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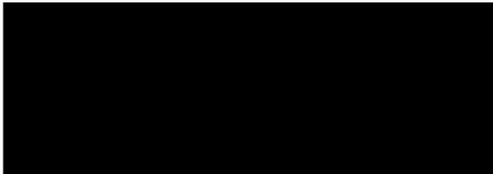
FILE: EAC 03 202 53936 Office: VERMONT SERVICE CENTER Date: **NOV 28 2007**

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, Chief  
Administrative Appeals Office

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

The petitioner is an employment staffing company that seeks to employ the beneficiary as a physical therapist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 filed June 27, 2003 with supporting documentation; (2) the director's June 3, 2004 notice of intent to revoke approval of the petition (NOIR); (3) the petitioner's June 14, 2004 response to the director's NOIR; (4) the director's November 15, 2005 revocation letter; and (5) the Form I-290B, Notice of Appeal. Although the Form I-290B indicates that a brief and/or additional evidence would be submitted to the AAO within 30 days, careful review of the record reveals no subsequent submission of a brief or evidence on the matter before the AAO. The AAO reviewed the record in its entirety before issuing its decision.

On November 15, 2005, the director revoked approval of the petition determining, in part: (1) that the May 14, 2003 letter authorizing the beneficiary to receive a limited permit to practice physical therapy in the State of New York upon submission of evidence that she had valid status to work in the United States is insufficient to establish that the beneficiary had a license prior to entering into a contract with the petitioner; and (2) that the petitioner's staffing agreement with a third party had been signed after the petitioner had filed the petition on behalf of the beneficiary. The director concluded that the petitioner did not have an opening for the beneficiary's services when the petition was filed.

In addition, the director looked beyond the record of proceeding and found that 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 other matters. 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 these petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants," "financial analysts," and "strategic management analysts."

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Counsel's statement on the Form I-290B reads: "Appeal brief to follow." However, the record does not contain an appeal brief. By facsimile transmission, the AAO requested counsel to forward any previously filed brief on October 30, 2007 and again on November 16, 2007. No response has been received. Accordingly, the record is considered complete. Although the record does not include an appeal brief addressing

any perceived errors on the part of the director, the AAO will provide a brief analysis of this matter and will withdraw a portion of the director's revocation decision.

The AAO observes that the director's revocation of approval of the petition based on altered evidence in other proceedings is in error. The record does not contain obvious alterations in the contract between the petitioner and the beneficiary. With regard to the other matters noted by the director, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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 NOIR sent by the director in this matter did not give the petitioner adequate notice of the director's intention to revoke approval based on alleged misrepresentations in other proceedings and did not provide the petitioner an opportunity to rebut this information. Thus, the director's determination regarding derogatory information in other proceedings is withdrawn.

The AAO finds however that the director's properly determined that the record did not substantiate that the petitioner had a specialty occupation available when the petition was filed. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of 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:

An 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered 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 14, 2004 rebuttal to the director's request 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 8, 2004 between the petitioner and Midtown Medical & Health Offices. The staffing agreement included an addendum referencing the beneficiary by name and indicating her work commencement date as June 1, 2004 for a term of one year. Thus, the staffing agreement submitted as evidence that the petitioner had a position for the beneficiary was not executed and in effect until after the petition had been filed. Accordingly, the staffing agreement does not demonstrate that the petitioner had a specialty occupation available when the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The AAO cannot consider facts that come into being only subsequently to the filing of the petition. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The director also found that the record did not establish that the beneficiary was qualified to perform the services of a specialty occupation as of the filing date of the petition. The AAO agrees. The AAO acknowledges the May 14, 2003 letter from the New York State Education Department indicating that the beneficiary may receive a limited permit to practice physical therapy as soon as an H-1B visa is issued. However, the petitioner did not have, as of the date of filing, a licensed physical therapist under whom the beneficiary would practice the profession. The letter from Midtown Medical & Health Offices that indicates the beneficiary would work under the supervision of Mariflor Trinidad, a licensed physical therapist, is dated April 8, 2004 almost a year after the petition was filed. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. 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) as the petitioner had not established the proffered position as a specialty occupation when the petition was filed and had not established that the beneficiary was eligible to perform the duties of a specialty occupation when the petition was filed. 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.

As neither the petitioner nor counsel presents additional evidence or argument on appeal, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The approval of the petition will be revoked and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the 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 summarily dismissed. The approval of the petition is revoked.