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JT

FILE: HHW 214F 0151 Office: HONOLULU, HAWAII

Date:

MAY - 3 2004

IN RE: Petitioner: 

PETITION: Petition for Approval of School for Attendance by Nonimmigrant Student under Sections 101(a)(15)(F)(i) and (M)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(F)(i) and (M)(i)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Petition for Approval of School for Attendance by Nonimmigrant Student (Form I-17) was denied by the District Director, Honolulu, Hawaii. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner in this matter [REDACTED] is a private school, established in 1989. The petitioner offers vocational and language training. The record reflects that the petitioner was originally approved by Citizenship and Immigration Services (CIS) to admit nonimmigrant F-1 students on March 10, 1989. On May 28, 2002, the petitioner received approval to admit nonimmigrant M-1 students. In accordance with 8 C.F.R. § 214.12, the petitioner applied for preliminary enrollment in the Student and Exchange Visitor Information System (SEVIS) for attendance by F-1 and M-1 nonimmigrant students. CIS denied the petitioner's request for preliminary enrollment after determining that the petitioner did not have the required accreditation necessary to establish eligibility. On October 10, 2002, the petitioner filed its SEVIS Form I-17 for continued approval in accordance with 8 C.F.R. § 214.3(h)(1).

On March 5, 2003, CIS approved the petitioner for continued attendance by F-1 nonimmigrant students but issued a notice of intent to revoke and deny the petitioner's approval to enroll M-1 nonimmigrant students based on the determination that the petitioner's vocational course of study did not meet the regulatory requirements. CIS issued its final decision denying the petition to enroll M-1 nonimmigrant students on July 24, 2003. The petition at issue in this appeal is the portion of the SEVIS Form I-17 that relates to the petitioner's approval for attendance by M-1 nonimmigrant students in the petitioner's tourism program.

The petitioner, through counsel, files a timely appeal and brief with no additional documentation.

Counsel argues that the administrative record as described in the district director's decision is incomplete. Specifically, counsel alleges that the decision "leaves the erroneous and false impression that the denied application is a new petition when in fact Academia is seeking certification of an existing approved program into SEVIS" and resulted in CIS denying the petitioner on the basis of a new petition rather than as an already approved program. While we agree with counsel that the district director's decision did not indicate that the petitioner's SEVIS petition was for continued eligibility, we do not find this fact to have resulted in any error. The action taken by the district director in issuing a notice of intent to revoke prior to the denial was the appropriate action for a school with prior approval and afforded the petitioner adequate notice to respond to the deficiencies found.

Counsel further argues that CIS "cannot use the SEVIS [r]egulations to [r]eadjudicate an [e]xisting [a]pproved I-17." We disagree with counsel's argument. The supplementary information contained in 67 FR 60107 (September 25, 2002), the rule implementing Phase II of the transition to SEVIS, indicates that all schools "must undergo a certification review, and pay the associated fee, prior to enrollment in SEVIS" (p. 60108). The rule further provides:

The current regulations, in 8 CFR 214.3, provide for a paper-based application process, in which the school seeking [CIS] approval must submit a paper Form I-17 together with specific forms of documentation. The evidentiary requirements are currently contained in 8 CFR 214.3(b) and (c) and the instructions on Form I-17. With the advent of electronic filing of the Form I-17, the school will not be required to present the accompanying documentation until the time of the on-site visit.

The purpose of the certification review under this rule is two-fold: both to establish the bona fides of the school with regard to its educational or vocational programs, and also to review the adequacy of the school's past and current efforts to comply with the existing requirements governing foreign students.

Counsel's argument is that CIS should enroll the petitioner in SEVIS simply because the petitioner has complied with the SEVIS electronic filing procedures. This clearly is not the intent of the regulations. The purpose of the SEVIS program was to ensure integrity in the SEVIS system and not allow any school access to the system until CIS could verify that the school was bona fide and in compliance with the regulations.

The requirement that a school be recertified prior to being enrolled in SEVIS is also discussed in 67 FR 34862 (May 16, 2002). The supplementary information on page 34864 states:

Will a School Need To Be Recertified Prior To Enrolling in SEVIS?

In order to maintain the integrity of the data that is initially being entered into SEVIS, all schools will need to be recertified by [CIS]. [CIS] will be publishing a separate notice in the Federal Register to allow schools that meet a specific criteria to be eligible for preliminary enrollment in SEVIS. In addition, [CIS] will promulgate a separate rule that will require each school authorized to accept F-1 or M-1 students who did not apply for or qualify for preliminary enrollment to be reviewed and re-approved. **Such preliminary enrollment or re-approval must be completed before a school will be granted authorization to use SEVIS.**

(Emphasis added).

