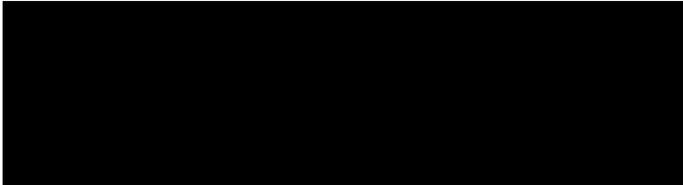


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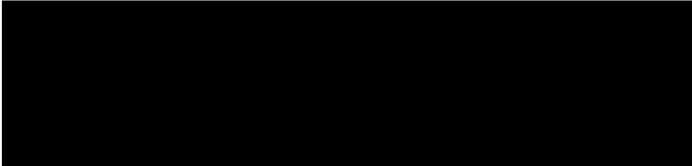
FILE: EAC 04 222 50788 Office: VERMONT SERVICE CENTER Date:

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 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 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; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request for evidence; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on two grounds: (1) that the certified labor condition application (LCA) contained in the record was not valid for the location of intended employment; and (2) that the petitioner had not submitted the health care certification required by section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C).

In his denial, 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.

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 August 27, 2004 request for additional evidence 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 provide for the opportunity to rebut this information.

The AAO agrees with counsel that the certified LCA contained in the record is valid for the location of intended employment. It finds that Suffern, 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.

However, the AAO agrees with the director that the petitioner did not meet the filing requirements for a foreign health care worker.

Section 212(a)(5)(C) of the Act, 8 U.S.C. § 1182(a)(5)(C), requires that certain healthcare workers obtain a certificate that verifies (1) that the alien’s education, training, licensure, and experience meet all applicable statutory and regulatory requirements for entry into the United States under the requested classification, are comparable to those required for American healthcare workers of the same type, and are authentic; (2) that the alien has the level of competence in oral and written English considered by the Secretary of Health and Human Services, in consultation with the Secretary of Education, to be appropriate to the type of healthcare work in which the alien will be engaged; and (3) if a majority of states licensing the profession in which the alien intends to work recognize a test predicting the success on the profession’s licensing or certification examination, that the alien has passed such a test or such an examination. The regulation at 8 C.F.R. § 212.15(d) requires that the alien who is seeking to enter the United States to perform services in a covered health care occupation must present a certificate of admissibility.

In a September 22, 2003 memorandum,¹ CIS noted that, in the case of physical therapists, two organizations are authorized to issue these certificates: (1) the Commission on Graduates of Foreign Nursing Schools (CGFNS) and (2) the Foreign Credentialing Commission on Physical Therapy (FCCPT).

The record does not contain the requisite certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act. The director requested the certification in his request for additional evidence, but the petitioner did not submit it in its response to the director’s request for additional evidence, nor is it submitted on appeal.

Accordingly, the record does not establish that the petitioner complied with the filing requirements for a foreign physical therapist, and the petition was properly denied.

Beyond the decision of the director, the AAO finds that the petition may not be approved for two additional reasons. First, the AAO has determined that the record does not establish that a specialty occupation existed 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.

¹ Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, Department of Homeland Security, *Final Regulation on Certification of Foreign Health Care Workers: Adjudicator’s Field Manual Update AD 03-31* (September 22, 2003).

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 duties described by the petitioner indicate that the proposed position is that of a physical therapist. The evidence of record establishes that the petitioner, in general, is an employment contractor in that the petitioner places individuals at multiple locations to perform services established by contractual agreements for third-party companies.

In its November 19, 2004 response to the director’s request for a copy of the petitioner’s contract with the specific facility where the beneficiary will be placed, the petitioner submitted a staffing agreement, dated November 5, 2004 between the petitioner and the Comprehensive Center. This staffing agreement, which mentioned the beneficiary by name, was to commence on November 1, 2004 and last for one year. However, this staffing agreement was executed subsequent to the filing of the petition on June 26, 2004, so the petitioner cannot use this agreement to demonstrate that a position existed at the time the petition was filed. 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.”

Accordingly, the AAO finds that the petitioner has failed to demonstrate that it had, on the date the petition was filed, a specialty occupation to be filled. The statute and regulation require that the petitioner establish that it will employ the beneficiary in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has not established that, as of the filing date of the petition, it would employ the beneficiary in a specialty occupation. For this additional reason, the petition may not be approved.

Also, the AAO finds that the record does not establish that as of the filing date of the petition, the beneficiary possessed licensure in physical therapy. 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.²

The record establishes that the beneficiary's license to practice physical therapy was issued on September 3, 2004, which was a date subsequent to the filing of the petition on June 26, 2004. Again, 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 petitioner has not established that as of the date the petition was filed, the beneficiary was qualified to practice physical therapy in the State of New York.

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

The petitioner has failed to submit the requisite certificate from either CGFNS or FCCPT, as required by Section 212(a)(5)(C) of the Act and, therefore, has not met the filing requirements for a foreign health care worker. The petitioner has also failed to establish that a specialty occupation existed at the time the petition was filed or that the beneficiary was licensed as a physical therapist at the time the petition was filed.

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.

² 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).