



U.S. Citizenship
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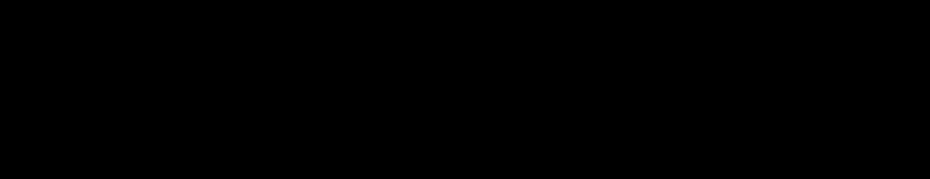
FILE: EAC 03 246 52165 Office: VERMONT SERVICE CENTER Date: FEB 20 2007

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, 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 appeal will be summarily dismissed. The approval of the petition will be revoked.

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 29, 2003 Form I-129 with supporting documentation; (2) the director's May 19, 2004 notice of intent to revoke approval of the petition (NOIR); (3) counsel's June 18, 2004 response to the director's NOIR; (4) the director's August 12, 2005 revocation letter; and (5) the Form I-290B, Notice of Appeal. Although the Form I-290B indicates that a brief and/or additional evidence would be submitted to the AAO within 30 days, careful review of the record reveals no subsequent submission of a brief or evidence; all of the petitioner's documentation in the record predates the issuance of the notice of decision.

The record contains a limited permit to practice physical therapy in the State of New York, under a licensed physical therapist. The limited permit is valid from November 14, 2003 to May 13, 2004. The record also contains an employment agreement between the beneficiary and the petitioner dated February 7, 2004, more than five months after the petition was filed and a January 16, 2004 staffing agreement, that does not contain a statement of work or work order referencing the beneficiary and was signed more than three months after the petition was filed.

On August 12, 2005, the director revoked approval of the petition determining, in part, that the beneficiary's limited permit to practice physical therapy had not been issued until after the beneficiary had been erroneously approved for H-1B status; thus the record did not include evidence that the beneficiary had been a licensed physical therapist in New York when the petition had been filed, or had a limited license to practice in New York when the petition had been filed, or had other evidence that she had been immediately eligible to practice her profession in New York. The director also noted that the petitioner's staffing agreement with a third party had been signed after the petitioner had filed the petition on behalf of the beneficiary. The director concluded that the petitioner did not have an opening for the beneficiary's services when the petition was filed. 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 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."

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). Counsel's statement on the Form I-290B reads: "Appeal brief to follow."

The AAO reviewed the record in its entirety before issuing its decision. As observed above, the record does not contain an appeal brief. Accordingly, the record is considered complete.

The AAO observes that the director's revocation of approval of the petition based on altered evidence in other proceedings is in error. 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 based on alleged misrepresentations in other proceedings and did not provide the petitioner an opportunity to rebut this information. Thus, the director's determination regarding derogatory information in other proceedings is withdrawn.

The director's decision correctly notes that the staffing agreement submitted as evidence that the petitioner had a position for the beneficiary was not signed and in effect until after the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the record did not contain evidence that the beneficiary was eligible to practice physical therapy in New York when the petition was filed.

Neither counsel nor the petitioner provides evidence of the beneficiary's proposed employment for the time period requested in H-1B status. Thus, CIS cannot determine whether the proffered position qualifies as a specialty occupation. The beneficiary was not qualified to perform services as a physical therapist as of the filing date of the petition. As neither the petitioner nor counsel presents additional evidence or argument on appeal, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

The approval of the petition will be revoked and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 summarily dismissed. The approval of the petition is revoked.