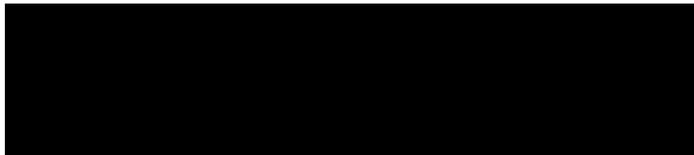


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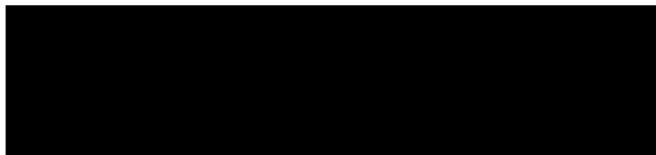
FEB 27 2007

FILE: EAC 03 223 53367 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 service center director revoked 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 revoked.

The petitioner is a staffing agency and seeks to employ the beneficiary as a physical therapist. The petitioner 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 director revoked the prior approval of the petitioner's Form I-129 petition, in part, because the petitioner submitted a Labor Condition Application (LCA) for a New York city work location when the beneficiary was going to be performing services for the petitioner's client in Suffern, NY. The director also revoked approval of the petition because the beneficiary was not licensed to work as a physical therapist in the state of New York at the time the petition was filed. The director further stated that due to the apparent alteration of documents and misleading statements made by the petitioner, Citizenship and Immigration Services (CIS) could not determine the validity of any position offered or claim made, or the authenticity of any document submitted and held that the petitioner had not established eligibility for the benefit sought. On appeal, counsel states that the beneficiary is licensed to work as a physical therapist, that the LCA submitted is valid for the beneficiary's work location, and that the petition should be approved.

The LCA submitted with the Form I-129 petition is for the city of New York. The proposed work location for the beneficiary is Suffern, NY. Suffern, NY is within the standard metropolitan statistical area for the city of New York. The LCA submitted is, therefore, valid for the beneficiary's proposed work location. The director's decision to the contrary is withdrawn.

The next issue to be determined is whether the beneficiary is qualified to perform the duties of a specialty occupation, a physical therapist in this instance.

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 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent or the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The director found, in part, that the beneficiary was not qualified to perform the duties of the proffered position because the petitioner failed to submit a license authorizing the beneficiary to practice physical therapy in New

York.

The record does not establish that the beneficiary was qualified to work as a physical therapist in the State of New York when the initial petition was filed. The record indicates that the Form I-129 petition was filed on July 20, 2003. On May 19, 2004, the director gave notice of her intent to revoke the approval of the petition because the record did not establish that the beneficiary was qualified to enter the United States to immediately engage in employment in the occupation of a physical therapist. At the time the Form I-129 petition was filed, the petitioner submitted a letter dated May 19, 2003 from the New York State Education Department indicating that the beneficiary's educational credentials had been approved and that she was at that time eligible to take the physical therapy examination for licensing. The beneficiary had not obtained a license or been authorized by the State of New York to practice physical therapy immediately upon her arrival in the United States. By letter dated January 22, 2004, approximately six months after the filing of the petition, the State of New York indicated that the beneficiary was at that time eligible to obtain a limited permit to practice physical therapy upon receipt of evidence that the beneficiary had obtained valid immigration status. The director's decision revoking approval of the present petition shall not be disturbed as the petitioner failed to establish that the beneficiary was qualified to perform the duties of the proffered position immediately upon arrival in the United States.

The petitioner cites the memorandum of Thomas E. Cook, Assistant Commissioner, Office of Adjudications (November 20, 2001), in support of its position that the beneficiary may be considered qualified to perform the services of the specialty occupation. The memorandum indicates that when the only impediment to licensure is the alien's physical presence in the United States the alien may be issued a visa without having first obtained a license. In this case, the beneficiary did not receive a letter from the state of New York indicating that she was qualified for a limited permit upon proof of valid status in the United States, until six months after the petition was filed. 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).

Beyond the decision of the director, 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. The record indicates that the petitioner entered into a staffing agreement on April 30, 2004 with North County Medical Services to place the beneficiary with that facility as a physical therapist. The staffing agreement creating the beneficiary's employment opportunity was entered into approximately nine months after the Form I-129 petition was filed. The petitioner has not, therefore, established that a specialty occupation was available for the beneficiary when the petition was filed. For this additional reason, the petition may not be approved.

The director also makes reference to matters outside the record in issuing his revocation of the present petition. If matters outside the record adverse to the petitioner come to the director's attention and are considered in denying a petition, the director should first issue a NOIR giving the petitioner an opportunity to respond to any adverse information considered. The director should also make any such adverse information considered a part of the record. A portion of the information referenced by the director in denying the petition concerns the number of positions petitioned for and approved in unrelated cases, and the petitioner's inconsistent statements concerning employment of those individuals. The petitioner should note that it must notify CIS of any change in employment circumstances of any beneficiary approved for H-1B classification pursuant to C.F.R. § 214.2(h)(11)(i)(A).

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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 and the appeal shall accordingly be dismissed.

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