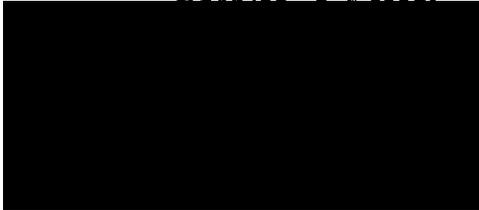




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FILE: WAC 05 204 50371 Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2005

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
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 manufacturer of precision instrument parts and electronic components that seeks to employ the beneficiary as a sales trainee. The director determined that the petitioner did not establish that the training program had a fixed schedule, objectives or means of evaluation. The director found that the beneficiary would be engaged in productive employment beyond that which is incidental and necessary to the training. The director stated that the petitioner did not establish that the training was unavailable in the beneficiary's home country. The director also stated that the petitioner did not establish that it has a sufficient physical plant or personnel to provide the training.

On appeal, counsel submits a brief and supporting documentation.

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.

On appeal, counsel states that the director disregarded the evidence provided in response to his request for evidence. In addition, counsel states that the director misconstrued the facts of the case in determining that the beneficiary would be engaged in productive employment.

The director found that there was no valid organized training program. The AAO concurs. There is no evidence that the training program deals with a fixed schedule, objectives, or means of evaluation. The schedule provided in response to the director's request for evidence lists different phases of the training and the time attached to each (ranging from three weeks to nine weeks each), along with a list of topics to be covered in each phase. None of the topics in the training include any additional information regarding the length of time to be spent on each topic within the phases or what the beneficiary would actually be doing for each segment of training. It does not provide any specifics to establish the means of evaluation or that the program does not deal in generalities.

The director found that the beneficiary would be engaged in productive employment beyond that which is incidental and necessary to the training. There is no indication in the record that the beneficiary would be engaged in productive employment, beyond the remuneration to be earned. The beneficiary will receive \$2,000 per month of training, for the equivalent of an annual salary of \$24,000. This amount is not insignificant, and could in some cases indicate that a beneficiary would be engaged in productive employment. In this case, however, since the beneficiary is training to be the petitioner's employee overseas, and there is no evidence establishing that the beneficiary would be performing productive employment, the AAO finds that the amount of remuneration is not sufficient to establish that the petitioner would be utilizing the beneficiary as an ordinary worker, rather than a trainee.

The director stated that the petitioner did not establish that the training was unavailable in the beneficiary's home country. The AAO does not concur. The petitioner's product employs proprietary and complex technology, and training related to the product and the technology could reasonably only be acquired from the petitioner itself.

The director determined that the petitioner did not establish that it has a sufficient physical plant or personnel to provide the training. The petitioner stated that its gross annual income is approximately \$8.9 million, and that it employs 162 people. While the petitioner did not provide evidence to substantiate its income, it did provide an organizational chart. In addition, in reviewing the petitioner's website, it is clear that the petitioner has an extensive physical plant, which could accommodate a single trainee.

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.