Moreover, the rule in its final form in 8 C.F.R. § 214.3(h)(2) states:

Service Adjudication. [CIS] will review the electronic Form I-17 information submitted in SEVIS and will require an on-site visit of the school. If [CIS] approves the certification request, SEVIS will be updated to reflect the approval.

Contrary to counsel's argument, CIS clearly intended to use the SEVIS regulations as the way to adjudicate petitions for continued approval and will not allow a school to be approved in SEVIS until the school is found to meet all eligibility requirements.

Counsel argues that CIS did not follow the regulations at 8 C.F.R. §§ 214.4(a) and (b). We agree, in part, with counsel's argument. As the petitioner was a school currently approved to admit M-1 nonimmigrant students, the district director appropriately issued a notice of intent to revoke the petitioner's approval in accordance with 8 C.F.R. §§ 214.4(a) and (b). The notice informed the petitioner and counsel of the grounds upon which the district director intended to withdraw approval. These actions are consistent with the requirements of the regulation.

However, the district director failed to inform the petitioner of the additional provisions of 8 C.F.R. § 214.4(b) that state:

The notice shall also inform the school . . . that it may, within 30 days of service of the notice, submit written representations under oath supported by documentary evidence setting forth reasons why the approval should not be withdrawn and that the school . . . may, at the time of filing the answer, request in writing an interview before the district director in support of the written answer.

First, the record reflects that the district director afforded the petitioner only 18 days to respond, rather than the 30 days stipulated by regulation. Second, the record does not reflect that the district director informed the petitioner it could request an interview before the district director. However, while we do acknowledge that the district director's actions do not comport with the specific regulatory requirements, we do not find that such actions resulted in any harm to the petitioner.

We note that on March 24, 2003, after the receipt of the notice of intent to revoke, counsel requested that CIS hold any further adjudication in abeyance for a period of 60 days in order for the petitioner to obtain "the appropriate licensing of its M-1 program from the State of Hawaii, Department of Education." CIS complied with counsel's request and allowed the petitioner to respond to the notice and supplement the record on two additional occasions; May 21, 2003 and June 10, 2003, respectively. As the petitioner was afforded more time than allowed by regulation, we do not find that the petitioner was unduly harmed by the failure of CIS to provide for an initial response time of 30 days. Further, although not notified of the opportunity to request an interview with the district director, we do not find that the petitioner suffered any detriment. The record reflects that the petitioner was afforded additional time to provide arguments and documentation in support of the petition. There is no allegation that additional material or arguments could have been introduced in an interview with the district director.

As counsel provides no statement or evidence on appeal that demonstrates the petitioner was harmed by CIS' failure to notify the petitioner of its ability to request an interview with the district director in support of the answer, or that the additional period of time allowed by the district director was insufficient to allow the petitioner to adequately respond to the district director's notice, we do not find the actions of the district director so flawed as to undermine the ultimate determination or to warrant a remand.

Finally, counsel argues that the petitioner has complied with all requirements and that the CIS has created additional requirements not required by regulation.

In order to establish eligibility for approval for attendance by nonimmigrant students under section 101(a)(15)(M)(i) of the Act, a petitioner must satisfy each of several eligibility requirements.

According to 8 C.F.R. § 214.3(e), there are four eligibility requirements.

To be eligible for approval, the petitioner must establish that—

- (i) It is a bona fide school;
- (ii) It is an established institution of learning or other recognized place of study;

(iii) It possesses the necessary facilities, personnel, and finances to conduct instruction in recognized courses; and

(iv) It is in fact, engaged in instruction in those courses.

Further, 8 C.F.R. § 214.3(b) specifies the following required supporting evidence:

Any other petitioning school shall submit a certification by the appropriate licensing, approving, or accrediting official who shall certify that he or she is authorized to do so to the effect that it is licensed, approved, or accredited A school catalogue, if one is issued, shall also be submitted with each petition. If not included in the catalogue, or if a catalogue is not issued, the school shall furnish a written statement containing information concerning the size of its physical plant, nature of its facilities for study and training, educational, vocational or professional qualifications of the teaching staff, salaries of the teachers, attendance and scholastic grading policy, amount and character of supervisory and consultative services available to students and trainees, and finances (including a certified copy of accountant's last statement of school's net worth, income, and expenses).

