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U.S. Department of Homeland Security

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



FILE: SRC 02 063 50972 Office: TEXAS SERVICE CENTER

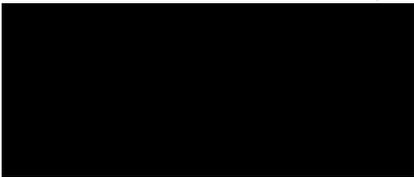
Date: **OCT 23 2003**

IN RE: Petitioner:
Beneficiary:



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:



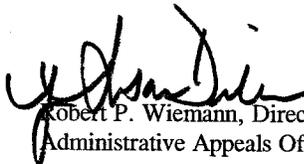
INSTRUCTIONS:

This is the decision 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 Director of the Texas Service Center denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a helicopter flight school, which also sells and rents helicopters. It seeks classification of the beneficiary as a flight instructor for a period of two years. The director determined 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.

Upon notice of certification to the AAO, neither counsel nor the petitioner submitted any additional evidence; therefore, 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, as it is presently constituted, contains: statements by the petitioner; approval notices for H-3 classification for others in the same training program; a copy of the training program for ground and flight instruction; the petitioner's F.A.A. documents; the beneficiary's airman and medical certificates; photographs of the petitioner's facility; the petitioner's brochure; and a letter from the German Civil Aviation Authority stating that there is no helicopter flight training school in Germany providing similar training.

The first reason given by the director for denying the petition is that the beneficiary already possesses substantial training and expertise in the proposed field of training. The beneficiary is a licensed flight instructor and commercial pilot. The petitioner states, "[W]ith a lack of teaching and flight experience, it is highly unlikely for the trainee to obtain employment in his country. Helicopter companies in many countries, including Germany, do not offer employment to recent graduates with Flight Instructor Certificates if they have no flight experience as a Ground and Flight Instructor or line pilot." The director did not request any additional evidence from the petitioner regarding this claim. Additionally, no evidence was requested as to the beneficiary's background and training. On its face, it would appear that as a licensed flight instructor, the beneficiary would, in fact, be barred from this training program as having substantial training and expertise. There is no evidence to either support the director's conclusions, or the petitioner's assertions.

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 approximately 70 percent of his time in practical, on-the-job training, and about 30 percent of his time in classroom 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 supervised on-the-job training for about 70 percent of the time. This is a significant amount of time to be spent in on-the-job training, and some positions could not support this ratio of on-the-job training to classroom time. Other positions, however, mandate this considerable amount of on-the-job training due to nature of the job. A position such as a flight instructor would require on-the-job training, since 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.

Beyond the decision of the director, it appears that the petitioner should be considered a vocational school. The petitioner provides instruction in a school 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).

Accordingly, the matter will be remanded to the director. The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of: (1) the beneficiary's training and experience; (2) the hiring practices of helicopter companies in Germany in terms of the level of training required; and (3) whether the petitioner is a vocational school. 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 decision of the director is withdrawn. The matter is remanded to her for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.