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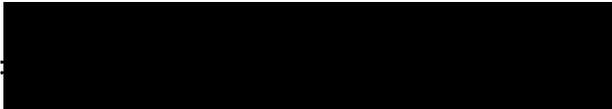
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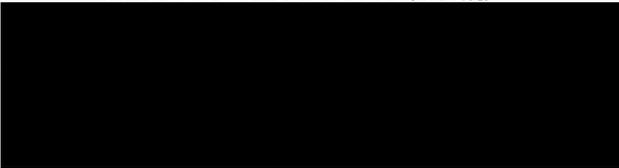
FILE: WAC 03 221 50428 Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2005**

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.

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 window manufacturer that seeks to employ of the beneficiary as a market analyst trainee. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country.

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 requests for additional evidence; (3) the petitioner's responses to the director's requests; (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. Counsel submits nine statements, eight of which were from individuals who had previously submitted slightly different 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 nine above-referenced statements and a copy of a report from the Internet to establish that the beneficiary could not receive similar training in her home country. The report from the Internet is undated, with no background information provided about the author, so it is difficult to determine its relevancy or authenticity. Two of the statements submitted in response to the director’s request for evidence were from employees of the petitioner, two were from individuals affiliated with machining and engineering companies, and the remaining four were from individuals who work for other window companies. Three of the letters discuss the absence of training available for the equipment used in modern window manufacturing and one (from the petitioner’s president) does not discuss the availability of training in the beneficiary’s country at all. On appeal, the statements from these same individuals are essentially the same as those submitted earlier, except that they include references to the absence of sales and marketing training in the beneficiary’s country.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. 103.2(b)(8). The petitioner was put on notice of required evidence to establish that training was unavailable in the beneficiary’s country, and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner submitted

evidence that was not fully responsive, and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The letters indicate that much of the industry in Poland still relies on Communist-era machinery and not well-trained marketing/sales personnel, and that there is little, if any, training available in these fields. 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. 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). 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).

Since the AAO has determined that the evidence submitted to establish that the proposed training is unavailable in the beneficiary's home country is unpersuasive, the petitioner has not established that requirement of the regulation.

Beyond the decision of the director, the AAO finds that the training program has no means of evaluation, and therefore could not be approved, pursuant to at 8 C.F.R. § 214.2(h)(7)(iii)(A). For this additional reason, the petition may not be approved. The AAO also notes that there is a question about whether the beneficiary will be engaged in productive employment.<sup>1</sup>

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.

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<sup>1</sup> The petitioner, in its July 23, 2003 letter of support, stated that it had also filed a Form I-129 for an H-1B classification for the beneficiary and, prior to filing the instant petition, had received CIS's Notice of Intent to Deny. While each petition is adjudicated on its own merits, the petitioner's interest in employing the beneficiary in a specialty occupation raises a question as to whether the petitioner intends to have the beneficiary engage in productive employment rather than in a training program.