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FILE: EAC 03 160 50091 Office: VERMONT SERVICE CENTER Date:

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.

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 April 30, 2003; (2) the director's July 8, 2003 request for additional evidence; (3) the petitioner's August 5, 2003 response to the director's request; (4) 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 September 20, 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 certified labor condition application (LCA) contained in the record was not valid for the location of intended employment; (2) that a specialty occupation did not exist at the time the petition was filed; and (3) that the beneficiary was not maintaining valid nonimmigrant status 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 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.

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 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 19, 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 also notes that it cannot address the issue of whether the beneficiary was maintaining valid nonimmigrant status at the time the petition was filed. Such a determination is within the director's sole discretion and is beyond the scope of the AAO's jurisdiction.

The AAO first turns to the issue of the director's finding that the certified LCA contained in the record of proceeding is not valid for the intended location of employment. Counsel contends that the certified LCA contained in the record is valid for the location of intended employment, as "area of intended employment" is defined at 20 C.F.R. § 655.715 as "the area of normal commuting distance of the place of employment where the H-1B nonimmigrant is employed or will be employed." The AAO agrees, and finds that West Hempstead, New York is within the "the area of normal commuting distance" of New York, New York as defined at 20 C.F.R. § 655.715. The AAO therefore withdraws the portions of the director's decision to the contrary.

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 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.

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. The July 6, 2004 Master Agreement and Staffing Agreement between the petitioner and West Hempstead Medical and Rehabilitation Services submitted in response to the director’s NOIR does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not cover the entire period of employment requested by the petitioner. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the petition cannot be approved.

Moreover, the AAO also notes that the record contains 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 beneficiary. The July 6, 2004 Master Agreement and Staffing Agreement between the petitioner and West Hempstead Medical and Rehabilitation Services referenced previously 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. As noted previously, the Form I-129 was received at the service center on April 30, 2003, and these agreements are dated July 6, 2004. The petitioner, therefore, cannot use this letter to demonstrate that at the time of filing the petition on March 24, 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*

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).

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.

The petitioner has failed to provide an itinerary of employment pursuant to 8 C.F.R. § 214.2(h)(2)(i)(B), and it has failed to demonstrate that as of the filing date of the petition it would employ the beneficiary in a specialty occupation. Accordingly, the petition may not be approved, and 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. Approval of the petition is revoked.