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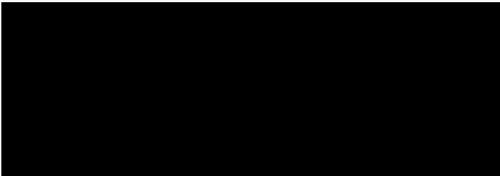
FILE: EAC 03 146 50616 Office: VERMONT SERVICE CENTER Date: **MAR 10 2005**

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 an HVAC design, engineering, installation & service company that seeks to employ the beneficiary as an HVAC technical trainee. The director found that the training program could not be approved because it was designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

On appeal, counsel submits a statement asserting that the director misinterpreted 8 C.F.R. § 214.2(h)(7)(iii)(F), since the beneficiary is not being trained for the ultimate staffing of domestic operations, but is rather being trained to recruit temporary workers for the petitioner in the beneficiary's home country.

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 training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. The petitioner intends to train the beneficiary as an HVAC technician and then employ the beneficiary in his home country to recruit HVAC workers to come to the United States to work for the petitioner in an H-2 classification. Counsel states that the director misinterpreted the regulations, which should only apply to whether the beneficiary would be employed in the

United States. The AAO disagrees. The language of the regulation is clear: "A training program may not be approved which: . . . Is designed to recruit and train aliens for the *ultimate* staffing of domestic operations in the United States." 8 C.F.R. § 214.2(h)(7)(iii)(F) [Emphasis added]. While the beneficiary would not be working for the petitioner in the United States, the purpose of the training program is to train and employ the beneficiary to recruit other aliens for the ultimate staffing of the petitioner's domestic operations. Counsel misstated the rationale for the director's decision by asserting, "The Center Director determined that because the beneficiary would be paid by the petitioner, in Brazil, for work performed by the beneficiary in Brazil that the petition must be denied because the 'H-3 visa classification prohibits recruiting and training aliens for the ultimate staffing of domestic operations in the United States.'" It is not the fact that the petitioner would be paying the beneficiary for his overseas work that mandates denying the petition, but rather that the training program is for the express purpose of preparing the beneficiary to recruit aliens for the ultimate staffing of the petitioner's business in the United States.

Beyond the decision of the director, the AAO notes that the period of intended employment listed on the Form I-129 in Part 5 is 4/10/03 to 12/10/03, or eight months. The proposed training program covers a 12-month period, which clearly could not be completed in the time frame requested. Additionally, the beneficiary had already spent ten months in H-3 status with the petitioner. It is not apparent how the proposed training differs from the training the beneficiary has already received from the petitioner.

Additionally, 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 these additional reasons, 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.