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U.S. Citizenship  
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MAR 02 2007

FILE: LIN 05 159 52905 Office: NEBRASKA 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The petition will be denied. The appeal will be dismissed.

The petitioner is a staffing services company that 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 denied the petition based on a determination that the petitioner had failed to establish it met the definition of a “United States employer”, and because the petitioner failed to establish the bona fides of the proposed employment for the beneficiary.

The petitioner indicates, through counsel, that the evidence in the record demonstrates it has sole authority to hire, pay, fire, supervise, or otherwise control the work of the beneficiary. The petitioner concludes that it thus meets the definition of a U.S. employer, as set forth in 8 C.F.R. § 214.2(h)(4)(ii). The petitioner indicates further that the evidence establishes where the beneficiary will work, and her employment itinerary.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker (Form I-129) and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s denial letter; and (5) Form I-290B, Notice of Appeal to the AAO (Form I-290B), a brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner states that it seeks to hire the beneficiary as a physical therapist. The regulations at 8 C.F.R. § 214.2(h)(4)(ii), provide that a “United States employer” is a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The record contains an employment contract between the petitioner and the beneficiary, and petitioner-client staffing agreements. The employment contract reflects that the beneficiary will be paid by the petitioner, and that the petitioner will assign the beneficiary to work as a physical therapist at client facilities. Upon review of the evidence contained in the record, the AAO finds that the petitioner will engage the beneficiary to work within the United States, that the petitioner has an Internal Revenue Service Tax identification number, and that the petitioner has the authority to hire, pay, supervise or otherwise control the work of the beneficiary. The petitioner is thus the beneficiary’s employer for 8 C.F.R. § 214.2(h)(4)(ii) purposes.

Evidence of the beneficiary's duties include: the Form I-129 and supporting documentation; the petitioner's response to the director's RFE; and the Form I-290B and supporting documentation. The petitioner indicates that the proffered positions' duties will consist of:

- Evaluating physicians' referral and patient medical records to determine required physical therapy treatment;
- Performing patient tests, measurements, and evaluations;
- Recording and evaluating findings to aid in establishing or revising specifics of treatment programs;
- Planning and preparing written treatment programs based on evaluation of available patient data;
- Administering manual therapeutic exercise to improve or maintain patients' muscle function;
- Instructing, motivating and assisting patients in non-manual exercises and in functional activities;
- Administering massage treatment to achieve maximum benefit, and recording patients' treatment response and progress.

The evidence in the record fails, however, to establish where the beneficiary will work throughout the three-year period requested in the petitioner's Form I-129, or what the petitioner will be doing. The petitioner's employment agreement with the beneficiary reflects that the beneficiary would spend 100% of her time working at an off-site work location performing services established by contractual agreements with third-party companies. The petitioner-beneficiary employment agreement indicates further that the beneficiary would work for a client named, Access Therapies. The record contains no separate staffing contract for Access Therapies, however. Moreover, counsel asserts on appeal that the beneficiary will work as a physical therapist for Ball Memorial Hospital for the duration of her status as an H-1B nonimmigrant visa holder. The record contains copies of a staffing agreement between the petitioner and Midwest Health Strategies, and between the petitioner and Midwest Health Strategies affiliate, Ball Memorial Hospital. Both staffing agreements are general in nature and provide merely that the petitioner will provide therapists or health service employees to the client on an as needed basis, for periods of time up to 13 weeks. Neither agreement discusses or mentions the beneficiary or her proffered position duties. Furthermore, the staffing contracts between the petitioner and Midwest Health Strategies and Ball Memorial Hospital mention various worksite locations for the therapists and health service employees, and the contracts contain vague, open-ended employment time periods. The AAO additionally notes that the Ball Memorial Hospital contract is signed but not dated, and that its validity is thus questionable.

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, when requested at the discretion of the director. In the present matter, the director properly exercised his discretion to request an itinerary of the beneficiary's employment. See 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). The evidence reflects that the beneficiary will work in off-site locations, but does not establish what the beneficiary will be doing, for whom, or for how long, and the record does not contain an itinerary of employment with the dates and locations of the beneficiary's work in multiple locations. The petitioner has thus not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B).

Although not addressed in the director's decision, the AAO finds further that the petitioner has failed to establish that the proffered position is a specialty occupation under the Act. An application or petition that fails to

comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

For the purpose of determining whether a proffered 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." *See Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). 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 (now CIS) had reasonably interpreted the statute and regulations as requiring a 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. Only a detailed job description from the entity that requires the alien's services will suffice to meet the burden of proof in these proceedings. In the present matter, the absence of specific employment contracts or an itinerary of services to be rendered, make it impossible for the AAO to determine that a specialty occupation would exist for the beneficiary as set forth in the Act or the regulations.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained its burden in the present matter. The appeal will therefore be dismissed.

**ORDER:** The appeal is dismissed. The petition is denied.