

D2

U.S. Department of Homeland Security

Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



FILE: SRC 03 035 50281 Office: TEXAS SERVICE CENTER

Date: OCT 23 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

PUBLIC COPY

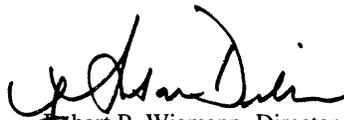
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Texas Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational non-profit organization. It seeks classification of the beneficiary as a director of Asian outreach for 36 months. The director determined that the training is primarily on-the-job training, which does not establish the beneficiary's eligibility for classification under Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act.

On appeal, the petitioner asserts, in part, that the beneficiary will attend a 13-week leadership training, prior to performing on-the-job training.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (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, as it is presently constituted, contains a statement from the petitioner's president attesting that it will provide funding to support the beneficiary during the training period, a copy of the petitioner's financial statements, copies of the beneficiary's passport and those of his family, and a statement in response to the director's request for evidence.

The director denied the petition based on the petitioner's response to a question in the request for evidence regarding the amount of time the beneficiary would spend in classroom instruction and in practical training. The petitioner responded:

We do not plan on any classroom training except the time he will spend observing our English courses that he will be teaching (a 30 hour course is currently planned for March/April, and another 30 hour course will be planned for the fall). 100% of the time will be in-the-field experience, working under our supervision. 100% of the time is on-the-job training, for his need to be exposed to non-Korean cultures and learn how to interact effectively with them.

The director determined that the training is to be entirely on-the-job, with no classroom or academic instruction whatsoever. The Immigration and Naturalization Service - the predecessor of what is now Citizenship and Immigration Services - has previously determined that where a beneficiary is to be engaged primarily in on-the-job productive employment, classification as a trainee will be denied. *Matter of Sasano*, 11 I&N Dec. 263 (Reg. Comm. 1965).

On appeal, the petitioner submits new information stating that the beneficiary's training "will begin with reviewing the three-month leadership training program of [the petitioner] in Warrenton, Missouri. . . . The program contains 13 weeks of intense academic classroom instruction (520 hours), and several projects called practicums [sic] to be completed after graduation."

The proposed work that the beneficiary would be doing at the petitioner's office has been altered substantially since the

filing of the petition. In the petition, it was stated that the beneficiary would be:

Working in Asian communities of Dallas, especially with Korean, Chinese and Japanese churches and non-profit organizations, to share expertise in area [sic] of religious education of children. . . . Because of the large Asian population in Dallas, [the petitioner] is interested in the special cultural, language and experience skills of [the beneficiary]. We believe that [the beneficiary] will help us to reach whole communities that we do not now have the expertise to enter.

On appeal, the description of the training following the three-month leadership training is that the beneficiary will work under supervision:

[T]raining teachers of children for spring and autumn Home Bible classes, in summer Bible classes, and camps. . . . He will also have hands on experience in planning and administering a year's program month by month, using English language, methods and materials. He will be communicating regularly with international headquarters as a local director might, learning how to work with the home office staff and their procedures.

The regulations that govern the filing of petitions affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). For this reason, the AAO will not consider the description of the training program that the petitioner now presents on appeal. The AAO does note, however, that even if the three-month training were included in the determination of whether the position is primarily comprised of on-the-job productive employment, the outcome would be the same. The position, as described by the petitioner, is primarily training teachers and planning and administering programs, under supervision of a staff person. There is no reference to any sort of structured training program beyond the first three months.

Beyond the decision of the director, the training program may not be approved because it deals in generalities with no fixed schedule, objectives, or means of evaluation. 8 C.F.R. § 214.2(h)(7)(iii)(A). In addition, the training is scheduled

for 36 months, 12 months longer than allowed by the regulations.
8 C.F.R. § 214.2(h)(9)(iii)(C)(1).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.