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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

Dr

FILE: LIN 03 165 50850 Office: NEBRSKA SERVICE CENTER Date: DEC 02 2005

IN RE: Petitioner:
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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is provider of rehabilitation services and staffing. It seeks to employ the beneficiary as a physical therapist and to continue her classification 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 on the grounds that the record failed to establish that the proffered position qualifies as a specialty occupation.

Section 214(i)(l) of 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.

As provided in 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 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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, the petitioner' letter outlining the appeal, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial documentation, including Form I-129 and an accompanying letter, the petitioner indicated that it is a provider of physical therapy services, in business since 1996, with 109 employees and gross annual income of $3,176,590. The petitioner stated that it had employed the beneficiary as a staff physical therapist in H-1B status since August 2002 and wished to extend the beneficiary's stay in the United States for an additional three years in H-1B status. The duties of the proffered position, according to the petitioner, included providing therapy services as prescribed by a physician, receiving and assessing patients, writing a plan of care, and monitoring the patient's progress. Documentation in the record shows that the beneficiary graduated from Quezon City Medical Center and Colleges in the Philippines on April 8, 1999 with a bachelor of science in physical therapy, and that she was granted a temporary physical therapist license in Indiana effective January 24, 2002. In the Labor Condition Application (Form ETA 9035) accompanying Form I-129, certified by the Department of Labor, the petitioner identified the beneficiary's work location as Indianapolis, Indiana.

In the RFE the director requested, as evidence of the duties the beneficiary actually performs, documentation of the petitioner's contracts with its client(s) stating the specific address where the beneficiary will be performing the duties of the proffered position. The director also requested copies of the beneficiary's W-2 forms for 2002 and 2003 and, if they do not show an address in Indianapolis, an explanation from the petitioner as to why the beneficiary does not reside in Indianapolis. In response to the RFE the petitioner submitted a copy of its therapy services agreement with AEGIS Therapies, Inc. ("AEGIS") of Fort Smith, Arkansas, dated August 14, 2001, under which the petitioner provides physical therapists to AEGIS. The contract stipulates that the physical therapists, while providing services to AEGIS, remain employees of the petitioner, which is solely responsible for compensating them. The petitioner also submitted its W-2 forms from 2002 and 2003, both of which identify the beneficiary's residence as Trackford, Illinois. According to the petitioner, the foregoing location is the beneficiary's permanent mailing address, while she works at different sites as a "traveling physical therapist." The petitioner did not explain the discrepancy between this information and that provided in the certified Labor Condition Application – *i.e.*, that the beneficiary's work location was Indianapolis.

In his decision the director determined that the petitioner is an employment agency or consulting firm which provides contract employees to other entities. Based on the contractual agreement between the petitioner and AEGIS, the director concluded that AEGIS is also a consulting firm providing contract employees to other entities. Though physical therapists have been determined by CIS to be a specialty occupation, the director found that there was no evidence in the record identifying any client for whom the beneficiary would actually be performing physical therapy services. Absent such evidence the director declared that the record failed to show that the beneficiary would be performing the duties of the proffered position. The director concluded that the petitioner had failed to establish that the proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2 (h)(4)(iii)(A).

On appeal the petitioner submits a copy of the beneficiary's physical therapist license from the State of Indiana, some industry literature about physical therapists, a clinical internship certificate earned by the beneficiary in the Philippines, the previously submitted academic records of the beneficiary, and excerpts from AEGIS's website which describe it as the largest contract therapy company in the United States, providing rehabilitation services at health care facilities in 36 states and the District of Columbia. The

petitioner states that the beneficiary would be assigned to one of those facilities, but does not identify which one(s).

The AAO agrees with the director's characterization of the petitioner as an employment agency or consulting firm that provides contract employees to other business entities. The petitioner is not a United States employer, as defined in the regulation at 8 C.F.R. § 214.2(h)(4)(ii), because it does not have an employer-employee relationship with the beneficiary that meets the criteria of 8 C.F.R. § 214.2 (h)(4)(ii)(2) – *i.e.*, "as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work" of the beneficiary. The petitioner may hire and pay the beneficiary, but it does not supervise or otherwise control the work of the beneficiary at the facility or facilities to which she is assigned by AEGIS.

The AAO determines that the petitioner meets the criteria of a United States agent, as described in the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F):

> A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as it[s] agent. A petition filed by a United States agent is subject to the following conditions:
>
> *(1)* An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
> *(2)* A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. *The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.* [Emphasis added.]

While the petitioner is a United States agent, the petition may not be approved as the agent has not provided an itinerary of definite employment for the period of time requested in the H-1B petition, as required under 8 C.F.R. § 214.2(h)(2)(i)(F)(*1*). The petitioner merely states that the beneficiary will be assigned to one of its client's facilities around the country, but does not identify which one. The petitioner has not provided a complete itinerary of the beneficiary's services or engagements – specifying the dates, names and addresses of the establishment, venues, or locations where the services will be performed – as required under 8 C.F.R. § 214.2(h)(2)(i)(F)(*2*). Thus, the petitioner has not met its burden, as an agent, of explaining and documenting the terms and conditions of the beneficiary's employment.

Furthermore, in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), a federal appeals court held that the Immigration and Naturalization Service (now Citizenship and Immigration Services) reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the alien workers in a particular position require a bachelor's degree for all employees in that position. The court determined that the degree requirement should not originate with the employment agency that brought the aliens to the United States for employment with the agency's clients. In the instant petition, the record contains an agency service agreement between the petitioner and its client, AEGIS, for whom the beneficiary would work, but no description of the beneficiary's proposed duties from an authorized representative of AEGIS. Without such a description, the petitioner has not demonstrated that the work the beneficiary would perform at AEGIS requires a bachelor's degree in a specific specialty, thereby qualifying the position as a specialty occupation.

Notwithstanding the approval of a prior H-1B petition on behalf of the beneficiary, the current petition to continue the beneficiary's H-1B classification cannot be approved unless the record establishes current eligibility. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The AAO is not required to approve applications or petitions in which eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). For the reasons previously discussed, the record in the instant proceeding does not show that the proffered position qualifies as a specialty occupation.

In accord with the director's decision, the AAO determines that the documentation of record fails to establish that the beneficiary will be performing the services of a physical therapist in the proffered position. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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