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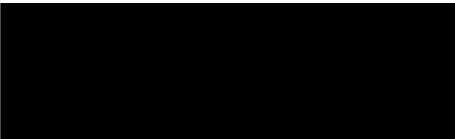
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FILE: LIN 05 085 51434 Office: NEBRASKA SERVICE CENTER Date: **MAY 23 2005**

IN RE: Petitioner: [Redacted]
Beneficiaries: [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 dismissed. The petition will be denied.

The petitioner is the arena football developmental league that seeks to employ the beneficiaries as trainees. The director determined that the petitioner did not establish that the training was unavailable in the beneficiaries' home country. The director also found that the training program does not have a fixed schedule, objectives or means of evaluation and that the beneficiaries would be engaged in productive employment. The director stated that the petitioner did not establish that the beneficiaries would utilize the proposed training overseas. Finally, the director stated that the beneficiaries already possess substantial expertise in the 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;

- (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 six previous petitions that were identical to the instant petition were approved and that if this petition is not approved, the petitioner will lose its sizable investment in the training program and in international market development initiatives. Counsel asserts that the director erred in its determination that the petitioner did not establish that the proposed area of training, American rules football, is unavailable in the beneficiaries' home country. Counsel asserts that the proposed area of training is in

Arena Football, a different game from American rules football. Counsel states that the director's statement that it was not clear "how the beneficiaries could immediately utilize the proposed training abroad," misstates the terms of the regulation, which only requires that the knowledge or skill will be used outside the United States, but gives no timeframe. Counsel states that the director's determination that the beneficiaries possess substantial training and expertise in the proposed field of training is based, once again, on his misunderstanding that arena football is the same as American rules football. Counsel also states that the director's finding that the training program will result in productive employment is inaccurate, as any productive employment that does occur will be incidental and necessary to the training. Finally, counsel asserts that the training program has a clear description, with a purpose and objective, hours spent in each stage of the program and with fixed terms.

The director found that the petitioner did not establish that the proposed training is unavailable in the beneficiaries' home country. Specifically, the director referenced "American rules football" as being played in the beneficiaries' home country. Counsel asserts that arena football is substantially different than American rules football, as indicated by the fact that the game is patented in the United States, Mexico, Canada and Japan. The director stated that the fundamentals of the game are the same, and that training in one game would prepare an individual to play the other game. The AAO disagrees with the director. While he was correct in stating that the fundamentals of the game, such as blocking, passing and rushing, may be the same, he disregards the myriad differences that made the game eligible for patent protection. If arena football had been the same game as American rules football, it would not have received this protection. The AAO finds that the petitioner established that the proposed training is unavailable in the beneficiaries' home country.

The director determined that the beneficiaries possess substantial training and expertise in the field of the proposed training. Both of the beneficiaries have played American rules football at a high level in their home country, but, as noted above, the record reflects that arena football differs from American rules football. Despite the beneficiaries' skill and expertise in American rules football, there is no indication that they have any experience with arena football; therefore, the AAO finds that the beneficiaries do not possess substantial training and expertise in the field of the proposed training.

The director also found that the beneficiaries would be engaged in productive employment because they would be paid \$200 per game if they reach "level 2" of their training. The petitioner stated that most players would not reach level 2, but for those that do advance, it would involve approximately 40-50 hours, following the 600 hours of training at level 1, or 6 percent of the total hours of training. The director stated that if the trainees are playing in regular league games and earning money for that play, it has the appearance of productive employment. However, given the small percentage of time involved, the nature of the petitioner's business, and the fact that most of the trainees would not participate at this level, this element does not violate the regulation that prohibits productive employment in excess of that which is incidental and necessary to the training.

The director found that it was not clear how the beneficiaries "could immediately utilize the proposed training abroad." Counsel is correct in stating that the regulation does not require that the training be utilized immediately. Specifically, 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) states that the petitioner is required to demonstrate that "[t]he training will benefit the beneficiary in pursuing a career outside the United States," and 8 C.F.R. § 214.2(h)(7)(iii)(D) states that a training program may not be approved which "[i]s in a field in

which it is unlikely that the knowledge or skill will be used outside the United States." While there is no timeframe given in the regulations, the petitioner still must establish that there will be an opportunity to apply the knowledge gained during the training outside the United States. Counsel and the petitioner refer to the league's International Development Plan ("Plan"), which was submitted with the petition to support their claim that the sport is expanding beyond the United States. The AAO notes that this is a draft plan that was copyrighted in 2000. There is no indication anywhere in the record, however, that the league has moved beyond presenting games at international venues. There are various timelines within the International Development Plan, which states both that "the goal is to launch a pan-European ArenaBall league of at least eight teams, playing a full season by the year 2000," and "either merging the AFL [Arena Football League] and NFL Europe for the 2002 season by taking the six NFL Europe teams/brands as a separate European division of the AFL with the addition of two new cities or establish an off season (fall and winter) European Arena Football League of ten to twelve teams." Similarly, the Plan states that the Canadian development plan "is to have League play in six cities in Canada in the winter of 2001," but the timeline of events within the Plan indicates that League play would begin in Canada in the winter of 2002. Nonetheless, there is no evidence of record that any of these events have occurred.¹

On appeal, counsel does not address this issue specifically, but states that "[d]etails concerning the execution of the Plan (i.e. exhibition and friendship games, overseas franchising, etc.) are highlighted in the [petitioner's January 3, 2005] "Supplement [sic] Letter to H-3 Training Visa Petition." This letter indicates that there have been a number of overseas exhibition games, as well as training clinics and three "friendship preseason games" which involved all-star teams from Australia/New Zealand and Japan playing against U.S. teams. The petitioner does not explain whether these all-star teams are American rules football players or Arena Football players. There is no other reference to overseas leagues or teams. The petitioner does state that it is in discussion with its Japanese partners regarding placing a franchise in Japan for the 2007 season, but there is no evidence to support this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Since there is no evidence in the record that there are Arena Football teams in Australia, New Zealand or Japan, or that any international expansion has occurred, the petitioner has not established the proposed training would be used by the beneficiaries in pursuing a career outside the United States.

Finally, the director found that the proposed training plan was "brief, vague, and lacks a fixed schedule, objectives, or means of evaluation." The AAO agrees. The petitioner described the training program as involving 600 hours of training, including classroom instruction, segmented drills and simulated game situations. The petitioner states that the training is "extremely regimented," but provides no detail as to the number of hours of training per day, how the training time is divided among the three areas, or how the trainees would be evaluated. There is not enough information provided about the proposed training to meet the terms of the regulations at 8 C.F.R. § 214.2(h)(7)(ii)(B)(1), (2) & (3) and 8 C.F.R. § 214.2(h)(7)(iii)(A), cited above.

¹ The websites for both Arena Football and the petitioner, Arena Football 2, indicate no reference to any international expansion as of May 2005.

Counsel asserts that identical petitions had been previously approved. The record of proceeding does not contain copies of the visa petitions that counsel claims were approved. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of CIS. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.