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U.S. Department of Homeland Security
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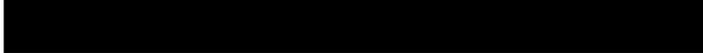
U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 056 50331 Office: VERMONT SERVICE CENTER Date: **JUL 30 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.

for *Michael T. Kelly*
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 The director's decision will be withdrawn and the petition remanded to the director for entry of a new decision.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 recruitment and staffing agency that seeks to employ the beneficiary to perform as a physical therapist for one of its client organizations. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 the beneficiary was not maintaining valid nonimmigrant status at the time the petition was filed. 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.

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 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." The director's May 12, 2005 request for additional evidence 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.

However, the AAO may not approve the petition, as 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 AAO notes 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. The evidence of record 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.¹ See 8 C.F.R. § 214.2(h)(4)(ii).

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.

¹ 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).

In his request for evidence, the director asked for contracts of work to be performed. Pursuant to the Aytes memorandum cited at footnote 1, the director has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request a contract. The December 10, 2004, 2004 staffing agreement between the petitioner and the New York Neuro & Rehab Center submitted by the petitioner in response to the director's request for additional evidence does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not provide information regarding the beneficiary's work location. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the record does not contain an itinerary, and the petition may not be approved at this time.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the petitioner has submitted an itinerary of employment. However, the director did not address this issue. 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 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.

Finally, the AAO reminds the petitioner that it cannot address the director's finding that the beneficiary failed to maintain valid nonimmigrant status prior to the filing of this petition. Such a determination is within the director's sole discretion and beyond the scope of the AAO's jurisdiction.

ORDER: The director's October 24, 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.