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U.S. Citizenship and Immigration Services

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[redacted]

APR 19 2004

FILE: LIN 02 275 52375 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiaries:

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 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, Director
Administrative Appeals Office

DISCUSSION: The Director of the Nebraska Service Center denied the nonimmigrant visa petition and the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO remanded the matter to the director for further consideration. The director again denied the petition and certified his decision to the AAO. The director's decision will be affirmed. The petition will be denied.

The petitioner is an institute of therapeutic massage. It seeks to employ the beneficiaries as student massage therapist trainees. The director found that the petitioner had not established that an actual training program existed. In addition, the director stated that the beneficiaries would be involved in productive labor and that the petitioner did not establish that the training is unavailable in the beneficiaries' home country.

On appeal, the petitioner stated that there is an established training program, and submitted copies of the training materials in support of this assertion. The petitioner also submitted information to establish that similar training is unavailable in the beneficiaries' home country. The petitioner stated that the practical training required of the beneficiaries is only that which is incidental to the training and would not displace citizen or resident workers.

On notice of certification, the petitioner submitted no evidence.

The matter was remanded to the director because there was no evidence in the record that the director had issued a request for additional evidence, pursuant to 8 C.F.R. § 103.2(b)(8). The information that was submitted on appeal could have been submitted in response to such a request, and then the director would have considered the information in making the decision on this petition.

In addition, the director did not address whether the petitioner would be considered a vocational school; if so, the beneficiaries are not eligible for an H-3 classification. The regulations state, "An H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, *or training provided primarily at or by an academic or vocational* institution." 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (emphasis added).

Upon remand, the director issued a request for additional evidence. The AAO notes that the director did issue a request for evidence following the initial filing of the petition, although that information was not in the record at the time of the appeal. Nonetheless, following the direction of the AAO, the director issued an additional request for evidence, to which the petitioner did not respond.

Had it been clear that the initial request for evidence had been issued, the matter would have been dismissed on appeal. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Citizenship and Immigration Services regulations affirmatively 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). The purpose of a Request for Evidence (RFE) 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 petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and

then submitted a portion of it on appeal. However, the Administrative Appeals Office will not consider such evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Now, the petitioner had a second opportunity to submit evidence following the remand of the petition, but chose to submit nothing. The director reviewed the material submitted with the appeal and found a number of documents in Spanish, without the translation required by the regulations; therefore, these documents cannot be used as evidence for this adjudication. In addition, the petitioner did not address the issue of how much time would be devoted to productive labor.

In the second request for evidence, the director requested that the petitioner provide information regarding its status as a vocational school, which would preclude approval of H-3 classification for the beneficiaries. The petitioner did not respond.

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 director's February 23, 2004 decision is affirmed. The petition is denied.