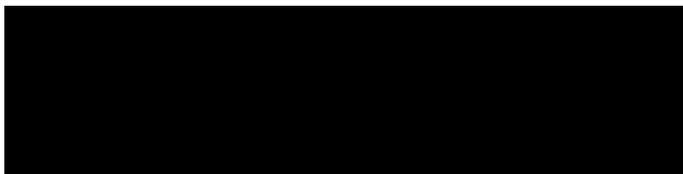


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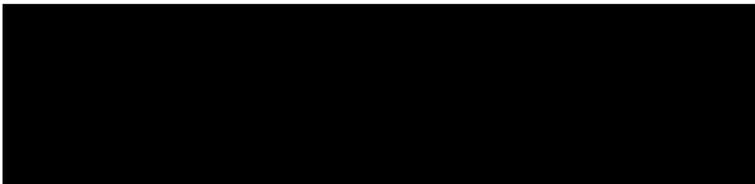
FILE: EAC 04 006 50213 Office: VERMONT SERVICE CENTER Date:

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:



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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a recruitment and staffing agency that seeks to employ the beneficiary 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, initially submitted on October 6, 2003; (2) the director's June 3, 2004 notice of intent to revoke (NOIR) approval of the petition; (3) the petitioner's June 15, 2004 NOIR response; (4) the director's August 12, 2005 revocation; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director revoked the approval of the petition on the basis of his determination that the petitioner had not established that a specialty occupation existed at the time the petition was filed. The director also found the employment agreement between the petitioner and the beneficiary null and void because the beneficiary did not possess licensure at the time the agreement was signed.

In his revocation, the director also looked beyond the record of proceeding. Noting that the petitioner currently employs eight accountants, the director stated that "[i]t is questionable that a company of your size and scope would require the services of such a large accounting staff performing virtually identical duties." The director also denied the petition—citing section 274C(a) of the Act—because Citizenship and Immigration Services (CIS) was unable to make a determination of the "validity of any positions offered or claims made, or the authenticity of any documents submitted by [the petitioner]" due to "the large number of obvious and intentional alterations to various documents submitted by [the petitioner] as well as a number of misleading statements made by [the petitioner]." In particular, the director found that "contracts between [the petitioner] and the beneficiary as well as pay statements for several beneficiaries...had been obviously altered" to remove sponsorship or filing fee deductions. The director also noted inconsistencies in the number of employees the petitioner listed in the various petitions it had filed and in income tax statements submitted with those petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants" concerning the number of accountants working for the petitioner.

As a preliminary matter, the AAO finds that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Furthermore, 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner "if a decision will be adverse to the...petitioner and is based on derogatory information considered by the Service and of which the...petitioner is unaware", and give the petitioner "an opportunity to rebut the information in his/her own behalf before the decision is rendered." The director's June 3, 2004 notice of intent to revoke approval of the petition did not give the petitioner adequate notice of the director's intention to deny the petition on the basis of misrepresentations or alteration of documents or an opportunity to rebut this information.

The AAO agrees with the director that the petitioner has not established that a specialty occupation existed at the time the petition was filed.

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.

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 duties described by the petitioner indicate that the proposed position is that of a physical therapist. The evidence of record establishes that the petitioner, in general, is an employment contractor in that the petitioner places individuals at multiple locations to perform services established by contractual agreements for third-party companies.

In its June 15, 2004 response to the director's request in the NOIR for a copy of the petitioner's contract with the specific facility where the beneficiary will be placed, the petitioner submitted a staffing agreement dated April 20, 2004 between the petitioner and Grand Central Physical Medicine & Rehabilitation. This staffing agreement, which mentioned the beneficiary by name, was to commence on April 20, 2004 and last for one year. However, this staffing agreement was executed subsequent to the filing of the petition on October 6, 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."

Accordingly, the AAO finds that the petitioner has failed to demonstrate that it had, on the date the petition was filed, a specialty occupation to be filled. The statute and regulations require that a petitioner establish that it will employ the beneficiary in a specialty occupation. Section 101(a)(15)(H)(i)(1) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has not established that as of the filing date of the petition it would employ the beneficiary in a specialty occupation. Accordingly, the petition may not be approved, and the AAO will not disturb the director's revocation of the petition's approval.

The AAO next turns to the issue of the beneficiary's licensure to practice physical therapy. 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.

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 record contains a letter from the Office of the Professions of the New York State Education Department, dated December 10, 2003, indicating that the beneficiary would be issued a limited permit to practice physical therapy in the United States upon approval of the H-1B petition. However, the AAO notes that this letter was issued subsequent to the date the petition was filed on October 6, 2003. 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). Thus, the petitioner has not established that as of the date the petition was filed, the beneficiary was qualified to practice physical therapy in the State of New York.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, approval of the petition was in violation of paragraph (h) of the cited regulation and constituted gross error. No evidence has been offered to overcome the grounds for revocation, and the AAO will not withdraw the director's decision.

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. Approval of the petition is revoked.

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).