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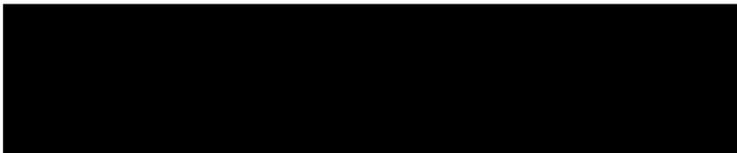
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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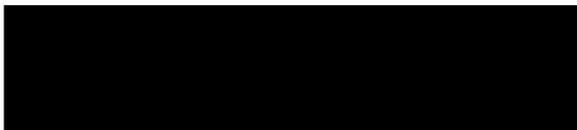


FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: SEP 03 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center 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 healthcare staffing firm. It seeks to employ the beneficiary as a physical therapist 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE and supporting documentation; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and supporting evidence. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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:

An 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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 proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a physical therapist. The petition was filed on April 30, 2008. Evidence of the beneficiary’s duties includes the petitioner’s March 30, 2008, letter of support and a copy of an employment agreement dated September 20, 2007, between the petitioner and the beneficiary. The support letter indicates the proffered position would require the beneficiary to perform the following duties:

- Review physician’s prescription and patient’s condition to determine and formulate physical therapy treatment and regimen;
- Evaluate patient’s functional ability and apply various tests and measurements to obtain supportive data;
- Test and measure patient’s strength, motor development sensory perception, functional capacity and respiratory and circulatory efficiency to develop or revise treatment programs;
- Administer treatments involving the application of physical agents;
- Evaluate effects of treatment and adjust treatment to achieve maximum benefit;
- Administer traction to relieve pain;
- Instruct patient and family in treatment procedures;
- Administer massage;
- Record treatment, response and progress in patient’s chart;
- Confer with physicians and other healthcare practitioners; and
- Orient, instruct and direct work activities of assistants, aides and students.

The support letter also states, “[w]e plan to employ [the beneficiary] as a physical therapist on one of the *New York* affiliated healthcare facilities that depend on our company for their staffing needs. . . .” (Emphasis added.) However, the Form I-129 and the Labor Condition Application (LCA) both indicate that the beneficiary will work at an address in Palisades Park, NJ. The petitioner is located in Hoboken, NJ and New York, NY. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Along with the petition, the petitioner submitted documentation indicating that the beneficiary has Commission on Graduates of Foreign Nursing Schools (CGFNS) certification as a physical therapist as well as a foreign degree that is equivalent to a U.S. bachelor’s degree in physical therapy awarded by an accredited college or university in the United States. The beneficiary is not licensed as a physical therapist in the U.S. and a letter from the New Jersey State Board of Physical Therapy Examiners dated December 20, 2007 indicates that the beneficiary had not yet taken and passed the National Physical Therapy Examination (NPTE), even though other licensing requirements established by the State of New Jersey had been met. The letter from the New Jersey State Board also indicates that the beneficiary could sit for the NPTE without first obtaining a social security number.

In the RFE issued on August 5, 2008, the director requested additional documentation evidencing that the proffered position qualifies as a specialty occupation as follows:

You have stated that your firm is a staffing agency and that the beneficiary will work at a health care facility that depends on your company to fill its staffing needs. It does not appear from this circumstance that your company will necessarily maintain an employee-employer relationship with the beneficiary as is required for H-1B employment authorization. Please provide documentary evidence to show that your company will retain such a relationship to include responsibility for hiring, firing, and paying the beneficiary and supervising or otherwise controlling the beneficiary’s work. A simple statement will not suffice. Supporting documentary evidence such as, but not limited to, the contract(s) pursuant to which the beneficiary will be employed must show that such a relationship between your company and the beneficiary will be maintained.

In response to the RFE, the petitioner submitted a copy of an employment agreement that is signed both by the petitioner and the beneficiary. However, this contract does not provide any details regarding the beneficiary’s proposed assignment in Palisades Park, NJ.

The director denied the petition on November 21, 2008.

For the first time on appeal, counsel for the petitioner submits the following documents:

- A letter from the New Jersey Office of the Attorney General addressed to the beneficiary and dated December 5, 2008, stating that the beneficiary’s application for examination as a Physical Therapist has been received and that the beneficiary will obtain a license to practice as a physical therapist once the beneficiary has obtained a social security number.

