U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY
identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

D2

FILE: EAC 04 045 53388 Office: VERMONT SERVICE CENTER Date: JAN 23 2007

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 initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke, approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will be revoked.

The petitioner is a recruitment and staffing agency that seeks to employ the beneficiary to perform as a physical therapist for one or more of its client organizations. 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation, initially submitted on December 5, 2003; (2) the director's May 19, 2004 notice of intent to revoke (NOIR) approval of the petition; (3) previous counsel's June 18, 2004 NOIR response; (4) the director's August 12, 2005 revocation; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director revoked the approval of the petition on the basis of his determination that the petitioner had not established that a specialty occupation existed at the time the petition was filed and that the certified labor condition application (LCA) contained in the record was not valid for the location of intended employment. The director also found the employment agreement between the petitioner and the beneficiary null and void because the beneficiary did not possess licensure at the time the agreement was signed.

In his revocation, the director also looked beyond the record of proceeding. Noting that the petitioner currently employs eight accountants, the director stated that "[i]t is questionable that a company of your size and scope would require the services of such a large accounting staff performing virtually identical duties." The director also denied the petition—citing section 274C(a) of the Act—because 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 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 those petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants" concerning the number of accountants working for the petitioner.

As a preliminary matter, the AAO finds that the director erred in denying the petition on the basis of evidence not in the record of proceeding and without giving the petitioner an opportunity to address the reasons for denial. Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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 averse 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 director's May 19, 2004 notice of his intent to revoke approval of the petition did not give the petitioner adequate notice of the director's intention to deny the petition on the basis of misrepresentations or alteration of documents or an opportunity to rebut this information.

Also, the AAO agrees with counsel that the certified LCA contained in the record is valid for the location of intended employment. It finds that Woodside, New York is within the "the area of normal commuting distance" of New York, New York as defined at 20 C.F.R. § 655.715.

However, the AAO nonetheless agrees with the director that the petitioner has not established that a specialty occupation existed at the time the petition was filed.

Section 214(i)(1) of the Immigration and Nationality Act (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:

> [A]n 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.

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 proposed 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 18, 2004 response to the director's request in the NOIR 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 June 1, 2004 between the petitioner and JP Medical. This staffing agreement, which mentioned the beneficiary by name, was to commence on July 19, 2004 and last for one year. However, this staffing agreement was executed subsequent to the filing of the petition on December 5, 2003, so the petitioner cannot use this agreement to demonstrate that a position existed at the time the petition was filed. CIS regulations 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). A visa petition may not be approved at a future date after the **petitioner or beneficiary becomes eligible under a new set of facts.** *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition."

Accordingly, the AAO finds that the petitioner has failed to demonstrate that it had, on the date the petition was filed, a specialty occupation to be filled. Accordingly, the petition may not be approved, and the AAO will not disturb the director's revocation of the petition's approval.

The director also found that the beneficiary was not authorized to practice physical therapy as of the date the agreement was entered into with JP Medical, the proposed work location. The AAO finds that as of the filing date of the petition, the record does not establish that the beneficiary was authorized to practice physical therapy under supervision.

The AAO accepts the July 9, 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. Nevertheless, 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 JP Medical indicating that the beneficiary would work under the supervision of Gwendolyn Tan, a licensed physical therapist, is dated May 28, 2004, almost six months after the filing date of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). 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) of the cited regulation because 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.

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. Approval of the petition is revoked.