



U.S. Citizenship
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FEB 27 2007

FILE: EAC 04 028 53252 Office: VERMONT SERVICE CENTER Date:

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 service center director revoked 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 revoked.

The petitioner is a staffing agency and seeks to employ the beneficiary as a physical therapist. The petitioner 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 director revoked the prior approval of the petitioner's Form I-129 petition, in part, because the petitioner failed to establish that the beneficiary was qualified to perform the duties of a specialty occupation. The director further stated that due to the apparent alteration of documents and misleading statements made by the petitioner, Citizenship and Immigration Services (CIS) could not determine the validity of any position offered or claim made, or the authenticity of any document submitted and held that the petitioner had not established eligibility for the benefit sought. On appeal, counsel states that the beneficiary is now fully licensed to work as a physical therapist and not subject to the supervision requirements imposed on individuals who practice physical therapy and have only a limited permit authorizing them to do so. The petitioner submits, on appeal, a copy of the beneficiary's license from the state of New York authorizing him to work as a physical therapist. The license was issued on March 16, 2005. Counsel also states that the director improperly considered extraneous matters to the present petition in denying the benefit sought.

The issue to be determined is whether the beneficiary is qualified to perform the duties of a specialty occupation, a physical therapist in this instance.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent or the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The director found, in part, that the beneficiary was not qualified to perform the duties of the proffered position because the petitioner failed to submit a license authorizing him to practice physical therapy in New York.

The Department of Labor's *Occupational Outlook Handbook (Handbook)* notes that all states require physical therapists to pass a licensure exam before they can practice, after graduating from an accredited physical therapist educational program. The New York State Education Department's Office of the Professions notes

that to meet the professional education requirement for licensure as a physical therapist, an individual obtaining his or her education from a New York State registered or APTA accredited physical therapy program must have a bachelor's or higher degree in physical therapy, or a graduate level certificate in physical therapy following completion of a bachelor's degree from an institution acceptable to the Department. A bachelor's degree in a specific specialty is, therefore, normally the minimum requirement for entry into the proffered position and the position qualifies as a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A).

The record does not establish that the beneficiary was qualified to work as a physical therapist in the State of New York when the initial petition was filed, or at the time the petitioner responded to the director's notice of intent to revoke (NOIR) which called into question the beneficiary's licensing. The director's NOIR specifically asked the petitioner to provide a copy of the beneficiary's license to practice physical therapy in New York, or alternatively, that the petitioner submit a letter from the licensing authority stating that licensure will be granted upon arrival or a letter from the appropriate licensing authority stating that licensure is not required. The director further stated that if the beneficiary will be receiving a limited permit to practice physical therapy, the petitioner should provide a copy of the license of the physical therapist who would be the beneficiary's on-site supervisor at the specific facility where the beneficiary would be working. In response to the NOIR, the petitioner provided a contract indicating that the beneficiary would be working at The Comprehensive Center under the direct supervision of [REDACTED], a licensed physical therapist in the state of New York (NY State License No. 025573). The limited permit submitted by the petitioner which authorizes the beneficiary to work as a physical therapist, however, authorized the beneficiary to work as a physical therapist at Careplus Medical under the supervision of physical therapist [REDACTED] (New York State License No. 025979). Thus, the beneficiary was not licensed to work at the Comprehensive Center under the supervision of Christine Geronimo as stated by the petitioner. The beneficiary's subsequent licensing on March 16, 2005 does not establish that at the time of filing the petition the beneficiary was immediately available to work in the United States. 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). The beneficiary was not, therefore, qualified to perform the duties of the proffered position and the director's decision revoking the prior approval of the Form I-129 petition shall not be disturbed.

The director also makes reference to matters outside the record in issuing the revocation of the present petition. If matters outside the record adverse to the petitioner come to the director's attention and are considered in denying a petition, the director should first issue a NOIR giving the petitioner an opportunity to respond to any adverse information considered. The director should also make any such adverse information considered a part of the record. A portion of the information referenced by the director in denying the petition concerns the number of positions petitioned for and approved in unrelated cases, and the petitioner's inconsistent statements concerning employment of those individuals. The petitioner should note that it must notify CIS of any change in employment circumstances of any beneficiary approved for H-1B classification pursuant to C.F.R. § 214.2(h)(11)(i)(A).

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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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is revoked.