

PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DS

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[REDACTED]

OCT 23 2003

FILE: SRC 02 162 54569 Office: TEXAS SERVICE CENTER

Date:

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]

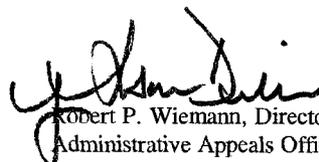
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a flight training and chartering company. It seeks classification of the beneficiary as a specialized flight instructor trainee for a period of two years. The director determined that the petitioner did not establish that the training is unavailable in the beneficiary's home country. The director also found that the training consists primarily of on-the-job training. In addition, the director stated that the beneficiary already possesses substantial training and expertise in the proposed field of training.

On appeal, counsel submits a brief stating that the director erred in her decision. Counsel states that evidence was submitted both previously and with the appeal showing that the proposed training is not available in the beneficiary's home country. Counsel states that any productive employment is merely incidental to the training. Counsel also asserts that the beneficiary has no background or experience in at least one area of the proposed training.

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, as it is presently constituted, contains: statements by the petitioner; photographs of the petitioner's planes and facilities; four of the trainers' resumes; a description and outline of the training program; the petitioner's promotional and business documents; letters from pilots attesting that similar training is unavailable in the beneficiary's home country; copies of the beneficiary's passport and visa, as well as those of his dependents; and the IAP-66 approving the beneficiary's J-1 status for a period of two years.

The director determined that the petitioner did not establish that similar training is unavailable in the beneficiary's home country. Counsel submitted letters from two pilots who are Israeli citizens. The first, from Ofer Sharon, states that the training opportunity would help the beneficiary in his career in Israel. He also states that training in the United States is more current than elsewhere and with fewer restrictions, thereby making it easier to attain the flight hours needed. The second letter is from Shlomo Sapir, stating that the training available through the petitioner would be unavailable abroad. He goes on to state that pilots trained in the United States are better prepared than others, and that the proposed training is much more extensive than it would be elsewhere. On appeal, counsel submits five additional letters from Israeli pilots or trainees which provide more specific information, such as: airspace for general aviation in Israel is greatly restricted; only one airport in Israel has facilities for instrument landing; the costs of instruction are much greater in Israel than in the United States; the difficulty of accumulating flight time in Israel; the need for training in English; and the lack of opportunities to utilize navigational aids in Israel. While the title of the proposed position is "specialized flight instructor trainee," two-thirds of the

training relates to running a charter business instead of flight instruction. The documentation submitted indicates that it is significantly easier and more cost-effective to receive flight training in the United States, and even that one receives better training, but not that the training is actually unavailable in the beneficiary's home country. None of the letters addressed the issue of whether training to become a flight instructor is available in Israel; nor did they address the charter business, and whether the industry exists in Israel or whether training in running such a business is available in Israel. The petitioner did not establish that the proposed training is unavailable in the beneficiary's home country.

The second reason for denying the petition is that the proposed program is primarily on-the-job training and, as such, cannot be approved. The petitioner submitted information stating that the beneficiary would spend slightly more than half of his time in a classroom setting and just under half the time in supervised practical training. The director relied on *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965), stating that Citizenship and Immigration Services (CIS), had previously:

[W]ithheld classification as a trainee (H-3) where the beneficiary was to be engaged primarily in on-the-job training. In that case, while the beneficiary was to supplement his training with some classroom instruction, the petition was denied upon a finding that the majority or primary part of the training proposed was to be on-the-job training. In the instant petition, because the proposed training is comprised mostly of on-the-job training, the proposed training does not establish the beneficiary's eligibility.

The instant petition can be distinguished from *Sasano*, however. The beneficiary in that case was to be the sole employee whose entire training was to be on-the-job productive employment, supplemented by unscheduled trips to hear university lectures. In contrast, the current beneficiary would be involved in on-the-job training for just under 50% of the time, with productive employment being a small portion of that time. The nature of the position dictates that training to be a flight instructor would require on-the-job training, as flying and instructing those learning to fly can only happen while actually doing the task. The director's comments relating to the *Sasano* decision shall be withdrawn.

The final basis for denying the position is that the beneficiary already possesses substantial training and expertise in the proposed field of training. It appears that the beneficiary may possess substantial training and expertise as a flight instructor, based on his two years in J-1 status, with a portion of that time as a flight instructor. There is no indication, however, that the beneficiary has any training or experience in flight school or charter business operations. As such, it cannot be said that the beneficiary has substantial expertise in the field of training and the director's comments on this matter are withdrawn.

Beyond the decision of the director, it appears that the petitioner should be considered a vocational school. The petitioner provides instruction in a school-like setting in preparation for a specific career, without providing a degree. Because the petitioner is a vocational institution, the beneficiary is not eligible for H-3 classification. The regulations state, "An H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, or training provided *primarily at or by an academic or vocational institution.*" 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (Emphasis added).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.