice under a limited permit shall be under the supervision of a licensed physical therapist in a public hospital, an incorporated hospital or clinic, a licensed proprietary hospital, a licensed nursing home, a public health agency, a recognized public or non-public school setting, the office of a licensed physical therapist, or in the civil service of the state or political subdivision thereof.
- c. Limited permits shall be for six months and the department may for justifiable cause renew a limited permit provided that no applicant shall practice under any limited permit for more than a total of one year.
- d. Supervision of a permittee by a licensed physical therapist shall be on-site supervision and not necessarily direct personal supervision except that such supervision need not be on-site when the supervising physical therapist has

¹ See Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, Johnny N. Williams, *Social Security Cards and the Adjudication of H-1B Petitions*, HQISD 70/6.2.8-P (November 20, 2001).

determined, through evaluation, the setting of goals and the establishment of a treatment plan, that the program is one of maintenance as defined pursuant to title XVIII of the federal social security act.

The record contains no information regarding the licensed physical therapist who would be required to supervise the beneficiary while permanent licensure is pending, and it does not provide sufficient evidence describing the level at which the duties of the proffered position would be performed under temporary licensure, the nature of the supervision that would be imposed on the beneficiary as a temporary licensee at the place of work, and any limitations that would be placed on the beneficiary's practice while under temporary licensure.

Therefore the record of proceeding does not provide CIS with sufficient information to reasonably determine that the beneficiary would be authorized to fully perform the duties of the occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(v)(B). For this additional reason, the petition must be denied.

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 petitioner's statement in its letter of support that it is engaged in the business of providing physical therapists to health facilities and 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 to a facility/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.² 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.

Pursuant to the Aytes memorandum cited at footnote 2, CIS has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Here, the record contains no documentation regarding the dates and locations of the beneficiary's employment. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.³ For this additional reason, the petition may not be approved.

Moreover, the AAO finds that the petitioner has failed to demonstrate that the petitioner would be performing services 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:

² 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).

³ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

- (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.

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 court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed 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)(1).

For this additional reason, the petition may not be approved.

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 those conclusions.

The AAO notes that this petition is for an extension of previously approved status. If the previous approval were based on the same evidence contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. The record's lack of an itinerary of definite employment precludes approval of the petition, and the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Accordingly, the AAO will not disturb the director's denial of the petition.

Finally, the AAO notes that 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,⁴ 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).

⁴ 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*

The record does not contain the requisite certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act.

However, this matter is an issue pertaining to the beneficiary's admissibility, which is beyond the AAO's jurisdiction. Accordingly, the AAO will not address the matter.

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 dismissed. The petition is denied.