

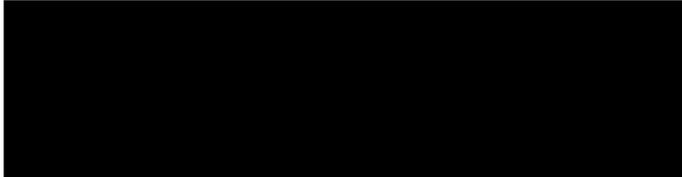
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U.S. Citizenship
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Services

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FILE: EAC 03 225 55175 Office: VERMONT SERVICE CENTER Date: FEB 05 2007

IN RE: Petitioner: [Redacted]
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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is an employment staffing company that seeks to employ the beneficiary as a physical therapist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 August 1, 2003 Form I-129 with supporting documentation; (2) the director's October 15, 2003 request for further evidence (RFE); (3) counsel's December 16, 2003 response to the director's RFE; (4) the director's May 19, 2004 notice of intent to revoke approval of the petition (NOIR); (5) counsel's June 15, 2004 response to the director's NOIR; (6) the director's August 3, 2005 denial letter; and (7) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner submitted the petition on August 1, 2003. On October 15, 2003 the director requested an evaluation of the beneficiary's foreign education and a copy of the beneficiary's authorization to perform the duties of a physical therapist in the State of New York. In a December 16, 2003 response, counsel provided an evaluation of the beneficiary's foreign education that concluded that the beneficiary possessed the equivalent of a bachelor's of science degree in physical therapy. Counsel also submitted an April 14, 2003 letter from the Bureau of Comparative Education indicating that the beneficiary's education had been approved and that she could apply for a physical therapy license.

On May 19, 2004 the director notified the petitioner that it had approved the petition in error. The director requested a copy of the beneficiary's license to practice physical therapy in the State of New York. The director also requested a copy of the petitioner's contract with the specific facility where the beneficiary would be working and a legible copy of the employment contract between that facility and the beneficiary indicating who would be paying, hiring, firing, and promoting the beneficiary. In a June 15, 2004 response, counsel provided a January 22, 2004 letter from the principal clerk of the New York State Education Department indicating that the beneficiary had provided an application for licensure with appropriate fee, evidence of acceptable education, a permit application signed by a prospective employer with appropriate fee, and that a limited permit to practice physical therapy in New York State may be issued upon receipt of evidence that the beneficiary had received a valid status to work in the United States. Counsel also submitted a staffing agreement between the petitioner and a third party located in Glen Cove, New York covering the placement of four physical therapists, including the beneficiary. Counsel also included an employment contract between the petitioner and the beneficiary.

On August 3, 2005, the director revoked approval of the petition determining, in part, that the petitioner's initial filing of a Department of Labor's Labor Condition Application (LCA) indicated that the beneficiary's work location would be in New York, New York but that the staffing agreement with the third party utilizing the beneficiary's services was located in Glen Cove, New York. The director noted that the record did not contain evidence of an amended petition changing the beneficiary's work location or that the petitioner had an approved LCA for the location of intended employment. In addition, the director revoked approval, citing section 274C)(a)

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," in other matters. 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 these petitions. Finally, the director found that the petitioner made "false and misleading statements" in petitions it filed for "in-house accountants," "financial analysts," and "strategic management analysts."

On appeal, counsel for the petitioner asserts that the Glen Cove, New York area is within the normal commuting distance of the New York, New York area. Counsel referenced the portions of the director's revocation decision regarding alleged inconsistencies, alterations of documents, and misleading statements but noted that this basis did not apply to the beneficiary of the matter at hand and that the director's statements were part of a pro forma blanket denial to petitions filed by the petitioner on behalf of different beneficiaries.

The AAO finds that the director erred when revoking approval of the petition based on a perceived inconsistency between the beneficiary's intended location of employment on the LCA and the beneficiary's actual place of employment. The AAO finds that Glen Cove, New York is within normal commuting distance of New York, New York.

The AAO concurs with the petitioner 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. The record does not contain obvious alterations in the contract between the petitioner and the beneficiary. With regard to the other matters noted by the director, the AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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 adverse 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." Neither the RFE nor the NOIR sent by the director in this matter gave the petitioner adequate notice of the director's intention to revoke approval for the reasons stated or an opportunity to rebut this information.

The director's decision does not address the regulatory requirements for eligibility. The director did not make a determination as to whether the proffered position is a specialty occupation or whether the beneficiary is qualified to perform services in a specialty occupation. Moreover, the AAO notes that the documents submitted in response to the NOIR do not establish the beneficiary's eligibility to practice physical therapy on a limited basis in the State of New York as of the filing date of the petition. The letter from the State Education Department indicating that the beneficiary is eligible to practice physical therapy as soon as her H-1 status has been obtained from CIS is dated January 22, 2004, six months after the filing date of the petition. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(12):

Any applicant or petitioner must establish eligibility for a requested immigration beneficiary. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form

Further, 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 must establish eligibility at the time of filing the nonimmigrant visa petition. Thus, the evidence of record does not establish that as of the filing date, the beneficiary was qualified to enter the United States and immediately engage in employment in the occupation. *See* 8 C.F.R. 214.2(h)(4)(v)(A).

Accordingly, the matter will be remanded for the director to render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the director chooses to base her decision on issues other than those listed in the May 9, 2004 NOIR, she must first issue a new NOIR containing a detailed statement of all the grounds for revocation, and accord the petitioner 30 days to submit evidence in rebuttal, as provided in 8 C.F.R. § 214.2(h)(11)(iii)(B). If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 3, 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.