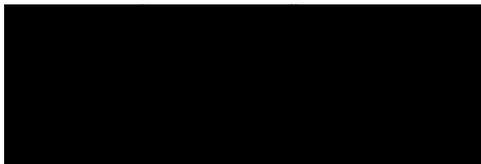


Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



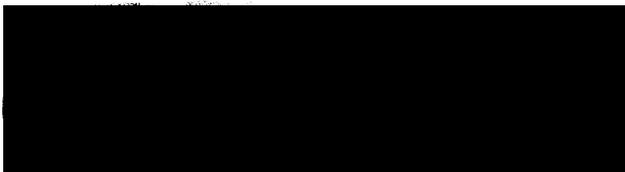
74

FILE: LIN 04 224 52182 Office: NEBRASKA SERVICE CENTER Date: AUG 24 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:



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 sustained. The petition will be approved.

The petitioner is a training orchestra. It seeks classification of the beneficiary as a musician in training. The director found that the beneficiary possesses substantial education, training and expertise in the field of the proposed training. The director also determined that the petitioner did not establish that the training is unavailable overseas. Finally, the director stated that the beneficiary would be engaged in productive employment.

On appeal, the petitioner submits a statement stating that the director erred in making these determinations.

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 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the beneficiary possessed substantial education, training and expertise in the field of the proposed training. The beneficiary has a bachelor's degree in music, is a member of an orchestra, and is attending an orchestra academy in her home country. In addition, she placed second and third in two competitions in her home country. The beneficiary does possess substantial education, training and expertise, but in order to participate in the proposed training, all of the participants must possess similar skills. The training is with the training orchestra of the Chicago Symphony Orchestra, one of only two such programs in

the world. One could not train at the highest levels in any field without already possessing significant skills, training and experience. The AAO finds that the evidence submitted establishes that although the beneficiary possesses significant training and background in the proposed field of training, this background is necessary to acquire the skills in order to be eligible to participate in the advanced training to be provided by the program.

The director also determined that the training could be obtained in the beneficiary's home country, as evidenced by her prior education, training and experience, and by the petitioner's statement that training as an orchestra musician can be found both in the United States and in other countries. The director misinterpreted the petitioner's statement. While musical training can clearly be found worldwide, the record does not establish that a structured training with one of the preeminent orchestras in the world is available in the beneficiary's home country. The petitioner also stated that the proposed training is different than any standard conservatory or university music education, by virtue of its connection with the Chicago Symphony Orchestra. The AAO finds that the proposed training is not available in the beneficiary's home country.

Finally, the director stated that the beneficiary would be engaged in productive employment, since she would be receiving a \$6,000 stipend during the nine-month training period and would be giving public performances during the training. There is no indication that this would be productive employment. There is no benefit, beyond goodwill garnered, that the petitioner will accrue as a result of the performances, which are provided to the community free of charge. The stipend to be provided to the beneficiary is nominal, less than \$670 per month. Since the beneficiary would be training as a professional musician, public performance is incidental and necessary to the training, and does not constitute productive employment in this context.

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 sustained that burden.

ORDER: The decision of the director is withdrawn and the appeal is sustained. The petition is approved.