In his denial, dated March 5, 2003, the district director noted the Hawaii State Department of Education's determination that as the petitioner was an English-as-a-Second Language School, it was non-vocational and did not need to be licensed. In light of the fact that the state of Hawaii has now licensed the petitioner as a private trade, vocational, or technical school, it is unclear why this determination was originally made by the state of Hawaii. Presumably, the Hawaii State Department of Education did not consider the petitioner's vocational program when determining that the petitioner was not vocational.

As evidenced by the license contained in the record, there is no question that the state of Hawaii has determined the petitioner to be vocational. However, the documentation provided by the petitioner indicates that the petitioner received this approval on May 1, 2003. As the petition was filed on October 10, 2002, the petitioner is unable to establish eligibility as of the date of filing. Here, the petitioner provided CIS with documentation of state approval as of May 2003, seven months after the initial filing date. According to regulation, a petition shall be denied where evidence submitted in response to a request for evidence does not establish filing eligibility at the time the petition was filed. 8 C.F.R. § 103.2(b)(12).

While this determination sufficiently establishes the petitioner's ineligibility for approval, we will address the remaining issues in the district director's decision.

In addition to the evidence that must be submitted in accordance with 8 C.F.R. § 214.3(b), 8 C.F.R. § 214.3(c) requires the following additional evidence to be submitted:

If the petitioner is a vocational, business, or language school, or American institution of research recognized as such by the Attorney General, it must submit evidence that its courses of study are accepted as fulfilling the requirements for the attainment of an educational, professional, or vocational objective, and are not avocational or recreational in character.

The district director stated that the petitioner was required to submit "letters from at least three employers attesting that recent graduates of the school (within the last two years) are fully qualified in the field of training" as well as evidence that the petitioner "successfully accomplished its stated vocational objective." The district director based this requirement on the fact that these requirements are contained in the instructions on the Form I-17 petition. However, although the petitioner was previously approved on the paper Form I-17, the form at issue in this case is the electronic SEVIS Form I-17. This electronic form does not contain the instructions noted by the district director.

While the evidence indicated as a requirement by the district director does satisfy 8 C.F.R. § 214.3(c), such evidence is neither required, nor the only way for the petitioner to establish that its courses of study are not avocational or recreational in nature. The statute and regulations are silent as to what constitutes evidence that the petitioner's "courses of study are accepted as fulfilling the requirements for the attainment of an educational, professional, or vocational objective, and are not avocational or recreational in character." While we note that the evidence required by the district director is consistent with an internal memorandum previously issued by CIS¹, the memorandum does not preclude CIS from determining that a petitioner's course of study is not avocational or recreational in nature and fulfills an educational, professional, or vocational objective without submission of such letters from employers. Such an interpretation would constitute impermissible rulemaking. The memorandum's author intended to give guidance and illustration of what would constitute evidence that the petitioner's program was not avocational or recreational in nature.

In the instant case, the petitioner has submitted letters from five employers stating that graduates of the petitioning school are qualified for positions. The letters indicate that these graduates have been placed in positions such as tour conductors and customer service agents but do not indicate what programs the graduates were enrolled in at the petitioning school and do not substantiate that the names listed in the employer letters are actual graduates of the petitioning school. Despite the fact that we find the employer letters to be lacking, we do not find that either these letters or any other proof of the vocational objective is necessary in this case. In accordance with section 8-101-2 of the Hawaii Education Code, schools that are "avocational, hobby, recreation, or health classes or courses" are not required to be licensed. The fact that the petitioner has been licensed by the state of Hawaii sufficiently establishes that these programs are not avocational or recreational in nature. However, as determined above, such licensure was not in effect at the time of filing.

Beyond the decision of the district director is whether the petitioner's students are engaging in training that is in violation of their M-1 nonimmigrant status and whether the petitioner requires such training as part of the tourism program. In the notice of intent to revoke and deny, the district director noted that the "second three months [of] the 'Tour Conductor Course' . . . includes 'on-the job training ----work as a trainee at local travel agency about a [sic] month.'" In counsel's March 24, 2003 response he indicates that the petitioner's students are not "compensated" for their work but are only engaged in "an unpaid internship." We do not find counsel's argument to have merit. 8 C.F.R. § 214.2(m)(14) states that practical training may only be authorized *after* completion of the M-1 student's course of study. Regardless of whether the petitioner's students are being paid, no M-1 student is permitted to undertake practical training until the course of study has been completed.

¹ James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, Memorandum dated January 14, 1994.

Moreover, if the internship is a required part of the petitioner's curriculum, an M-1 student would not be able to enroll in a full course of study, as the student would be prohibited by the cited regulation from participation in a required part of the petitioner's curriculum. For this additional reason, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.