

AAU EAC 97 104 51388 (INS), 1999 WL 33636423

U.S. Department of Justice  
Immigration and Naturalization Service

Office of Administrative Appeals  
Vermont Service Center

**IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED  
BY AGENCY]**

Beneficiary: [IDENTIFYING INFORMATION REDACTED BY AGENCY]

Petition: Petition for a Participant in a Special Education Exchange Visitor Program  
Pursuant to § 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C.  
1101(a)(15)(H)(iii)

In Behalf of Petitioner: Self-Represented  
File No. EAC 97 104 51388  
January 29, 1999

\*1 DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a human service/educational institute. It seeks classification of the beneficiary as a child care worker for a period of three months. The director denied the petition based upon the petitioner's failure to demonstrate that the proposed training is not available to the beneficiary in her own country. The director also determined that the beneficiary would be engaged in productive employment beyond that which is incidental and necessary to the training.

The Associate Commissioner acknowledges that the director mistakenly adjudicated the instant petition based upon regulations relevant to H-3 alien trainees. The petitioner has clearly indicated, however, that it is petitioning for an H-3 participant in a special education exchange visitor program.

On appeal, the petitioner makes reference to the proper set of H-3 regulations upon which the director should have adjudicated the instant petition. The petitioner asserts that any productive employment performed by the beneficiary will not go beyond what is incidental and necessary to the training. The petitioner also states that the beneficiary does not possess substantial training and expertise in the proposed field of training. § 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(iii), provides classification to 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. 8 C.F.R. 214.2(h)(7) states, in pertinent part:

(iv) Petition for participant in a special education exchange visitor program--(A) General Requirements.

(1) The H-3 participant in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(2) The petition must be filed by a facility which has professionally trained staff and a structured program for providing education to children with disabilities, and for providing training and hands-on experience to participants in the special education exchange visitor program.

\*2 (3) The requirements in this section for alien trainees shall not apply to petitions for participants in a special education exchange visitor program.

(B) Evidence. An H-3 petition for a participant in a special education exchange visitor program shall be accompanied by:

(1) A description of the training program and the facility's professional staff and details of the alien's participation in the training program (any custodial care of children must be incidental to the training), and

(2) Evidence that the alien participant is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities. Although the director mistakenly adjudicated the petition based upon the regulations relevant to H-3 alien trainees, this matter need not be remanded back to the director at this point. It is the determination of the Associate Commissioner that the petition still may not be approved, based upon the evidence contained in the record, and the H-3 regulations pertinent to participants in a special education exchange visitor program.

The petitioner has submitted a photocopied job description for the position of child care counselor within its residential programs. The record contains insufficient evidence, however, to establish that the petitioner has a structured (emphasis added) program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities. The petitioner has neglected to provide a description of its training program, or details of the alien's participation in the training program. For these reasons, the petition may not be approved.

Furthermore, the record clearly indicates that the beneficiary has completed only 20 points of the 140 points required for her to attain a baccalaureate degree in Social Work from Mid Sweden University. Based upon this evidence, a conclusion cannot be reached that

the beneficiary is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, as required by the current regulation. Moreover, the record contains insufficient evidence to demonstrate that the beneficiary has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities. For these additional reasons, the petition may not be approved.

The Service notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within the power of the Service to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F.2d 231 (D.C. Cir. 1961), cert. denied, 368 U.S. 926.

In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

\*3 ORDER: The appeal is dismissed.

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

Terrance M. O'Reilly  
Director  
Administrative Appeals Office  
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