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FEB 01 2007

FILE: EAC 04 242 50218 Office: VERMONT SERVICE CENTER Date:

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:

SELF - REPRESENTED

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded to the director for entry of a new decision.

The petitioner is a licensed home healthcare agency and staffing company. It seeks to employ the beneficiary as a physical therapist and endeavors to classify her 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 a certified labor condition application (LCA) was not obtained for the intended place of employment (New York City) prior to the filing of the Form I-129 petition. The LCA submitted with the filing of the Form I-129 petition on August 21, 2004 was certified on August 11, 2004 for employment in Elmhurst, NY. On appeal, the petitioner submitted a new LCA for New York, NY and a new Form I-129. The new LCA was certified on August 3, 2005. The new Form I-129 is dated August 16, 2005, but there is no indication that it was filed with Citizenship and Immigration Services (CIS) prior to its submission on appeal or that the appropriate filing fee was paid for the new petition.

The issue to be discussed in this proceeding is whether a certified LCA was obtained prior to the filing of the Form I-129 petition.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 1182(n)(1)

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition "a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." The regulations further provide at 8 C.F.R. § 214.2(h)(4)(i)(B)(1):

:

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 LCA submitted with the filing of the Form I-129 petition noting a work location in Elmhurst, NY was certified prior to the filing of the petition, and is within the standard metropolitan statistical area for New York, NY, the place of intended employment for the beneficiary. The LCA is therefore valid and the director's decision to the contrary is withdrawn. The matter shall be remanded to the director to determine whether the proffered position is a specialty occupation, and if so, whether the beneficiary qualifies to perform the duties of the proffered position. It should be noted, however, that present record does not establish that the proffered position is a specialty occupation. The petitioner is a contractor who provides

personnel to perform work for third party clients. The job order provided by the petitioner in response to the director's request for evidence does not describe the duties to be performed by the beneficiary in sufficient detail to determine that the proffered position requires a baccalaureate level education in a specific specialty and qualifies as a specialty occupation. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th 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). Under these circumstances, the director should exercise his discretion to request a work order signed by both the petitioner and the third party contractor who will ultimately make use of the beneficiary's services, and one that specifically describes the duties to be performed by the beneficiary for the third party contractor. The director shall issue a new decision commensurate with the directives of this opinion, and may request such additional evidence as he deems necessary in rendering his opinion.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for entry of a new decision commensurate with the directives of this opinion, which, if adverse to the petitioner is to be certified to the AAO for review.