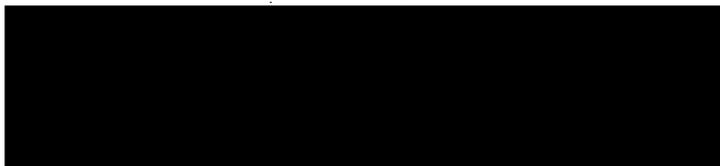


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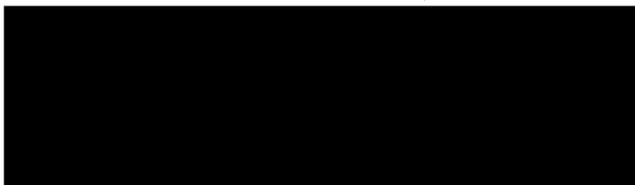
FILE: EAC 05 089 50556 Office: VERMONT SERVICE CENTER Date: **MAR 07 2007**

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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director initially approved the nonimmigrant visa petition. 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 to perform as a physical therapist for one 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; (4) the director's denial letter; and (5) the Form I-290B and supporting brief. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that the beneficiary lacks physical therapy licensure, and that the beneficiary was not maintaining valid nonimmigrant status at the time the petition was filed. 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.

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 averse 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 12, 2005 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 an opportunity to rebut this information.

The AAO nonetheless agrees with the director that the record does not demonstrate that the beneficiary possesses the licensure requisite for performing the duties of the proposed position. 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.¹

Counsel submits a July 9, 2003² letter from the State of New York, which states the following:

¹ See Memorandum from [REDACTED] Acting Assistant Commissioner, Office of Adjudications, [REDACTED], *Social Security cards and the Adjudication of H-1B Petitions*, HQISD 70/6.2.8-P (November 20, 2001).

² This letter was two and a half years old at the time it was submitted by counsel. As a temporary license still has not been submitted, it appears that the beneficiary has not obtained one.

Please be advised that [the beneficiary] has met the following requirements for the issuance of a limited permit to practice Physical Therapy in New York State: submission of an application for licensure with appropriate fee and evidence of acceptable education, permit application, signed by a prospective employer, with appropriate fee.

The limited permit to practice Physical Therapy in New York State may be issued upon receipt of evidence that [the beneficiary] has received a valid status from the Immigration and Naturalization Service to work in the United States.

This letter indicates that, as of July 9, 2003, the beneficiary was qualified for temporary licensure in physical therapy. However, there would be restrictions on the temporary license. The duration of the license would be six months – renewable, for proper cause, for only an additional six months – and the temporary licensee would be subject to supervision. Office of the Professions, New York State Education Department, Education Law, Article 136, section 6735 on limited permits states:

- a. The department of education shall issue a limited permit to an applicant who meets all requirements for admission to the licensing examination.
- b. All practice under a limited permit shall be under the supervision of a licensed physical therapist in a public hospital, an incorporated hospital or clinic, a licensed proprietary hospital, a licensed nursing home, a public health agency, a recognized public or non-public school setting, the office of a licensed physical therapist, or in the civil service of the state or political subdivision thereof.
- c. Limited permits shall be for six months and the department may for justifiable cause renew a limited permit provided that no applicant shall practice under any limited permit for more than a total of one year.
- d. Supervision of a permittee by a licensed physical therapist shall be on-site supervision and not necessarily direct personal supervision except that such supervision need not be on-site when the supervising physical therapist has determined, through evaluation, the setting of goals and the establishment of a treatment plan, that the program is one of maintenance as defined pursuant to title XVIII of the federal social security act.

The record does not contain any information about the licensed physical therapist³ who would be required to supervise the beneficiary, and it does not provide sufficient evidence describing the level at which the duties of the proposed position would be performed under temporary licensure, the nature of the supervision that would be imposed on the beneficiary as a temporary licensee at the place of work, and any limitations that would be placed on the beneficiary's practice while under temporary licensure.

Moreover, the petitioner indicates that it seeks a continuation of the beneficiary's employment without change. The current petition was filed on February 7, 2005. The letter indicating that the beneficiary is eligible for licensure as soon as the licensing authority receives evidence of the beneficiary's immigration status does not qualify the beneficiary to work without a license or actual limited permit in this case. The

³ The petitioner submitted a license belonging to [REDACTED] in its August 3, 2005 response to the director's request for additional evidence. However, the petitioner made no reference to this license in its response and did not attempt to establish that this individual worked at that same facility as the beneficiary, as requested. It is unclear whether this license was submitted in an attempt to demonstrate that Ms. [REDACTED] would supervise the beneficiary, or whether submission of this license was a clerical error.

beneficiary had ample opportunity under the previous visa to obtain the necessary licensure or limited permit. The petitioner has failed to submit such license or permit indicating that as of the filing date of the petition the beneficiary was eligible to immediately begin employment in the State of New York as a physical therapist.

Therefore, the record of proceeding does not provide CIS with sufficient information to reasonably determine that the beneficiary would be authorized to fully perform the duties of the occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(v)(B). Therefore, the petition must be denied.

Beyond the decision of the director, the AAO finds that the petition may not be approved for another reason, as the record does not establish that the beneficiary will perform services in a specialty occupation. 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.⁴ 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 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 his discretion to request a contract. The February 14, 2005 staffing agreement between the petitioner and ██████████ M.D., P.C. submitted by the petitioner in response to the director's request for additional evidence does not satisfy 8 C.F.R. § 214.2(h)(2)(i)(B) as it does not provide information regarding the beneficiary's work location. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), the record does not contain an itinerary, and the petition may not be approved at this time.

Moreover, this staffing agreement was issued subsequent to the filing of the petition, so the petitioner cannot use this agreement to establish that a position existed at the time the petition was filed. 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).

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

The record does not establish that the beneficiary is qualified to perform the duties of the proposed position. Beyond the decision of the director, the AAO finds that the record does not contain an itinerary, and that the record does not demonstrate that the position existed at the time the petition was filed. Accordingly, the AAO will not disturb the director's denial of the petition.

The AAO will not address the director's finding that the beneficiary failed to maintain valid nonimmigrant status prior to the filing of this petition, as such a determination is within the director's sole discretion and beyond the scope of the AAO's jurisdiction.

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.

⁴ See also Memorandum from ██████████ 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).