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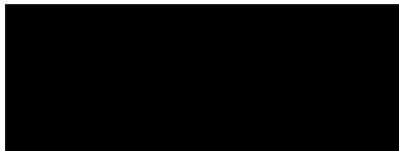
D4

FILE: WAC 05 088 53619 Office: CALIFORNIA SERVICE CENTER Date: OCT 14 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:



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 automobile fabrication and restoration company that seeks to employ the beneficiary as a chief designer-fabrication manager trainee. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country. The director also found that the training program does not have a fixed schedule, objectives or means of evaluation and that the beneficiary would be engaged in productive employment. The director stated that the petitioner did not establish that the training would prepare the beneficiary for a career overseas. Finally, the director stated that there were discrepancies in the evidence that the petitioner did not adequately explain.

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 asserts that the training has a fixed schedule, objectives and means of evaluation. Counsel states that the evidence established that the proposed training is not offered in the beneficiary's home country and that the beneficiary's career prospects would be enhanced by the training. Counsel also states that the

director questioned the existence of the petitioner's business, despite the fact that the petitioner submitted tax returns and magazine articles about it. Counsel asserts that the director was incorrect in stating that the magazine articles featured the beneficiary.

Counsel states on appeal that the director erred in determining that the proposed training program did not have a fixed schedule, objectives and means of evaluation. Counsel asserts that the training program provided a month, day and year of when the proposed training would begin, and provided a timeframe for each module. Counsel states that the training shows who would provide the instruction, the topics to be discussed and how the trainee would be evaluated. The AAO agrees with the director that the training program deals in generalities with no fixed schedule, objectives, or means of evaluation. The classroom schedule provided with the petition is very general, broken into three modules of one and four month periods with a range of topics for each module. In response to the director's request for evidence, counsel stated that the beneficiary would also take two six-week classes on computerized business applications at the same time as the training, and that the beneficiary would spend 40 hours being trained by "the icon of custom painting," yet there is no reference to this portion of the training in the proposed schedule. None of the topics in the training schedule include any additional information beyond a title. For instance, the topics covered over a period of four months include: international commercial transactions; customs and tariffs; issues of legal liability for injuries; labor-management relations; employee rights; work place safety; management practices and techniques; potential problems in managing a small business; administrative problems; economics; applying sound business practices involving management, marketing, finance; organizational direction, control and decision-making; and policy. This gives no information regarding what the beneficiary would actually be doing for this four-month period or how he would be training. It does not provide any specifics to establish that the program does not deal in generalities.

The director found that the petitioner did not establish that the beneficiary would not be engaged in productive employment. The AAO concurs. In response to the director's request for evidence, counsel stated that the trainee would spend "approximately 3.5 to 5 hours a day engaged in incidental productive employment." On the Form I-129, the petitioner stated that the beneficiary would earn \$15.00 per hour and would work full-time. This equates to approximately \$30,000 per year. The beneficiary would be engaged in productive employment almost half of his training time, and would be earning a salary indicative of being a paid employee. In addition, the AAO notes that the petitioner's tax returns for 2002 and 2003 indicate that it paid \$28,800 and \$51,900 respectively in salaries and wages. The petitioner stated that it had four employees at the time the petition was filed. It appears that the petitioner would be paying the beneficiary a salary equivalent to or greater than that it pays its full-time productive employees, and that the beneficiary would be engaged in productive employment beyond that which is incidental to the training.

The director determined that the petitioner did not establish that the proposed training is unavailable in the beneficiary's home country. The petitioner submitted three letters from sources in the beneficiary's home country stating that the proposed training is unavailable there. Two of the letters are from schools stating that the training is not available in the beneficiary's country. The third letter is from a Master Body Repair Manager, which states that there is no training program "designed for custom and high performance automobiles" in the beneficiary's home country. None of the training, however, appears to be specifically related to having the beneficiary acquire skills to do the repair and restoration himself, but rather is focused

on general managerial skills, with some portions specifically relating to the petitioner's business. Although the evidence submitted does not address the issue of managerial training, because of the fact that some of the training is related primarily to the petitioner's business and mode of operating, the petitioner has established that this training could not be acquired in the beneficiary's home country.

The director found that the petitioner did not establish that the training would prepare the beneficiary for a career overseas. The petitioner had stated that it was intending to expand its operations to the beneficiary's home country and that it would "transfer the Trainee to an office" in his home country upon completion of the training. The director stated that the petitioner did not submit any evidence regarding its business plans or plans to expand outside the United States. The AAO finds, however, that the letter from a Master Body Repair Manager submitted to establish that the training is unavailable in the beneficiary's home country also establishes that there is a market for the skills the beneficiary would receive during the proposed training, even if the petitioner does not expand to that country. The director's remarks on this issue are withdrawn.

The director found a number of inconsistencies in the record that were not adequately explained. The director noted that the petitioner's tax records show that its primary activity is "service" and the product or service listed is "advertising." The director also stated that it was unclear whether the actual fabrication and painting is done at the petitioner's premises, and that the academic training appeared to be unrelated to the petitioner's worksite. Finally, the director stated that articles submitted by the petitioner featured the beneficiary and that the beneficiary was not previously authorized to be engaged in employment in the United States. On appeal, counsel states that the services provided by the petitioner are performed at its own shop and that within the industry, it is typical for different businesses to work together on one project. Counsel also states that the person referenced in the articles is not the beneficiary, but another person with the same last name. Counsel did not directly address the issue of the petitioner's industry as reported on its tax records. The AAO finds that the articles do not reference the beneficiary, and that the documentation provided establishes that the petitioner works with other specialists on projects, which established that the petitioner performs the work reported. It is not clear, however, why the petitioner's tax records indicate that its business is in advertising. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.