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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Massachusetts, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[redacted]

OCT 23 2003

FILE: SRC 03 055 50550 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a hair salon. It seeks to employ the beneficiary as a salon technician and management trainee. The director found that the petitioner had not established that the proposed training is unavailable in the beneficiary's home country.

On appeal, counsel states that the petitioner did establish that training is unavailable in the beneficiary's home country. Additionally, counsel asserts that the director erred in failing to provide the petitioner with the opportunity to provide additional evidence.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part:

> (ii) Evidence required for petition involving alien trainee--(A) Conditions. The petitioner is required to demonstrate that:
>
> (1) The proposed training is not available in the alien's own country;
>
> (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
>
> (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
> (4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) Description of training program. Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.

(iii) Restrictions on training program for alien trainee. A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

Counsel states on appeal, "Due to an administrative failure at TSC, petitioner was not provided with an opportunity to provide additional evidence." Counsel asserts that due to the advice given by the Texas Service Center (TSC), the petitioner believed no additional response other than resubmission of March 21 filing was necessary, but the director's decision clearly shows that the TSC did want additional information, but failed to give the petitioner the opportunity to provide it.

The petitioner originally filed the Form I-129 on December 16, 2002. On March 21, 2003, Citizenship and Immigration Services (CIS) received a new filing from the petitioner requesting premium processing. The petitioner submitted a new G-28 at that time with the same attorney, but including a new address for the attorney. In early April, counsel received a request for evidence dated 3/24/03 that had been sent to his previous address. On April 8, 2003, counsel e-mailed the TSC requesting a status update on the petition. On April 18, 2003, counsel received a response from the TSC stating that the petitioner had not responded to the request for evidence. On April 19, 2003, counsel e-mailed the TSC explaining that it appeared that the TSC did not review the new (3/21/03) filing before sending out the request for evidence. On April 21, 2003, counsel received a response from the TSC giving the premium processing fax number and requesting a fax of the March 21 filing, with a promise that the recipient would match the fax with the file and get it to an officer for review. On that same day, counsel faxed the March 21 filing, and e-mailed the TSC confirming sending the fax and offering to provide any further information requested. On April 22, 2003, counsel received an e-mail from the TSC telling counsel to wait and see what "develops from this RFE return. If the officer needs more, he will ask." On April 29, 2003, counsel e-mailed the TSC requesting a status update. On April 30, 2003, counsel received a response from the TSC stating that the petition was denied on April 25, 2003.

The Administrative Appeals Office notes that there is significant confusion resulting from information given to counsel by the Texas Service Center. While the director issued a request for evidence to the petitioner pursuant to 8 C.F.R. § 103.2(b)(8) prior to

denying the petition, the petitioner was not given a meaningful opportunity to respond due to miscommunication and/or misinformation given by the TSC. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The evidence submitted on appeal should have been submitted as a response to the request for evidence, prior to the director adjudicating the petition. Since counsel was led to believe that he did not need to respond to the request for evidence, the director's decision must be withdrawn.

The director must afford the petitioner reasonable time to provide evidence in response to the director's original request for evidence, dated March 24, 2003. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The matter is remanded to the director for further action and entry of a new decision in accordance with the above discussion, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.