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FILE: EAC 03 132 50139 Office: VERMONT SERVICE CENTER Date: JAN 23 2007

IN RE: Petitioner: [REDACTED] INC.
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:
[REDACTED]

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 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 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, initially submitted on March 24, 2003; (2) the director's June 25, 2004 notice of intent to revoke (NOIR) approval of the petition; (3) the petitioner's July 22, 2004 NOIR response; (4) the director's August 19, 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 certified labor condition application (LCA) contained in the record was not valid for the location of intended employment and that the employment agreement between the petitioner and the beneficiary was null and void because the beneficiary did not possess physical therapy licensure at the time the agreement was signed. The director also found that the "immigration sponsorship fee" to be paid by the beneficiary to the petitioner violated 8 C.F.R. § 655.731(c)(9).

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 25, 2004 notice of his 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.

Also, the AAO agrees with counsel that the certified LCA contained in the record is valid for the location of intended employment. It finds that West New York, New Jersey is within the “the area of normal commuting distance” of Engleside, New Jersey as defined at 20 C.F.R. § 655.715.

The AAO next turns to the issue of the “immigration sponsorship fee” to be paid by the beneficiary to the petitioner. As noted by the director, “item 8” of the employment agreement between the petitioner and the beneficiary calls for the beneficiary to pay the petitioner a fee of \$3,000 as a sponsorship fee. The director found this payment in violation of 8 C.F.R. § 655.731(c)(9). The petitioner does not address this finding on appeal.

The regulation at 20 C.F.R. § 655.731(c) states the following:

(c) Satisfaction of required wage obligation.

- (1) The required wage must be paid to the employee, cash in hand, free and clear, when due, except that deductions made in accordance with paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage. . . .

Thus, only deductions which are specifically authorized by 20 C.F.R. § 655.731(c)(9) may reduce the beneficiary’s salary below the level of the prevailing wage. The regulation at 20 C.F.R. § 655.731(c)(9) permits three types of deductions:

- (9) “Authorized deductions,” for purposes of the employer’s satisfaction of the H-1B required wage obligation, means a deduction from wages in complete compliance with one of the following three sets of criteria (i.e., paragraph (c)(9)(i), (ii), or (iii))--
 - (i) Deduction which is required by law (e.g., income tax; FICA); or
 - (ii) Deduction which is authorized by a collective bargaining agreement, or is reasonable and customary in the occupation and/or area of employment (e.g., union dues; contribution to premium for health insurance policy covering all employees; savings or retirement fund contribution for plan(s) in compliance with the Employee Retirement Income Security Act, 29 U.S.C. 1001, et seq.), except that the deduction may not recoup a business expense(s) of the employer (including attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of LCA and H-1B petition); the deduction must have been revealed to the worker prior to the commencement of employment and, if the deduction was a condition of employment, had been clearly identified as such; and the deduction must be made against wages of U.S. workers as well as H-1B nonimmigrants (where there are U.S. workers); or
 - (iii) Deduction which meets the following requirements:

- (A) Is made in accordance with voluntary, written authorization by the employee (Note to paragraph (c)(9)(iii)(A): an employee's mere acceptance of a job which carries a deduction as a condition of employment does not constitute voluntary authorization, even if such condition were stated in writing);
- (B) Is for a matter principally for the benefit of the employee (Note to paragraph (c)(9)(iii)(B): housing and food allowances would be considered to meet this "benefit of employee" standard, unless the employee is in travel status, or unless the circumstances indicate that the arrangements for the employee's housing or food are principally for the convenience or benefit of the employer (e.g., employee living at worksite in "on call" status);
- (C) Is not a recoupment of the employer's business expense (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)). (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.);
- (D) Is an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered (Note to paragraph (c)(9)(iii)(D): The employer must document the cost and value); and
- (E) Is an amount that does not exceed the limits set for garnishment of wages in the Consumer Credit Protection Act, 15 U.S.C. 1673, and the regulations of the Secretary pursuant to that Act, 29 CFR part 870, under which garnishment(s) may not exceed 25 percent of an employee's disposable earnings for a workweek.

