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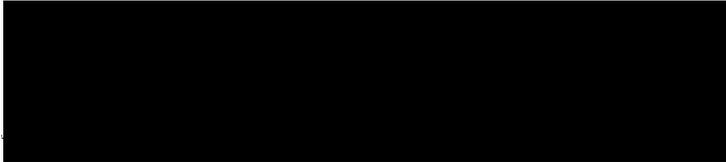
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U.S. Citizenship  
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FILE: EAC 03 199 50447 Office: VERMONT SERVICE CENTER

Date: SEP 06 2006

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 appeal will be dismissed. The petition will be denied.

The petitioner is a recruitment and staffing agency that seeks to employ the beneficiary to work as a physical therapist at its clients' 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; (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.

According to the petitioner's June 11, 2003 letter of support, the duties of the proposed position would include the following:

- Planning and administering medically prescribed physical therapy treatment programs for patients to restore function, relieve pain, and prevent disability following disease, injury, or loss of a body part (while working at a rehabilitation center or home health agency);
- Reviewing and evaluating physicians' referrals and patients' medical records to determine the appropriate type of physical therapy treatment required;
- Performing patient tests, measurements, and evaluations, such as range-of-motion and manual-muscle tests, gait and functional analyses, body parts measurements, recording and evaluating findings to aid in establishing or revising specifics of treatment programs;
- Administering manual therapeutic exercises to improve or maintain muscle function, applying precise amounts of manual force and guiding patients' body parts through selective patterns and degrees of movement;
- Instructing, motivating, and assisting patients in on-manual exercises, such as active regimens, isometric exercises, and progressive-resistive exercises and in functional activities, such as ambulation, transfer and daily living activities using weights, pulleys, exercise machines, mats, steps, and inclined surfaces, and assistive and supportive devices such as crutches, canes, parallel bars, orthoses, and prostheses;
- Administering traction to relieve neck and back pain, using intermittent and static traction equipment.

The petitioner noted that the beneficiary would work in New York, where the petitioner has an existing service agreement.

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.

In her September 26, 2003 request for additional evidence, the director requested evidence that the beneficiary possesses licensure to practice physical therapy in the State of New York. The director stated the following:

Please submit evidence that the beneficiary has a license to practice physical therapy in New York. A letter stating the license application has been received and has been forwarded for a decision will not suffice.

In response, the petitioner submitted a May 19, 2003 letter from the New York Office of the Professions, Bureau of Comparative Education stating the following:

The Bureau of Comparative Education has completed its review of the education portion of your application for licensure in physical therapy. I am pleased to inform you that your education has been approved.

Your application has been forwarded to the Physical Therapy Licensing Unit. . . .

The director denied the petition on October 29, 2004, holding that this letter did not establish that the beneficiary is immediately eligible to practice physical therapy in New York.

On appeal, counsel submits another letter from the New York Office of the Professions, Bureau of Comparative Education. This letter, dated December 29, 2003, states the following:

Please be advised that [the beneficiary] has met the following requirements for the issuance of a limited permit to practice Physical Therapy in New York State: submission of an application for licensure with appropriate fee and evidence of acceptable education, permit application, signed by a prospective employer, with appropriate fee.

The limited permit to practice Physical Therapy in New York State may be issued upon receipt of evidence that [the beneficiary] has received a valid status from the Immigration and Naturalization Service to work in the United States.

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.<sup>1</sup>

The instant petition was filed on June 23, 2003. However, the letter authorizing the beneficiary's temporary licensure was not issued until December 29, 2003. Therefore, the beneficiary did not meet the licensure requirement of 8 C.F.R. § 214.2(h)(v)(A) because, at the time the petition was filed for approval, the State of New York had not authorized the beneficiary to receive a temporary license to immediately practice physical therapy. Accordingly, the director was correct to deny the petition for lack of licensure. 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). For this reason, the appeal will be dismissed, and the petition will be denied.

Furthermore, even if the petitioner had submitted the December 29, 2003 letter at the time of filing, the evidence of record would be insufficient to establish that the beneficiary is qualified to perform the services of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(v)(B), 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.

The December 29, 2003 correspondence from the State of New York indicates that, as of that date, the beneficiary was qualified for temporary licensure in physical therapy. However, there would be restrictions on the temporary license. The duration of the license would be six months – renewable, for proper cause, for only an additional six months – and the temporary licensee would be subject to

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<sup>1</sup> 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).

supervision. Office of the Professions, New York State Education Department, Education Law, Article 136, section 6735 on limited permits states:

- a. The department of education shall issue a limited permit to an applicant who meets all requirements for admission to the licensing examination.
- b. All practice under a limited permit shall be under the supervision of a licensed physical therapist in a public hospital, an incorporated hospital or clinic, a licensed proprietary hospital, a licensed nursing home, a public health agency, a recognized public or non-public school setting, the office of a licensed physical therapist, or in the civil service of the state or political subdivision thereof.
- c. Limited permits shall be for six months and the department may for justifiable cause renew a limited permit provided that no applicant shall practice under any limited permit for more than a total of one year.
- d. Supervision of a permittee by a licensed physical therapist shall be on-site supervision and not necessarily direct personal supervision except that such supervision need not be on-site when the supervising physical therapist has determined, through evaluation, the setting of goals and the establishment of a treatment plan, that the program is one of maintenance as defined pursuant to title XVIII of the federal social security act.

The record does not contain any information about the licensed physical therapist who would be required to supervise the beneficiary, and it does not provide sufficient evidence describing the level at which the duties of the proffered position would be performed under temporary licensure, the nature of the supervision that would be imposed on the beneficiary as a temporary licensee at the place of work, and any limitations that would be placed on the beneficiary's practice while under temporary licensure.

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). For this additional reason, the petition must be denied.

Beyond the decision of the director, 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, including the petitioner's statement in its letter of support that the beneficiary would work in New York pursuant to an existing service agreement and the staffing agreements submitted by the petitioner in response to the director's request for additional evidence, establish 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.<sup>2</sup> 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.

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<sup>2</sup> 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).

Pursuant to the Aytes memorandum cited at footnote 2, CIS has the discretion to request that the employer who will employ the beneficiary in multiple locations submit an itinerary. Here, the record contains no documentation regarding the dates and locations of the beneficiary's employment. Accordingly, the petitioner has failed to comply with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B) and the petition must be denied.<sup>3</sup> For this additional reason, the petition may not be approved.

Moreover, the AAO finds that the petitioner has failed to demonstrate that the petitioner would be performing 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.

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<sup>3</sup> 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."

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 court in *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> 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 proffered 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 as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(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).

For this additional reason, the petition may not be approved.

The petitioner has failed to demonstrate that the beneficiary qualified to perform the duties of a specialty occupation on the date the petition was filed. Beyond the decision of the director, the record’s lack of an itinerary of definite employment precludes approval of the petition, and the AAO has determined that the record fails to establish 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).

Accordingly, the AAO will not disturb the director’s denial of the petition.

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. The petition is denied.