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U.S. Citizenship
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Services

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FILE: SRC 02 064 50237 Office: TEXAS SERVICE CENTER Date: **NOV 15 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:

[Redacted]

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 petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO remanded the matter to the director for further consideration. The director again denied the petition and certified her decision to the AAO. The director's decision will be affirmed. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary as a management trainee. The director found that because Citizenship and Immigration Services (CIS) denied the beneficiary a change of status while the H-3 petition was pending, the beneficiary was out of status at the time the H-3 petition was decided and, therefore, the petition could not be approved.

The matter was remanded to the director because no documentary evidence in the record indicated that the beneficiary's J-1 status (which was issued for the duration of his stay) had expired at the time the H-3 petition was filed. In addition, the AAO does not have the authority to review the denial of an application for a change of status that has been filed on an I-129 petition. *See* 8 C.F.R. § 248.3(g). The AAO determined that the director must adjudicate the beneficiary's request for a change of status and the merits of the petitioner's H-3 petition separately. As the director's decision did not address the underlying issues of the H-3 petition, she was directed to render a new decision based on the evidence of record as it related to the regulatory requirements for eligibility.

On January 28, 2005, the director issued a notice of certification with the new decision. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country. Neither counsel nor the petitioner submits evidence in response to the notice of certification. The record is complete.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (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; (5) the AAO's decision remanding the matter; and (6) the director's denial and certification to the AAO. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the petitioner did not establish that the training was unavailable in the beneficiary's home country.

In response to the director's request for evidence, counsel asserted that the only method by which franchises achieve consistency in service, food and cleanliness is by centralizing the training. Counsel repeated the petitioner's statements previously asserted in its letter of support that one restaurant in Argentina was under construction. While there may be instances where a franchised restaurant might reasonably choose to provide training at one central location, in this case, there is no evidence in the record that the petitioner has more than one restaurant, or that, if it does, it is a franchise of the petitioning restaurant. 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)). The petitioner has not established that it is providing centralized training for one of its franchised restaurants; the proposed training is general restaurant management training that could be received at many restaurants world-wide, including the beneficiary's home country.

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 director's January 28, 2005 decision is affirmed. The petition is denied.