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U.S. Citizenship
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Services

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FILE: WAC 04 230 53793 Office: CALIFORNIA SERVICE CENTER Date: **AUG 22 2005**

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:
[Redacted]

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 machine shop that seeks to employ the beneficiary as a machinist/CNC programmer trainee. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country and that the beneficiary would be engaged in productive employment beyond that which is incidental and necessary to the training. The director also found that the training program deals in generalities, with no fixed schedule, objectives or means of evaluation and that the petitioner does not have adequate staff to provide the 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;

- (5) Describes the career abroad for which the training will prepare the alien;
 - (6) 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
 - (7) 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 petitioner had not established that the proposed training was unavailable in the beneficiary's home country. On appeal, counsel states that the director erred in his interpretation of the regulations and resubmits a number of statements that were included with the response to the director's request for additional evidence.

Counsel states on appeal that the director misinterpreted the regulations, because he should have considered whether “comparable” training was available in the beneficiary’s home country, rather than whether any training was available. Counsel quotes from the *Immigration Procedure Handbook* (author not cited), “[The petitioner] should be able to establish that there is no **comparable** training available abroad. [...] training in the United States is **irreplaceable** in areas where the market or other business factors are unique.” [Emphasis in the original]. Counsel’s argument is not persuasive. The manner in which business is conducted in the United States is almost always going to be different than how it is done in any other country. The regulation indicates that the training has to be unavailable in the alien’s own country. It does not state that if no similar training is available, then an H-3 training program would be appropriate. This is clearly not the intent of the regulations. Counsel’s source material continues on to state:

INS will often focus on the generic type training—business management—and conclude that it is available in many industrialized countries, even though the training company has emphasized that the important aspect of the training is an introduction to U.S. management techniques, which is required for the trainee to be placed in a management position with the company abroad.

In the context of training in the United States “to be placed in a management position *with the company* abroad,” counsel’s argument is more coherent. If a company is training its own employees for work overseas, it would be more difficult to establish that training was available in the beneficiary’s own country. The situation in the petitioner’s case does not involve training aliens for work with the petitioner overseas. Counsel overlooks that portion of the source material, however, and simply states that training in the United States is irreplaceable for “foreign-based corporations and aliens seeking to increase their marketability.” Clearly, any training in the United States is irreplaceable with that found in any other country, but for the purpose of the regulations, the question is broader than whether *similar* training is available in the beneficiary’s country.

The petitioner has not established that training is unavailable in the alien’s country. The petitioner is relying on the above-referenced statements and various reports to establish that the beneficiary could not receive similar training in his home country. Most of the reports have no specific information regarding the state of the industry in the petitioner’s home country, and no information regarding whether training as a machinist/CNC programmer is available.

The letters indicate that much of the industry in Poland still relies on Communist-era machinery and that there is little, if any, training available in modern computerized machines. Other than stated familiarity with the marketplace in Poland, none of the letters’ authors attaches or cites to any materials in support of his or her conclusions. 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 addition, the attention of CIS is drawn to the remarkable similarity of the letters submitted to establish that training is unavailable in the beneficiary’s home country. All of the letters have similar, and sometimes identical, language. As the letters appear to have been drafted by the same individual or drafted off of a common template, 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 evidence submitted to establish that the proposed training is unavailable in the beneficiary's home country is unpersuasive. Thus, the petitioner has not established that requirement of the regulation.

The director also found that the training program deals in generalities, with no specific schedule, objectives, or means of evaluation. The AAO agrees that the classroom schedule provided in response to the director's request for evidence is general, broken into six or 12-week periods, with a brief paragraph describing the topics to be covered. This schedule gives no information regarding what the beneficiary would actually be doing for these periods or how he would be training. It does not provide any specifics to establish that the program does not deal in generalities, which is prohibited by the regulations. While the objectives of the proposed training are clear, the schedule lacks specificity, and the training program has no means of evaluation.

There is no indication in the record that the beneficiary would be engaged in productive employment. The AAO does not concur with the director's determination on this issue. The director also determined that the petitioner does not have adequate staff to provide the proposed training. There is no evidence in the record regarding the petitioner's staffing levels, or who would be providing the proposed training. The AAO agrees that the record does not establish that the petitioner has sufficiently trained staff to provide the training specified, as required by the regulations.

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.