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Citizenship and Immigration Services

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

[REDACTED]

OCT 23 2003

FILE: SRC 02 236 71198 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
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 The director's decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is an automotive engineering company. It seeks to employ the beneficiary as a technologist, automobile mechanic certification program. The director found that the petitioner had not established that it had an appropriate physical plant for the proposed training. Additionally, the director determined that the training consists primarily of on-the-job training.

On appeal, counsel states that the training program cannot be considered "primarily" on-the-job training, as the information submitted stated that the training would be 50 percent in the classroom, and 50 percent on-the-job. Additionally, counsel states that the director erred in determining that there is no adequate space for the training, as indicated by the photographs submitted in response to the director's request for evidence.

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 director determined that the training consists primarily of on-the-job 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*. 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 beneficiary in this case would be involved in on-the-job training for 50 percent of the time, with the other 50 percent devoted to classroom training. While this is a significant percentage of time to be engaged in on-the-job training, as counsel states, it cannot be considered comprised "primarily" of on-the-job training since the segments are divided into equal parts. Nor is there any indication that the on-the-job training would be productive employment. For these reasons, the director's comments relating to the *Sasano* decision shall be withdrawn.

The second ground for the director's denial is that the petitioner had not established that it has adequate physical space to conduct the proposed training. The petitioner submitted photographs of two desks with computers, and stated on appeal that the beneficiary would be using one of these desks. The classroom

element of the training would be met by a desk and computer for the beneficiary. Due to the lack of specificity of the training program, it cannot be determined whether "on-the-job training" would also take place at a desk and computer, or whether there is a more hands-on component that would require different training space. There is not enough evidence in the record to make this determination and, therefore, the director's remarks on this issue are withdrawn.

However, the petition still may not be approved at this time. The director has not addressed the issue of whether the training program deals in generalities with no fixed schedule, objectives, or means of evaluation, as prohibited by 8 C.F.R. § 214.2(h)(7)(iii)(A). The director has not determined whether the structure and schedule of the training program meet the requirements of the regulations. The program has no timeframes associated with it, nor is there a means of evaluation included.

Additionally, the petitioner submits a statement that there is no industry in the petitioner's home country currently offering this technology (and therefore the training); however, there is no evidence in the record to support this claim. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the petitioner has not established that the training would benefit the beneficiary in pursuing a career outside the United States. The petitioner states that it plans to hire the beneficiary to work in his home country, but the petitioner did not provide any information regarding a plan to establish an office in the beneficiary's home country, nor was any agreement submitted regarding a future employment contract between the petitioner and the beneficiary.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of: (1) the nature of the proposed training program; (2) whether the training will benefit the beneficiary in his home country; (3) whether the industry and training exist in the beneficiary's home country; and (4) the type of training space needed for the proposed training. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The matter is remanded to the director for further action and entry of a new decision in accordance with the above discussion, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.