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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

DEC 14 2006

FILE: EAC 05 234 51273 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a staffing and recruitment service. It seeks to extend the employment of the beneficiary as a physical therapist. Accordingly, 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 record includes: (1) the August 22, 2005 Form I-129 and supporting documents; (2) the director's August 30, 2005 request for further evidence (RFE); (3) the director's September 13, 2005 denial decision; and (4) the Form I-290B and documents in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On September 13, 2005, the director denied the petition. The director observed that the petitioner had provided the necessary additional fee but had not provided evidence that the beneficiary would be employed in professional duties.

On appeal, counsel for the petitioner submits a Form I-290B and indicates that a separate brief or evidence will not be filed. The statement on the Form I-290B reads:

> On August 30, 2005, the Service sent notice to undersigned counsel requesting the ACWIA fee on behalf of the above-listed Petitioner and Beneficiary. In the same notice, the Service requested a copy of the contract between Petitioner and Beneficiary evidencing that Beneficiary would actually be working at performing the duties as described in Beneficiary's position as a physical therapist.
>
> Undersigned counsel sent the proper ACWIA fee; however, he inadvertently forgot to place a copy of the contract between Petitioner and Beneficiary in the same envelope in which he sent the ACWIA fee. Moreover, undersigned counsel did not become aware of this discrepancy until he received the Service's decision on September 13, 2005.
>
> As such, undersigned counsel respectfully requests the Service to consider the enclosed documentation on behalf of Petitioner and Beneficiary in this matter and reverse the decision denying the decision.

Counsel attached a September 14, 2005 letter signed by the petitioner's vice-president/chief operating officer indicating that the beneficiary would be a full-time employee "working in Sunrise of Woodcliff Lake at [redacted] in Woodcliff, New Jersey as a full-time contracted Physical Therapist." Counsel also attached an August 23, 2005 employment agreement between the petitioner and the beneficiary of the petition outlining the rights and responsibilities of each.

Preliminarily the AAO observes that the petitioner's Labor Condition Application (LCA) lists the petitioner's address as in Westfield, Indiana and the proffered position's work location in Westwood, New Jersey. The AAO also notes that the director's RFE stated: "ALL DOCUMENTATION REQUESTED SHOULD BE SUBMITTED TOGETHER" and "SUBMISSIONS RECEIVED AFTER THE ABOVE DATE (November 25, 2005) WILL NOT BE ACCEPTED." The AAO further observes that the director requested, in addition to the fee, evidence that "your company will employ the beneficiary on a full-time basis performing duties as a physical therapist for your company." The director did not request a copy of a contract between the beneficiary and the petitioner.

The AAO will accept the evidence submitted on appeal in this matter. However, the evidence submitted on appeal is insufficient to overcome the director's determination that the record lacked evidence demonstrating that the beneficiary would be performing the duties of a physical therapist for the petitioner's organization.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

The August 23, 2005 employment agreement between the petitioner and the beneficiary at Article II provides: Duties of Employee, subheading (1) Services Rendered indicates that the beneficiary will be hired as the

petitioner's staff therapist "under the direct supervision of Access Therapies' client and, in the capacity, primarily to provide professional therapy services to such health care facilities or organizations ("Client Facility")" as the [petitioner] shall designate from time to time." The August 23, 2005 employment agreement in the second paragraph of Article II: indicates that the beneficiary will perform her duties as a staff therapist, subject to the direction and control of the petitioner, and will work at least 40 hours per week at such "Client Facility" as the petitioner designates. The August 23, 2005 employment agreement lists the petitioner's responsibilities as the employer, in part, as providing the beneficiary's compensation, providing housing upon start of employment and during the contract, and providing a relocation allowance from one assignment to the next. The August 23, 2005 employment agreement indicates the initial term of employment is for eighteen months.

The August 23, 2005 employment agreement indicates that the beneficiary will be under the supervision of a third party, Access Therapies' client and will provide services to health care facilities as the petitioner designates. The September 14, 2005 letter signed by the petitioner indicates that the beneficiary will be placed at Sunrise of Woodcliff Lake, New Jersey. In that letter, the petitioner states that it expects the beneficiary will work for it at least two years.

The petitioner is an employment contractor in that it will place the beneficiary in multiple work locations, as indicated in the employment agreement and in the LCA that shows the proffered position is not at the petitioner's location. Thus the petitioner's description of the beneficiary's duties on appeal is insufficient to establish that the beneficiary will perform the same duties for the ultimate employer. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

When a petitioner is an employment contractor, the entity ultimately employing the alien or using the alien's services must submit a detailed job description of the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.[1] Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Going on record without supporting

[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." *See id.* at 387.

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Without a description of the beneficiary's actual duties from the entity utilizing the beneficiary's services, the AAO is precluded from determining whether the offered position is one that would normally impose the minimum of a baccalaureate degree in a specific specialty. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*). In that the record offers no description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner may not establish the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. Absent a listing of the duties the beneficiary would perform under contract, the petitioner cannot establish that it previously employed degreed individuals to perform such duties, as required by the third criterion. Neither can the petitioner satisfy the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the petitioner has not submitted an itinerary valid for the period of employment. In the Aytes memorandum cited at footnote 1, the director has the discretion to request that that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, of the conflicting evidence submitted on appeal, an itinerary or contracts reflecting the dates and locations of employment, is required in this matter. The petitioner's letter indicates that it will place the beneficiary in Woodcliff Lake, New Jersey, for two years. The employment contract submitted on appeal indicates that the beneficiary will be placed in locations at the discretion of the petitioner using a third party agency, Access Therapies, for 18 months. There is no indication on record that the employment in Woodcliff Lake, New Jersey is through Access Therapies. Further, the specified duration of employment is conflicting. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). **Neither document covers the three-year period of employment requested. In light of these** deficiencies, the petitioner's failure to provide an itinerary with dates and locations of employment precludes approval of the petition. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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