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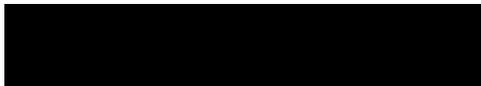
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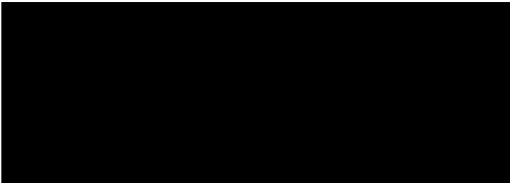
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FILE: EAC 05 034 52851 Office: VERMONT SERVICE CENTER Date **MAY 23 2005**

IN RE: Petitioner:   
Beneficiary: 

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:



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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a tennis club that seeks to employ the beneficiary as a tennis coach trainee. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country. The director also found that the training program does not have a fixed schedule, objectives or means of evaluation and that the beneficiary would be engaged in productive employment. Finally, the director stated that the beneficiary already possesses substantial expertise in the field of training.

On appeal, counsel submits a brief.

Section 101(a)(15)(H)(iii) of the Act, 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for 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.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part:

(ii) Evidence required for petition involving alien trainee--(A) Conditions. The petitioner is required to demonstrate that:

- (1) The proposed training is not available in the alien's own country;
- (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
- (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
- (4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) Description of training program. Each petition for a trainee must include a statement which:

- (1) Describes the type of training and supervision to be given, and the structure of the training program;
- (2) Sets forth the proportion of time that will be devoted to productive employment;
- (3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

- (4) Describes the career abroad for which the training will prepare the alien;
  - (5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and
  - (6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.
- (iii) Restrictions on training program for alien trainee. A training program may not be approved which:
- (A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;
  - (B) Is incompatible with the nature of the petitioner's business or enterprise;
  - (C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;
  - (D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
  - (E) Will result in productive employment beyond that which is incidental and necessary to the training;
  - (F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;
  - (G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or
  - (H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

The record of proceeding before the AAO contains: (1) Form I-129; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel states, "The Petitioner utilizes an established and USCIS approved training program[.]" and that previous identical petitions were approved. Counsel asserts that the director arbitrarily denied the petition. Counsel states that the training does not exist in the beneficiary's home country. Counsel also states that the director erred in determining that the petitioner could not afford to pay the beneficiary \$50,000 per year, and that the petitioner had not trained all of its tennis pros. Finally, counsel asserts that the director

erred in finding that the training program was designed to extend the total allowable period of practical training for the beneficiary.

Counsel asserts that the director erred in finding that there is no comparable training program in the beneficiary's home country, and references the petitioner's statements in its November 9, 2004 letter of support as evidence to establish this fact. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In the director's request for evidence, he asked the petitioner to "[p]rovide additional documentary evidence . . . to establish that there are no training programs overseas that the beneficiary would be able to attend to learn how to be a tennis coach." Counsel did not address this issue in his response to the director's request. On appeal, counsel provides three letters from tennis professionals who were raised in the beneficiary's home country and who state that the proposed training is not available there. The purpose of a request for evidence is to elicit 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 now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In addition, that AAO notes that the content of the three letters is identical. As the letters appear to have been drafted by the same individual, the evidentiary weight of the letters is lessened. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988).

The petitioner has not established that the proposed training is unavailable in the beneficiary's home country.

Counsel states that the director erred in finding that the petitioner could not afford to pay the beneficiary \$50,000 per year. In his request for evidence, the director requested that the petitioner "identify the normal wages for a professional tennis coach and identify how you are able to pay the beneficiary \$50,000 per year as a trainee." Again, counsel did not address this request in his response, but on appeal provides the petitioner's corporate tax return. Counsel states that the information provided in Part 5 of the Form I-129 indicates that the petitioner had adequate income and that previous petitions were approved without providing proof of income. As noted above, the director requested the information because he determined that it was germane to the adjudication. Counsel chose not to provide the information and provides a portion of it 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). In addition, counsel misrepresents the director's reliance on this element in his decision. The director did not find that the petitioner was unable to pay this salary, only that the petitioner did not provide the requested information. What the director did find, however, was that a salary of \$50,000 per year indicates that the beneficiary would likely be engaged in productive employment. The petitioner's refusal to "identify the normal wages for a professional tennis coach" as requested by the director does not

allow for a determination that this remuneration is some smaller percentage of a regular coach's salary, as might be expected of a trainee. The AAO concurs that the beneficiary will be engaged in productive employment in violation of the regulations.

Counsel asserts that the director erred in finding that the petitioner has not trained all of its tennis pros, and references the director's request to "provide evidence of those individuals who have previously attended your training program." Counsel states:

[T]he request was interpreted as a request for evidence of other tennis professionals who have been granted the H-3 visa petition for this training program only. It did not appear to be relevant to include all other tennis professionals at the academy, especially since all of them are full-time employees and either U.S. citizens or lawful permanent resident aliens. The training program is only for foreign tennis professionals and for those who wish to return to their home countries to run and operate a tennis club the way one is operated in the U.S.

The director's request, however, was clear on its face in requesting evidence of individuals who have attended the training program. Counsel chose to interpret the director's request differently, and then, on appeal, states that the director abused his discretion and was in error in determining that there was not an actual training program to train coaches, but that the program was being used to employ individuals from overseas. Counsel also states, "the training program is utilized for those tennis professionals who are foreign born and who wish to return to their home country to own and/or operate a tennis club or academy. It was never stated any other way." Despite counsel's assertions, there is nothing in the record to indicate that the training program was specifically designed either to train foreign-born professionals or train them so that they can own or operate a tennis club. In the petitioner's letter of support, it states, "The trainee will be eligible for a position as a tennis professional at tennis clubs, colleges, university, camps, clinics, etc. around the world," but says nothing about foreign nationals owning or operating a tennis club or academy in their home countries.

Counsel asserts that the director erred in determining that the training program was designed to extend the total allowable period of practical training. The director made this finding because the petitioner had employed the beneficiary for ten months in optional practical training. In his request for evidence, the director asked the petitioner to "[i]dentify whom the beneficiary worked for in optional practical training and what the beneficiary did for that training." In response, counsel stated, "[T]he Beneficiary was on optional practical training and worked for [the petitioner] since January, 2004. Mr. [REDACTED] the President and Owner of [the petitioner] is very impressed with the Beneficiary and has offered him an opportunity to participate in this training program." The AAO notes that this response only provided a portion of the information requested by the director and did not address the beneficiary's course of training. On appeal, counsel states that the beneficiary was working for the petitioner "designing and implementing training programs for specific junior and adult and professional tennis players at the academy. He was not being trained in this specific training program. The Service erred by assuming and concluding that he was." Since counsel did not respond to the director's request for information, the director can hardly be faulted for "assuming and concluding" that the beneficiary already had significant training and expertise in the proposed area of training, when he would be working for the same employer. 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).