U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: LIN 04 119 51414 Office: NEBRASKA SERVICE CENTER Date: MAY 10 2006

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:

SELF-REPRESENTED

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 of the service center denied the nonimmigrant visa petition and 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 provider of rehabilitation services and staffing. It seeks to employ the beneficiary as a physical therapist. 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 director denied the petition because the petitioner failed to submit a certified labor certification application (LCA) for the intended location of employment. On appeal, the petitioner submits additional evidence.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. **A statement that it will comply** with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. **Evidence that the alien qualifies to perform** services in the specialty occupation.

The record in this proceeding contains: (1) the LCA that the Department of Labor (DOL) certified on March 11, 2004 reflecting Fort Wayne, Indiana, as the intended work location; (2) the Form I-129 petition and supporting documentation that CIS received on March 19, 2004; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; (5) the director's denial letter; (6) Form I-290B; (7) the petitioner's letter (dated September 29, 2004); (8) the February 10, 2004 letter from [redacted]; and (9) the previously submitted LCA. The AAO reviewed the record in its entirety before issuing its decision.

CIS regulations affirmatively 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). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Based on the regulations, it is incumbent upon the petitioner to file the proper documents in

order to establish eligibility for a benefit. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date 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 record reveals that the submitted LCA has Fort Wayne, Indiana, as the work location for H-1B nonimmigrants. The petitioner's June 28, 2004 and September 29, 2004 letters state that the petitioner has a contract to provide physical therapy services at the HTS facility located at [redacted] Fort Wayne, Indiana; and that the beneficiary will perform services there pursuant to the contract. The petitioner asserts that although the HTS office is located in Indianapolis, the beneficiary will perform services at the HTS location in Fort Wayne, Indiana. The petitioner states "[w]e have attached a note from [redacted] regarding their facility in Fort Wayne, Indiana."

The AAO finds that the February 10, 2004 letter from HTS does not support the petitioner's assertions concerning the beneficiary's location of intended employment. The HTS letter reads as follows:

> [redacted] is a contract therapy company for professional healthcare workers, including [p]hysical [t]herapists and [o]ccupational [t]herapists. HTS has an ongoing need for both disciplines throughout the [s]tate of Indiana.
>
> We have an immediate need for a full[-]time [p]hysical [t]herapist in Indianapolis, IN and Fort Wayne, IN.

In the letter, HTS is described as a "contract therapy company for professional healthcare workers." HTS is therefore a contract agency that places workers at the worksites of the entities that will ultimately use the services of the workers. HTS does not state in the letter that the beneficiary will work at its facility located in Fort Wayne, Indiana. As such, the HTS letter contradicts the petitioner's assertion that the beneficiary will perform services at the HTS facility located in Fort Wayne, Indiana. Moreover, the document in the record entitled "Temporary Staffing Agreement," which was entered into between the petitioner and HTS, does not indicate that the beneficiary will provide services at the HTS facility located in Fort Wayne, Indiana. Based on the inconsistent evidence in the record, and the fact that HTS is a contract agency, the AAO cannot determine the beneficiary's actual intended place of employment. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has thereby not complied with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) as the AAO cannot determine whether the submitted LCA covers the alien's intended location of employment; and the petitioner also fails to comply with CIS regulations set forth at 8 C.F.R. § 103.2(b)(12) and 8 C.F.R. § 214.2(h)(4)(iii)(B)(*1*). For this reason, the petition will be denied.

Beyond the decision of the director, the AAO cannot conclude that the proposed position qualifies as a specialty occupation. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

Although the record contains a staffing agreement between the petitioner and HTS, the letter from HTS reveals that HTS is a contract agency. Thus, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of where the beneficiary will ultimately be employed. Without such a description, the petitioner has not demonstrated that the work that the beneficiary will perform will qualify as a specialty occupation.

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. The petition is denied.