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U.S. Citizenship
and Immigration
Services

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FILE: EAC 04 019 51894 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 employ the beneficiary to perform as a physical therapist for one or more of its client organizations. 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 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.

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 her conclusions.

However, the director's decision also references the petitioner's failure to provide information relevant to the circumstances of the beneficiary's working as a physical therapist prior to permanent licensure. The director cited the fact that, in response to his request for a copy of the license of the physical therapist under whose supervision the beneficiary would work, the petitioner provided a copy of a license of one of its H-1B employees.

The director's discounting of the information provided with regard to the supervision of the beneficiary constitutes a denial of the petition, in part, on the basis of a failure to satisfy temporary licensure provisions at 8 C.F.R. § 214(h)(4)(v), cited *infra*.

As discussed *infra*, the AAO finds that the denial of the petition on the basis of petitioner's failure to establish compliance with 8 C.F.R. § 214(h)(4)(v) is correct.

According to the petitioner's October 1, 2003 letter of support, the duties of the proposed position would include the following duties:

- Planning and administering medically prescribed physical therapy treatment programs for patients to restore function, relieve pain, and prevent disability following disease, injury, or loss of a body part (while working at a rehabilitation center or home health agency);
- Reviewing and evaluating physicians' referrals and patients' medical records to determine the appropriate type of physical therapy treatment required;
- Performing patient tests, measurements, and evaluations, such as range-of-motion and manual-muscle tests, gait and functional analyses, body parts measurements, recording and evaluating findings to aid in establishing or revising specifics of treatment programs;
- Administering manual therapeutic exercises to improve or maintain muscle function, applying precise amounts of manual force and guiding patients' body parts through selective patterns and degrees of movement;
- Instructing, motivating, and assisting patients in on-manual exercises, such as active regimens, isometric exercises, and progressive-resistive exercises and in functional activities, such as

ambulation, transfer and daily living activities using weights, pulleys, exercise machines, mats, steps, and inclined surfaces, and assistive and supportive devices such as crutches, canes, parallel bars, orthoses, and prostheses;

- Administering traction to relieve neck and back pain, using intermittent and static traction equipment.

The petitioner noted that the beneficiary would work in New York, where the petitioner has an existing service agreement.

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 February 3, 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:

Please submit a copy of the beneficiary's license to practice the occupation of physical therapist in New York. If law or regulations prohibit making a copy, the original must be submitted. You must either submit a license or an original letter from the appropriate licensing authority stating that licensure is not required.

The letter that you submitted only states that the beneficiary's education has been approved. It further states that he needs to schedule the examination by the Federation for State Boards of Physical Therapy (FSBPT) and that his application has been forwarded to the Physical Therapy Licensing Unit. This is not sufficient evidence that he has a license to practice Physical Therapy or that he will be issued one immediately upon arrival.

In response, the petitioner submitted a March 5, 2004 letter from the New York Office of the Professions, Bureau of Comparative Education stating 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

The instant petition was filed on October 27, 2003. However, the letter authorizing the beneficiary's temporary licensure was not issued until March 5, 2004. Therefore, the beneficiary did not meet the licensure requirement of 8 C.F.R. § 214.2(h)(v)(A) because, at the time the petition was filed for approval, the State of New York had not authorized the beneficiary to receive a temporary license to immediately practice physical therapy. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, on appeal the petitioner has not overcome director's reason for discounting the license of an H-1B employee of the petitioner as establishing that the beneficiary would be supervised by a licensed physical therapist. There is no evidence to corroborate that the person cited by the petitioner would actually supervise the beneficiary. In addition, the record does not establish the nature of the beneficiary's supervision and the latitude of the therapy practices in which he would actually engage, therefore denying Citizenship and Immigration Services information necessary to analyze

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).

whether the beneficiary would fully perform the duties of a physical therapist, as required by 8 C.F.R. § 214.2(4)(v)(B) For these reasons, the appeal will be dismissed, and the petition will 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 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 any clinic, organization and/or individual as may be designated by the [petitioner]," the "Master Agreement" between the petitioner and [REDACTED], and the petitioner's statement in its letter of support that the beneficiary would work pursuant to "an existing service agreement," 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.

In his request for evidence, the director asked for contracts of work to be performed. Pursuant to the Aytes memorandum cited at footnote 2, 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 "Master 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.³

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 October 27, 2003, and the "Master Agreement" is dated June 7, 2004. The petitioner, therefore, cannot use this agreement to demonstrate that an itinerary for the position existed on October 27, 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

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 The period of authorized employment requested on the Form I-129 was March 30, 2004 through March 29, 2005. The "Staffing Agreement" between the petitioner and [REDACTED], for whom the beneficiary would work, covers the period June 7, 2004 through June 7, 2005, so it does not cover the entire period of requested employment.

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.

The petitioner has failed to provide an itinerary of employment pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B), and it has failed to demonstrate that an itinerary for the position existed at the time the petition was filed. For this additional reason, the petition may not be approved.

Accordingly, the petition may not be approved, and 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).

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 not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.

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 Workers: Adjudicator’s Field Manual Update AD 03-31* (September 22, 2003).