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20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

DEC 30 2004

FILE: [redacted] Office: ATLANTA, GEORGIA Date:

IN RE: Petitioner [redacted]

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

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.

Mari Johnson

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, of the Atlanta, Georgia, Citizenship and Immigration Services (CIS) district office. The matter is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the case will be remanded to the district director for further consideration and entry of a new decision.

The Form I-17 reflects that the petitioner in this matter, S&J Beauty Academy, Inc., is a private school established in 2002. The Form I-17 petition at issue in this proceeding is the Student and Exchange Visitor Information System (SEVIS) petition, filed in accordance with 8 C.F.R. § 214.3(a)(1)(i). The petitioner declares an enrollment of approximately 30 students per year with four instructors. The petitioner seeks approval for attendance by F-1 nonimmigrant students.

The district director denied the petition on June 2, 2003, after determining that the petitioner was not eligible for approval under Section 101(a)(15)(F) of the Immigration and Nationality Act (the Act). Specifically, the district director determined that the petitioner failed to establish its course of study is accepted as fulfilling the requirements for the attainment of an educational, professional, or vocational objective, and are not avocational or recreational in nature. The district director further determined the petition could not be approved because the petitioner's Principal Designated School Official (PDSO) received compensation for recruiting foreign students.

The regulation at 8 C.F.R. § 214.3(c) provides, in pertinent part:

> *Other evidence* . . . If the petitioner is a vocational, business or language school . . . 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's denial provides no explanation for the determination that the petitioner failed to establish it courses are not avocational or recreational in nature. The record does, however, contain the request for evidence, issued by the district director, which states:

> Please submit evidence that the school is accredited by an accrediting agency in order to establish that your courses fulfill the appropriate objective. If you do not have accreditation, submit letters from 3 employers attesting that recent graduates of the petitioning school are fully qualified in the field of training. The letter must state the name and position of the graduate and the dates of employment with the company.

While the evidence indicated by the district director does satisfy 8 C.F.R. § 214.3(c), such evidence is not required and is not 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 nature." While we note that the evidence required by the district director is consistent with an internal memorandum previously issued by CIS[1], 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 being properly accredited or submitting letters from employers. Such an interpretation would constitute

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

impermissible rulemaking. The intent of the memorandum's author was to give guidance and illustrate what types of evidence could establish that the petitioner's programs were not avocational or recreational in nature.

The record contains evidence that the petitioner is licensed by the Georgia State Board of Cosmetology. In this case, we agree with counsel's statement on appeal that such licensure is sufficient evidence to establish that the petitioner's programs are not avocational or recreational in nature, and do, in fact, fulfill the requirements for the attainment of an educational, professional, and vocational objective.

The next issue is whether the petitioner's designation of Jin Kim as PDSO precludes approval of the petition.

The regulation at 8 C.F.R. § 214.3(l) states:

> *Designated Official* . . . means a regularly employed member of the school administration whose office is located at the school and whose compensation does not come from recruitment of foreign students. An individual whose principal obligation to the school is to recruit foreign students for compensation does not qualify as a designated official.

Based upon a sworn statement by Mr. [redacted] the district director determined that Mr. [redacted] was receiving compensation for the recruitment of students. In her denial, the district director states:

> [T]he owner and PDSO are involved in recruitment as evidenced by [redacted] in his sworn affidavit signed May 21, 2003. The PDSO may not receive compensation for recruitment. However, if the PDSO is the owner, he is receiving compensation for recruiting.

The statement, signed by Mr. [redacted] states:

> I [redacted] have sworn statement given under oath that I am the PDSO. Involved in recruitment. Not Song H. Sonu who is DSO.

We do not find the record as presently constituted, contains sufficient evidence to determine whether Mr. [redacted] designation as PDSO precludes approval. First, though Mr. [redacted] sworn statement indicates that he is involved in the recruitment of foreign students, there is no evidence to establish that his compensation comes from such recruitment or that his principal obligation to the school is recruitment. Second, the fact that Mr. [redacted] receives a salary as Vice President does not mean his compensation comes directly from the recruitment of foreign students. Clearly, the salaries of the petitioner's employees are based on generated revenue and will presumably increase if enrollment in the school increases. That fact, however, does not mean that Mr. [redacted] compensation comes directly from the recruitment of foreign students.

Counsel's statements on appeal do not help to clarify the matter. Counsel first states that prior to Mr. [redacted] designation as PDSO and the submission of the petition, the petitioner requested guidance from the district office on what was considered compensation.[2] Counsel then states "the [petitioner] was instructed by Steve

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[2] The record contains no evidence to support counsel's statement that the district office gave improper advice. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, even if counsel could establish the petitioner received incorrect advice from a CIS employee, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior advice of the district office that may have been erroneous.

of [the district] office that an owner, could indeed serve as PDSO." Though counsel states "Steve's" affirmative response to whether an *owner* could service as PDSO, counsel does not indicate that "Steve's" response included any discussion on the issue of compensation. Counsel does not dispute that fact that Mr. ecruits students and fails to indicate whether Mr compensation comes from a "direct bonus" or an "indirect [salary] increase."

