

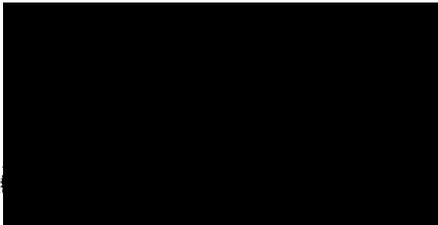
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U.S. Citizenship  
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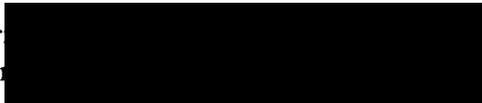
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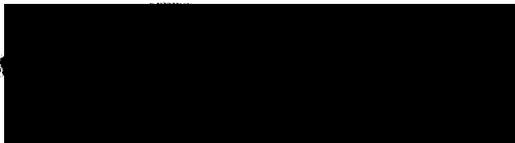
FILE: WAC 03 111 54388 Office: CALIFORNIA SERVICE CENTER Date: FEB 25 2005

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:



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 black ink, 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 sightseeing tour and utility helicopter services company that seeks to employ the beneficiary as a helicopter pilot trainee. The director determined that the beneficiary already possessed substantial training and expertise in the proposed field of 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 beneficiary already possessed substantial training and expertise in the proposed field of training. The director stated that the beneficiary is certified as a commercial and helicopter pilot in his home country, and also engaged in two years of training in the United States in M-1 status.

On appeal, counsel states the proposed training is in flying turbine helicopters in a high altitude environment and training as a utility pilot, which are different skills than basic flight training. In addition, counsel states that the beneficiary has no experience as a pilot in Brazil and only received his FAA certification during his

M-1 training in the United States. Counsel asserts that the beneficiary's M-1 training did not provide any training in high altitude or utility flying.

The AAO agrees with counsel that there is no evidence in the record that the beneficiary had previous flight training or experience in his home country. The directors' remarks on this issue are withdrawn.

The petitioner provided a copy of its training program, as well as a brochure about its business. There is no evidence, however, to establish that the proposed training is different from the training already received by the beneficiary. Counsel states on appeal that it is different, but the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Despite the details presented in the petitioner's training program, there is no information about how the training can be differentiated from the training the petitioner already received while in M-1 status. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has not established that the beneficiary does not already possess substantial training and expertise in the field of proposed training.

Beyond the decision of the director, it appears that the beneficiary will be engaged in productive employment during the training. The petitioner stated in its response to the director's request for evidence (Exhibit 2) that the only individuals who can receive the training are those employed by the petitioner. The beneficiary would receive \$2,750 per month, and would spend the first year flying the petitioner's customers, and the second year performing contracts for the petitioner's clients. These activities appear to be productive employment beyond that which is incidental to the training. Indeed, the training seems to be incidental to the productive employment. For this additional reason, the petition may not be approved.

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.