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U.S. Citizenship and Immigration Services

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[redacted]

JAN 27 2004

FILE: EAC 02 066 52720 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[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, Director
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 The director's decision will be withdrawn and the matter remanded to him for entry of a new decision.

The petitioner is a New Jersey home health care services company that seeks to contract out the beneficiary's services as an occupational 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 denied the petition because, based on the petitioner's submitted financial reports, the petitioner did not appear to have the financial resources to make a bona fide employment offer to the beneficiary. On appeal, counsel submits a brief with additional documentation to further substantiate the nature of the petitioner's business operations and finances.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for further evidence dated February 11, 2002; (3) the petitioner's response to the director's request for further evidence; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Evidence of the petitioner's financial operations includes: the I-129 petition; the petitioner's December 3, 2001 letter in support of the petition; and the petitioner's response to the director's request for further evidence. In the original petition, the petitioner identified itself as a full service rehabilitation center serving New Jersey that employed three employees and realized gross annual sales in excess of one million dollars. In its request for further evidence, the director requested the petitioner's most recently filed federal income tax return for a full year, a copy of the petitioner's business lease, and a bank statement for the petitioner, among other documents. The petitioner submitted the requested information with the exception of the most recently filed federal income tax return for a full year.

In his denial, the director determined that the petitioner had paid salaries totaling $10,108 in the quarter ending December 31, 2001, for an annualized amount of about $40,432. The director stated that the annualized salary total was an amount smaller than the salary offered to the beneficiary, and determined that the petitioner did not have a bona fide offer of employment for the beneficiary. On appeal, counsel states that although the petitioner incorporated in 1999, it had only begun business operations in September 2001. Counsel asserts that the petitioner included the figure of $1 million annual gross income as an anticipated amount of income, and regrets the inconvenience caused by the petitioner's inaccurate information. Counsel further identifies the petitioner as having two employees and twenty-seven individual contractors and submits a quarterly statement for the petitioner for the first two quarters of the year 2002 with evidence of the bills submitted to individual health facility contractors for services rendered by the petitioner's contractual employees. Counsel also submits copies of contracts with organizations such as the Mercer County Geriatric Center, Red Bank Convalescent Center, and the Princeton Nursing Home & Rehabilitation Center. These contracts specify that the petitioner as a subcontractor will provide healthcare services or long term nursing care services to the contracting health facilities.

While the determination of suitable wages and the enforcement of their payment with respect to the H-1B classification are primarily the responsibility of the Department of Labor, Citizenship and Immigration Services (CIS) will comment on the director's determination with regard to whether a bona fide offer of employment has been made to the beneficiary. Upon review of the financial reports submitted in response to the director's request for further evidence and on appeal, the petitioner does appear to be able to pay for the beneficiary's services at the proposed wage level. It should be noted that for purposes of the H-1B

adjudication, the issue of the bona fide employment is viewed within the context of whether the petitioner has offered the beneficiary a position that is viewed as a specialty occupation. Of greater importance to this proceeding, therefore, is whether the petitioner has provided sufficient evidence to establish that the services to be performed by the beneficiary are those of a specialty occupation.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

Citizenship and Immigration Services (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 proffered position.

In addressing whether the proffered position is a specialty occupation, the record is devoid of any documentary evidence as to where the beneficiary would be performing her services, and whether her services would be that of an occupational therapist.

The record contains documentary evidence such as contracts between the petitioner and various health or rehabilitation facilities in New Jersey, as well as evidence of the payment of salaries to twenty-seven contractual employees during 2002 who performed unidentified healthcare or other health services at various healthcare facilities. None of the contracts specify any occupational therapist positions to be filled by the petitioner. There is no evidence on the record as to the current employment of any occupational therapists by the petitioner. There is no evidence on the record as to any contract between the beneficiary and any of the health care facility contractors. The documentation presently on the record is not sufficient to establish the ultimate employment of the alien, and whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner,* 201 F.3d 384 (5th Cir. 2000). The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[1]

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. With regard to the issue of a bona fide employment offer that the director addressed in his decision, the petitioner has sustained that burden. Nevertheless, the issue of whether the beneficiary will be performing the duties of a specialty occupation remains unresolved. The petition is remanded to the director to determine whether the proffered position is a specialty occupation and more specifically, evidentiary documentation as to the nature and location of the beneficiary's employment. The director may request any additional evidence deemed necessary to assist him with his determination.

ORDER: The director's decision is withdrawn. The case is remanded for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *Supra* at 387.