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U.S. Citizenship
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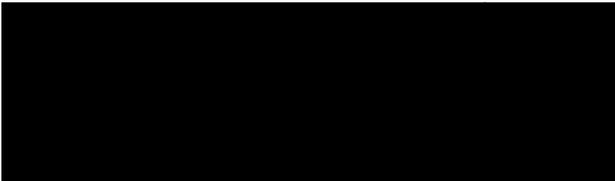
FILE: EAC 03 225 52065 Office: VERMONT SERVICE CENTER Date: MAY 03 2007

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 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 July 30, 2003; (2) the director's September 14, 2004 notice of intent to revoke (NOIR) approval of the petition; (5) the petitioner's October 8, 2004 NOIR response; (6) the director's August 25, 2005 revocation; and (7) 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 (1) the petitioner had not established that the beneficiary was licensed to practice physical therapy during the entire period of time from October 2003, when the petition was approved, until August 27, 2004, when the beneficiary received a six-month renewal; and (2) that a specialty occupation did not exist at the time the petition was filed.

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 revoked the approval of 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.

On appeal, counsel contends that the director erred in revoking petition's approval.

As a preliminary matter, the AAO finds that the director erred in revoking approval of 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 revocation. 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 September 14, 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.

The AAO finds that the record fails to establish that the beneficiary is qualified to perform the duties of the 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

Further, the limited permit contained in the record expired on February 26, 2005, and there is no indication that the beneficiary renewed this permit or obtained an unlimited license. Therefore, the record of proceeding does not provide CIS with sufficient information to reasonably determine that the beneficiary would be authorized to fully perform the duties of the occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(v)(B).

Moreover, the director found that there was a gap in the beneficiary's licensure from October 2, 2003 through August 27, 2004, when the beneficiary received a six-month renewal of licensure. The determination of the director that the petitioner had not established that the beneficiary was licensed to practice physical therapy in New York from the date of approval of the petition until the renewal of the limited permit is correct. The petitioner submits a copy of a limited permit for the beneficiary to practice physical therapy at Cross Island Medical Center from January 29, 2004 through July 28, 2004. There is no evidence of record that at the time the petition was filed, the beneficiary was immediately available to practice physical therapy in New York. While the CIS memorandum cited at footnote 1 allows a beneficiary to practice the occupation, the record does not meet the minimum threshold of the memorandum that the beneficiary must have evidence from the state of intended employment at the time of the filing of the petition that the only obstacle to licensure is the beneficiary's lack of physical presence in the United States. There is no evidence in the record to indicate that, at the time of filing, the beneficiary had made an application to the State of New York for a limited permit, and that her education credentials had been accepted. 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). 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). Further, there is no evidence in the record to establish that the beneficiary ever worked at Cross Island Medical Center. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the director properly revoked the petition's approval based on the failure of the petitioner to establish that the beneficiary was qualified to practice physical therapy in New York.

The AAO next turns to the director's finding that a specialty occupation did not exist 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

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

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.² 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.

In his NOIR, the director asked for a copy of the petitioner's contract with the specific facility where the beneficiary was working.

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 her discretion to request a contract. However, there is no evidence to demonstrate that an itinerary for the position existed at the time the petition was filed. The director found that based on the evidence of record the petitioner did not have a specialty occupation position in which it would employ the

² See also Memorandum from [REDACTED], 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).

beneficiary. The July 9, 2004 Staffing Agreement between the petitioner and Pelham Physical Medicine submitted in response to the director's NOIR did not exist at the time the petition was filed, which precludes the petitioner from using it to establish that the position in fact existed at the time the petition was filed. The petitioner, therefore, cannot use this agreement to demonstrate that at the time of filing the petition on July 30, 2003, it would employ the beneficiary in a specialty occupation. See Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

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." The record fails to establish that the petitioner had an itinerary of employment for the beneficiary at the time the instant petition was filed.

Accordingly, the petition may not be approved, and the director properly revoked approval of the petition.

The petitioner has failed to establish that it had, on the date the petition was filed, an itinerary of employment. The petitioner has also failed to demonstrate that the beneficiary is qualified to perform the duties of the position. Accordingly, the petition may not be approved, and the AAO will not disturb the director's revocation of the petition's approval.

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.