- A copy of a Staffing Contract for the beneficiary, which is between the petitioner and Dr. [REDACTED] of [REDACTED] and is dated November 10, 2008, after the date the petition was filed. This contract states that the agreement term is for one year starting on November 10, 2008.
- A copy of the General Agreement between the petitioner and [REDACTED] which states that the petitioner is engaged in the provision of medical services and personnel. The duration of this agreement is two years and the location of [REDACTED] C. is in Carteret, NJ.

Based on the signed Staffing Contract, which only covers one year of employment even though the petitioner requested that the duration of employment be for three years, as well as the General Agreement, which states that the petitioner's business is to contract out medical services and personnel, it is therefore clear that the petitioner is a contractor or agent for physical therapists to work at different third party locations in the United States as the need arises and, moreover, that the beneficiary's potential assignments to these various facilities are short-term and not guaranteed.

As indicated above, the Staffing Contract and General Agreement submitted on appeal are both dated after the petition was filed. Therefore, the petitioner has not demonstrated that it knew the location of employment where the beneficiary would be assigned or even the work the beneficiary would perform at the time the petition was filed. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Moreover, according to the U.S. Department of Labor's Foreign Labor Certification Data Center Online Wage Library, the newly proffered position location on appeal in Carteret, NJ is in a different geographical metropolitan area than Palisades Park, NJ, which is the location of employment listed in the Form I-129 and LCA. Therefore, even if these contracts were dated prior to the petition being filed, the petition could not be approved because the LCA would not correspond with the proposed location of employment. For all of these reasons, the AAO therefore will not consider the Staffing Contract and General Agreement as evidence that the proffered position is a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

The petitioner claims on the Form I-129 and LCA that the beneficiary will be working in Palisades Park, NJ. However, the petitioner never provided any information about the health center(s) where the beneficiary will work or contracts with client orders for work to be done that corresponds to the location listed in the petition and that covers the period of employment requested in the petition. There are no work orders, no statements of work, and no work itinerary with respect to the proposed employment of the beneficiary that are valid as of the time the petition was filed and that cover the duration of the petition. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. Going on record without

supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the 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. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

Here, as in *Defensor*, the petitioner is not the only relevant employer for purposes of determining the normal degree required by the employer for the position offered. See *Defensor v. Meissner*, 201 F.3d at 387-388. Instead, the healthcare facilities to which the beneficiary allegedly will be assigned must be examined to determine whether or not they normally require a bachelor's or higher degree in a specific specialty (or its equivalent) in order to perform the duties of the position. As stated in *Defensor*:

To interpret the regulations any other way would lead to an absurd result. If only [the petitioner]'s requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

Id. at 388.

The petitioner is seeking the beneficiary's services as a physical therapist. Counsel asserts on appeal that the position of physical therapist is always a specialty occupation. In this matter, however, the AAO need not address the issue of whether the position of physical therapist is always a specialty occupation, because the issue that must be addressed first is whether sufficient evidence was provided that demonstrates whether the work to be completed by the beneficiary entails the performance of duties that correspond with the description of a physical therapist. As the record does not contain sufficient evidence of the work the beneficiary would perform for the petitioner's client(s) that corresponds with the location and dates provided in the petition, the AAO cannot analyze whether his placement is related to the provision of a product or service that requires the performance of the duties of a physical therapist. Applying the analysis established by the Court in *Defensor*, USCIS has found that the record does not contain any documentation from the end user client(s) for which the beneficiary will provide services that establishes the specific duties the beneficiary would perform. Without

this information, the AAO cannot analyze whether these duties would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Regarding counsel's argument on appeal that USCIS approved other petitions that had been previously filed on behalf of other workers, the director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO therefore affirms the director's finding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

Beyond the decision of the director, the AAO finds that the beneficiary was not qualified for the proffered position as of the date the petition was filed. The AAO notes that the occupation of physical therapist is specifically listed under 8 C.F.R. § 212.15 as one that requires a certificate from one of the approved credentialing organizations set forth in 8 C.F.R. § 212.15(e). Moreover, 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, a beneficiary (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. However, the AAO notes that as of the date the petition was filed, the beneficiary had not yet taken the state licensing exam, which was a prerequisite for licensing as a physical therapist by the State of New Jersey. As discussed previously, it does not appear that the beneficiary met the requirements for licensing as a physical therapist in New Jersey

until December 5, 2008, after the date the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). 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 petition must therefore be denied on this additional ground.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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