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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



MAR 17 2004

FILE: EAC 03 043 52331 Office: VERMONT SERVICE CENTER Date:

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:



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prevent clearly unwarranted
invasion of personal privacy**

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 nonimmigrant visa petition was denied by the service center director. The petitioner filed a motion to reopen, which was granted, but the director again denied the petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hospital and medical center. It seeks a change in classification of the beneficiary from an F-1 student to an H-3 nurse trainee. The petitioner endeavors to classify the beneficiary as a nonimmigrant trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(iii).

The director denied the petition because the training would be on behalf of a beneficiary who already possessed substantial knowledge and expertise in the area of proposed training. The director also found that the petitioner had not established that the beneficiary would not be placed in a position that is in the normal operation of the business. Finally, the director stated that the petitioner had not established the number of hours that would be spent in productive employment.

On appeal, counsel submits a brief stating that the director erred in making these determinations. Counsel states that the beneficiary does not have any training or expertise in the specific area of the proposed training. Counsel also states that the petitioner submitted information regarding both the time to be spent in practical training, and enough evidence to establish that the beneficiary would not be placed in a position that is in the normal operation of the business.

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;
- (4) 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
- (5) 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 description of the 18-month training program; the beneficiary's academic documents and resume; copies of the beneficiary's passport, visa, I-94 card, and Form I-20; and numerous documents about both the petitioner and the beneficiary's home country.

The first basis for the director's denial of the petition is that the petitioner did not establish the breakdown of the training time to be spent in classroom instruction and in on-the-job training. The director requested this information in his request for evidence; in response, the petitioner stated that 40 percent to 70 percent of the training would involve in-class training. The director, in his decision, stated that the remaining portion of the beneficiary's time, 30 percent to 60 percent, constitutes a disproportionate amount of time spent in hands-on training. The director found that much of the proposed training includes hand-on, practical application of medical procedures that would likely be connected to productive employment. The AAO agrees that the lack of detail provided regarding the specifics of the hands-on training reflects the likelihood that the beneficiary would be engaged in productive employment.

The director also found that the petitioner had not established that the beneficiary would not be placed in a position that is in the normal operation of the business. The director noted that the beneficiary will be paid more than \$50,000 per year during her training, and suggested that this is a high salary for someone who is not engaged in productive employment. In the petitioner's response to the director's request for evidence, the petitioner states that the salary is high due to the high cost of living in its location. In counsel's cover letter submitted with the petition, however, it states that the petitioner will be paying for housing and meals, in addition to the beneficiary's salary, which would negate the rationale for the high salary. The petitioner also states in the response to the director's request that the beneficiary will receive a standard benefits package in addition to her salary, and that benefits package includes a housing allowance. The director found that the petitioner did not submit any evidence that this salary is standard compensation for all of its nurse trainees, and, as such, again leads to the conclusion that the beneficiary is being paid for productive employment.

Finally, the director determined that the training would be on behalf of a beneficiary who already possesses substantial knowledge and expertise in the area of proposed training.

The beneficiary has been working for the petitioner in F-1 status for her practical training. She was approved for one year of post-completion practical training from March 2002-March 2003. The beneficiary's resume states that she has been working as a registered nurse for the petitioner since July 2002. The petitioner and counsel stated that the beneficiary participated in a 12-week orientation program, but did not respond to questions in the request for evidence, or to the same concerns in the director's decision on the initial petition, or to the issue raised again in the director's decision on the motion to reopen regarding the beneficiary's employment as a nurse with the petitioner.¹ While the petitioner made it clear that the proposed training is different than the 12-week orientation program, the issue of the beneficiary's current employment with the petitioner was not addressed. It appears that the beneficiary has significant training in the proposed field of training, specifically with the petitioner and, therefore, the training program can not be approved, pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(C).

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.

¹ At the time the petition was filed, the beneficiary had apparently been working for the petitioner for five months. It is not known whether this employment continued for the entire approved period.