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U.S. Citizenship
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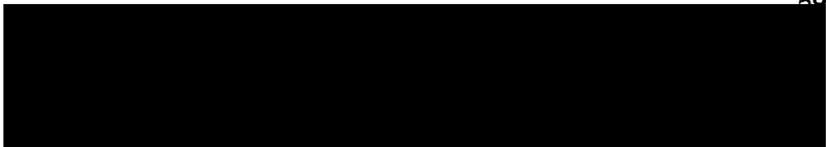
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FILE: LIN 05 222 51520 Office: NEBRASKA SERVICE CENTER Date: AUG 20 2007

IN RE: Petitioner:



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:



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 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 The director's decision will be withdrawn and the petition remanded to the director for entry of a new decision.

The petitioner is a therapy provider that 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that, since the beneficiary lacks physical therapy licensure, she is therefore unable to perform the duties of the proposed position.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

- (A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.
- (B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.
- (C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.
- (D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.
- (E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for

a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

Pursuant to 8 C.F.R. § 214.2(h)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. Licensure would not preclude the granting of a petition if the only bar to licensure is the fact that a beneficiary is not yet present in the United States.¹

In his denial, the director did not properly address the petitioner's attempt to satisfy 8 C.F.R. § 214.2(h)(4)(v)(C), which allows Citizenship and Immigration Services (CIS) to examine the nature of the proposed duties, and the level at which they are performed, if the State of intended employment (Illinois, in this case) allows unlicensed individuals to fully practice the occupation under the supervision of licensed senior or supervisory personnel. If CIS determines that Illinois makes such an allowance and determines that the beneficiary could, under the supervision of a licensed senior or supervisory physical therapist, perform the duties of the position, the petition may be approved. In his denial the director stated that the petitioner had not established that the beneficiary is authorized to perform the duties of the proposed position under the auspices of a licensed physical therapist. The AAO disagrees.

In its adjudication of this petition, the AAO has reviewed the Illinois Physical Therapy Act, with specific attention to section 90/2, which states, in pertinent part, the following:

Sec. 2. Licensure requirement; exempt activities. Practice without a license forbidden – exception. No person shall after the date of August 31, 1965 begin to practice physical therapy in this State or hold himself out as being able to practice this profession, unless he is licensed as such in accordance with the provisions of this Act. . . .

This Act does not prohibit:

- (2) The practice of physical therapy by those persons, practicing under the supervision of a licensed physical therapist and who have met all of the qualifications as provided in Sections 7, 8.1, and 9 of this Act,² until the next examination is given for physical therapists or physical therapy assistants and the results have been received by the Department and the

¹ See Memorandum from Thomas E. Cook, Acting Assistant Commissioner, Office of Adjudications, Johnny N. Williams, *Social Security cards and the Adjudication of H-1B Petitions*, HQISD 70/6.2.8-P (November 20, 2001).

² The AAO notes that, in this case, sections 7, 8.1, and 9 do not pertain to the beneficiary. Sections 7 and 9 have been repealed, and section 8.1 pertains to physical therapy assistants.

Department has determined the applicant's eligibility for a license. Anyone failing to pass said examination shall not again practice physical therapy until such time as an examination has been successfully passed by such person.

A careful reading of section 90/2 reveals that Illinois allows physical therapists such as the beneficiary to work as physical therapists, under the guidance of a licensed physical therapist, while they wait to sit for, and receive the results from, the physical therapy licensing examination. If the individual fails the examination, then he or she may not practice until they have sat for, and passed, the next licensing examination. The petitioner has established that the beneficiary has registered to sit for the Illinois physical therapy licensing examination. It therefore appears to the AAO as though she qualifies to perform the duties of the proposed position, under the supervision of a licensed physical therapist, in the State of Illinois. Accordingly, the AAO will withdraw the director's decision.

However, for the reasons discussed below, the petition may not be approved at this time.

Although it appears that the State of Illinois will permit the beneficiary to practice the duties of the proposed position, the record, as presently constituted, does not satisfy 8 C.F.R. § 214.2(h)(4)(v)(C). As noted previously, that regulation allows CIS to examine the nature of the proposed duties, and the level at which they are performed, if the State of intended employment allows unlicensed individuals to fully practice the occupation under the supervision of licensed senior or supervisory personnel. The AAO has made such an examination, and determines that, in this case, the petitioner has established that the beneficiary could in fact fully perform the duties of the proposed position under supervision. However, 8 C.F.R. § 214.2(h)(4)(v)(C) specifically states that the beneficiary must be supervised by licensed "senior or supervisory personnel." The petitioner has submitted the name and license of an individual whom it states will supervise the beneficiary. However, the petitioner has not established that this individual holds a senior or supervisory position within its hierarchy. Nor has the petitioner developed its job description for the proposed position with sufficient specificity to indicate the nature of the supervision that would be imposed on the beneficiary.

As the director did not address these matters, the petition will be remanded in order to afford the petitioner the opportunity to address it.

Beyond the decision of the director, the AAO finds that at this time the petition may not be approved for another reason: the record does not establish that the beneficiary will perform services in a specialty occupation. 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 term "employer" is defined at 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 evidence of record, however, also establishes that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.³ See 8 C.F.R. § 214.2(h)(4)(ii).

The petitioner's July 15, 2005 letter of support states the following:

³ See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

[The petitioner] specializes in provided an integrated rehabilitation program designed to improve the physical function of disabled individuals in the Chicagoland area. Contracting with facilities and home health care providers to bring this essential care to those patients most in need. . . .

Such language indicates that the beneficiary would not be performing services at the petitioner's place of business, but would rather be working at various locations as established by contractual agreements between the petitioner and its clients.

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location. While the Aytes memorandum cited at footnote 3 broadly interprets the term "itinerary," it provides CIS the discretion to require that the petitioner submit the dates and locations of the proposed employment. As the record indicates that the beneficiary be working at various locations as established by contractual agreements between the petitioner and its clients, the director in this case should exercise his discretion to require an itinerary of employment for the three-year period of requested employment.⁴

The record as presently constituted contains no contracts, work orders or statements of work from the entity, or entities, for whom the beneficiary would provide her services. It does not contain an itinerary. Absent such information, the petitioner has not established that it has three years' worth of H-1B-level work for the beneficiary to perform, and therefore has not satisfied 8 C.F.R. § 214.2(h)(2)(i)(B). Therefore, the petition, as presently constituted, cannot be approved.

The record also does not establish that the beneficiary would perform specialty occupation work for the petitioner's clients, whose specific needs would determine the actual work that the beneficiary would perform under this petition. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proposed position is a specialty occupation, the 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 proposed position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner's clients, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies for classification as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I). The petition, therefore, may not be approved at this time.

⁴ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary is qualified to perform the duties of a specialty occupation, that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), or that the petitioner has submitted an itinerary of employment. However, the director did not address these issues. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of a specialty occupation (specifically, to establish that the individual who was named as the beneficiary's supervisor holds a senior or supervisory position as well as to submit a more detailed job description to indicate the nature of the supervision that would be imposed on the beneficiary); that the proposed position qualifies for classification as a specialty occupation (specifically, to provide a detailed job description from the entity for whom the beneficiary would be performing services); and to provide an itinerary of services to be performed, with the dates and locations of the proposed employment. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 18, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.