As such the case must be remanded to the district director to request specific details related to Mr job, salary, and compensation, such as a description of Mr specific job-related responsibilities and whether his salary is based upon the number of students he recruits in the form of a bonus or other compensation.

Beyond the decision of the district director, we find an additional issue that needs to be determined on remand.

The regulation at 8 C.F.R. § 214.3(a)(2) states:

> (i) *F-1 Classification.* The following schools may be approved for attendance by nonimmigrant students under section 101(a)(15)(F)(i) of the Act:
>
> > (A) A college or university, i.e., an institution of higher learning which awards recognized bachelor's, master's doctor's or professional degrees.
> >
> > (B) A community college or junior college which provides instruction in the liberal arts or in the professions and which awards recognized associate degrees.
> >
> > (C) A seminary.
> >
> > (D) A conservatory.
> >
> > (E) An academic high school.
> >
> > (F) A private elementary school.
> >
> > (G) An institution which provides language training, instruction in the liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines.
>
> (ii) *M-1 classification.* The following schools are considered to be vocational or nonacademic institutions and may be approved for attendance by nonimmigrant students under section 101(a)(15)(M)(i) of the Act:
>
> > (A) A community college or junior college which provides vocational or technical training and which awards recognized associate degrees.
> >
> > (B) A vocational high school.
> >
> > (C) A school which provides vocational or nonacademic training other than language training.
>
> (iii) *Both F - 1 and M - 1 classification.* A school may be approved for attendance by nonimmigrant students under both sections 101(a)(15)(F)(i) and 101(a)(15)(M)(i) of the Act if it has both instruction in the liberal arts, fine arts, language, religion, or the professions and vocational or technical training. In that case, a student whose primary

intent is to pursue studies in liberal arts, fine arts, language, religion, or the professions at the school is classified as a nonimmigrant under section 101(a)(15)(F)(i) of the Act. *A student whose primary intent is to pursue vocational or technical training at the school is classified as a nonimmigrant under section 101(a)(15)(M)(i) of the Act.*

(iv) English language training for a vocational student. *A student whose primary intent is to pursue vocational or technical training who takes English language training at the same school solely for the purpose of being able to understand the vocational or technical course of study is classified as a nonimmigrant under section 101(a)(15)(M)(i) of the Act.*

[Emphasis added].

On the Form I-17 the petitioner indicates that it is a cosmetology school and that it is also engaged in language training. The petitioner's catalogue states the following as its objectives:

1. To develop a knowledge, understanding, skill and appreciation in the theory and operation of cosmetology.
2. To develop habits of good workmanship and the orderly performance of various tasks in a beauty shop.
3. Protect health, safety and welfare of the public and the cosmetology workforce.
4. To learn to select wisely, care for, and use properly, commercial products that are related to the application of beauty treatments.
5. To promote mutual esteem, goodwill, harmony and cooperation with professional and related organizations.
6. To help the student to prepare for the state board examinations in order to obtain a license to practice cosmetology.
7. To prepare students for entry level jobs in their demanding workforce.

On appeal, counsel argues the petitioner is eligible for F-1 classification under 8 C.F.R. § 214.3(a)(2)(i)(G) as an institution that provides language training, instruction in the liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines. To support his argument, counsel refers to petitioner's licensure by the Georgia State Board of Cosmetology and states that the petitioner's program assists "students in fulfilling the requirements of a professional or vocational objective – Cosmetology," and that the petitioner "provides the necessary classroom and practical hours to qualify pupils to take the Cosmetology licensing exams administered by the [Georgia State Board of Cosmetology]."

Based upon the evidence contained in the record, and upon counsel's statements on appeal, we find no evidence that the petitioner is engaged in any language training. Not one of the courses listed in the required curriculum for the petitioner's Cosmetology Program, Nail Care Course, or Cosmetology Teacher Training program involves language training. Further, even if the petitioner could establish that its students receive some English language training as part of the curriculum, the primary intent of the petitioner's students is to pursue studies in Cosmetology. As cited above, the regulations are clear that a nonimmigrant student must be classified as an M-1 nonimmigrant when the student's primary intent is to pursue vocational or technical training, despite the fact that the student may also take English language training to understand the vocational or technical course of study.

In the district director's decision on remand, the district director should discuss the petitioner's request for F-1 classification despite the fact that the petitioner is considered a vocational or nonacademic institution. The district director should afford the petitioner the opportunity to establish it is eligible for approval for F-1 nonimmigrant students.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. In this case the burden has not been met.

ORDER: The district director's decision is withdrawn. The case is remanded to the district director for action consistent with the above discussion and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.