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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 01 080 54823 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2004

IN RE: Petitioner: [redacted]
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:

[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 California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a convalescent hospital that provides both long-term and short-term residency, respite care, and rehabilitation services. It seeks to employ the beneficiary as head nurse. The petitioner 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 director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation.

However, the record as presently constituted contains no indication that the director had issued a Request for Evidence (RFE): there is no copy of an RFE in the record, and the record contains no evidence that one was ever issued. Furthermore, the record contains no evidence of ineligibility. In such circumstances, a director is generally required to request additional evidence from a petitioner. 8 C.F.R. § 103.2(b)(8).

In accordance with 8 C.F.R. § 103.2(b)(8), the director must issue an RFE specifying any missing initial evidence of eligibility, and any regard in which evidence submitted by the petitioner either does not fully establish eligibility for the H-1B benefit or raises underlying questions regarding eligibility. The RFE must be written in such a manner as to put the petitioner on adequate notice as to the nature of the evidentiary deficiencies that the director identifies under 8 C.F.R. § 214.2(h)(4)(iii)(A).

Pursuant to 8 C.F.R. § 103.2(b)(8), the director shall allow the petitioner 12 weeks to respond to the RFE, and then shall render a new decision based on the evidence then of record as it relates to the regulatory requirements for eligibility. If that decision is adverse to the petitioner, the director shall follow the usual regulatory procedures regarding such decisions and the petitioner's right to contest them.

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 director's May 14, 2001 decision is withdrawn. The petition is remanded to the director for entry of a new decision.