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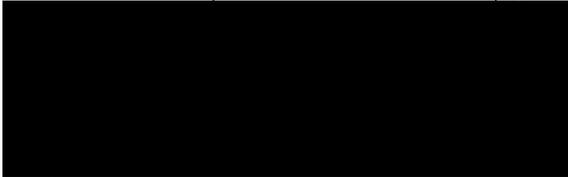
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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NOV 24 2004

FILE: EAC 03 254 52361 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:

SELF-REPRESENTED

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 an accounting corporation that seeks extension of classification of the beneficiary as a tax preparer. The director determined that the beneficiary is primarily a productive employee rather than a trainee, and the training does not establish the beneficiary's eligibility under Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

On appeal, the petitioner submits a statement.

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.

The director found that the beneficiary would be primarily engaged in productive employment. On the Form I-129, the petitioner stated that the beneficiary's wages were \$500 per week. In the director's request for evidence, he asked the petitioner to explain why the beneficiary was "earning what appears to be the salary of an employee engaged in primarily productive employment rather than training." In response, the petitioner stated that the position paid only slightly more than minimum wage, for a total annual wage of \$15,000 per year. On appeal, the petitioner states that due to his "silly mistake," the information on the Form I-129 was erroneous, and should have stated that the beneficiary was receiving \$300 per week. The petitioner included the beneficiary's Form W-2 for the 2003 tax year to support his claim. In that year, the beneficiary earned

\$13,496.90. The director based his decision on the information initially provided by the petitioner. The petitioner has provided evidence to establish that the beneficiary is being paid at a rate significantly lower than reported at the time of filing. Despite the lower salary being paid to the beneficiary, the AAO finds that the nature of the work is more like productive employment than a training program. The petitioner stated:

[The beneficiary] will be assisting me with initial interviews of tax clients, tax preparation and follow-up. In addition, because of the high concentration of Polish clients in this Tax Practice, [sic] her bilingual abilities will be utilized in the fullest. The language problem has been a stumbling bloc to increasing business from Polish clients not versed in English.

The petitioner provided no information regarding an actual structured training program, as required by the regulations. It appears that the petitioner is using the beneficiary as a translator and tax assistant to help increase and promote his business amongst the Polish community. The regulations require that the beneficiary not be placed in a position that is in the normal operation of the business and in which citizens and resident workers are regularly employed. The petitioner stated, "My practice, over the past 2 years, has had a great increase in the number of Polish speaking tax clients. I have been attempting to obtain the employment of someone to train who is completely fluent in both English & Polish. These attempts have proven to be fruitless." Again, it appears that the petitioner is using the beneficiary to fill a position that he was unable to fill through his regular hiring practices. This is not the purpose of the H-3 classification; it is to be used for short-term training, not to meet the regular business needs of a petitioner.

Beyond the decision of the director, the AAO notes that the beneficiary has already exceeded the maximum period of stay allowed in the H-3 classification. An H-3 alien trainee who has spent 24 months in the United States "may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months." 8 C.F.R. § 214.2(h)(13)(iv). The beneficiary would not have been eligible for extension even if it had been found that she was not engaged in productive employment.

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.

ORDER: The appeal is dismissed. The petition is denied.