Pursuant to 20 C.F.R. § 655.731(c), the salary paid to the beneficiary must be equal to, or higher than, the prevailing wage listed on the certified labor condition application (LCA). No deductions from the amount paid to the beneficiary by the petitioner that would take the beneficiary's salary below that amount are permitted, unless the deduction falls under one of the three categories permitted by 20 C.F.R. §§ 655.731(c)(9)(i), (ii), or (iii).

The deduction to be taken for the loan does not qualify under the first exception, set forth at 20 C.F.R. § 655.731(c)(9)(i), as the deduction is not "required by law."

Nor does the deduction to be taken for the loan qualify under the second exception, set forth at 20 C.F.R. § 655.731(c)(9)(ii), as it is to recoup a business expense of the employer. As stated in the regulation, attorney fees and other costs connected to the performance of H-1B program functions, such as

the preparation and filing of the LCA and H-1B petition, are required to be performed by the employer and therefore constitute a “business expense of the employer.”¹

Nor does the deduction to be taken for the loan qualify under the third exception, set forth at 20 C.F.R. § 655.731(c)(9)(iii), as it does not meet all five conditions of that exception. Recovering sums spent on attorney fees and other costs connected to the performance of H-1B program functions, such as the preparation and filing of LCA and H-1B petition, is considered recoupment of a business expense. Further, the deduction may not be considered voluntary under 20 C.F.R. § 655.731(c)(9)(iii)(A).

Accordingly, the deduction to be taken for repayment of the loan satisfies none of the exceptions set forth at 20 C.F.R. § 655.731(c)(9). Accordingly, the AAO’s next line of inquiry is to determine whether the deduction of the \$3,000 from the beneficiary’s salary would reduce her salary to a level below the prevailing wage.

According to the certified LCA, the prevailing wage for this position is \$40,000 per annum. The LCA states that the proffered salary is also \$40,000 per annum. Taking into account the \$3,000 to be deducted for repayment of the loan, her salary would be \$37,000 per annum, or \$3,000 below the prevailing wage.

As provided by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner shall certify at the time of filing the petition that it will comply with the terms of the LCA. As the petitioner’s contract with the beneficiary clearly indicates that it is not in compliance with the terms of the LCA, the petition must be denied.

The director also found that as of the date of the employment agreement entered into between the petitioner and the beneficiary, the beneficiary was not authorized to practice physical therapy. The record does not establish that as of the filing date of the petition, the beneficiary was authorized to practice physical therapy with a limited permit under the supervision of a licensed physical therapist. The record contains a letter predating the filing of the petition from the State of New Jersey Department of Law and Public Safety indicating that the beneficiary is authorized to apply to sit for the National Physical Therapy Examination (NPTE). However, the record does not contain a letter from New Jersey indicating that the beneficiary’s application to take the NPTE had been received and accepted. Nor does the record establish that the petitioner had arranged for the beneficiary to practice under the supervision of a licensed physical therapist as of the filing date. 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, the petition may not be approved, as the petitioner has not demonstrated that it will employ the beneficiary 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:

- (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.

¹ The contract of employment does not clarify that the \$3,000 fee is not for the H-1B visa sponsorship.

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 July 22, 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 July 9, 2004 between the petitioner and Medical Breakthroughs, P.C. This staffing agreement, which mentioned the beneficiary by name, was to commence on July 12, 2004 and last for one year. However, this staffing agreement was executed subsequent to the filing of the petition on March 24, 2003. The petitioner cannot use this agreement to demonstrate that a position existed at the time the petition was filed. 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 is not in compliance with the terms of the LCA regarding wages, and that the beneficiary was not authorized to practice physical therapy in the State of New Jersey as of the filing date of the petition. Beyond the decision of the director, 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. Accordingly, the petition may not be approved, and the AAO will not disturb the director's revocation of the petition's approval.

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 because approval of the petition 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.