

DIAL 5

U.S. Department of Homeland Security
Citizenship and Immigration Services

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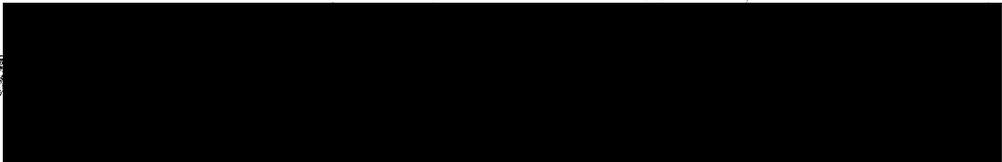
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



FILE: SRC 02 165 51970 Office: TEXAS SERVICE CENTER

Date: **OCT 24 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:



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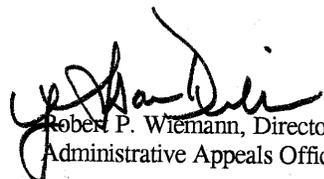
INSTRUCTIONS:

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 overturned. The petition will be approved.

The petitioner is a resort hotel. It seeks classification of the beneficiaries as management trainees. The director determined that the proposed training is available in the beneficiaries' home countries. The director also determined that the training constitutes productive labor beyond that which is incidental to the training and consists primarily on-the-job training. The final ground for denial is that the beneficiaries already possess substantial training and expertise.

Neither counsel nor the petitioner submitted any additional evidence upon notice of certification of the decision to the AAO.

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 a training program schedule showing an eighteen-month program covering four different areas of focus, the petitioner's brochures and promotional materials, an international associates orientation guide, resumes for all of the beneficiaries, resumes for four of the trainers, and notices of prior approvals to support the petitioner's claim that it had received approvals for 27 H-3 beneficiaries for the same training program in 2001.

The first basis for denying the petition is that the beneficiaries could receive the training in their home countries of Mexico, Spain, Morocco, and Germany. In her denial, the director quoted counsel as stating:

The proposed training is not available in the alien's own country. The proposed training is designed to provide participants with development in social, technical, operational and management skill sets as they relate to the American hospitality industry, as opposed to the European style of hospitality management. . . . Training in the American style and structure of hospitality management is not readily available in other parts of the world.

The director then stated, "A search of the Internet produced several five star hotels in in [sic] Mexico, Spain, Morocco and Germany." The director is relying on the premise that the beneficiaries could receive training at any number of world-class, five-star hotels in their home countries. This, however, ignores the representations by both counsel and the petitioner as to the basis for the training in the United States. In the initial petition, the petitioner stated, "The Training Program provides specific attributes of U.S. training which are unique for preparation in the field and enable the trainee to apply on return to their home country." As referenced above, counsel reiterated this in the June 14, 2002 response to the Request for Evidence. Given that experience with the hospitality system as practiced in the United States is the stated underlying principle of the petitioner's training program, it is not clear on what grounds the

director determined that the training is available in the beneficiaries' home countries. The director's comments on this issue are withdrawn.

The second basis for denying the petition is that the training is primarily comprised of on-the-job training and that it includes productive employment beyond that which is incidental to the training. The director relied on several cases, including *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965). She stated that what was then the Service, and is now 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 beneficiaries' 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 this case, while the beneficiaries will only have a minimal amount of classroom training (50 hours), the balance of the training is not productive employment despite it being on-the-job training. On-the-job training is not, by definition, always productive employment. The beneficiaries will be working under the supervision of a Department Manager during the training and they will have the opportunity to handle real problems and participate in decision making. They are not filling vacant positions that would otherwise go to citizens or residents, but are instead filling positions specifically reserved for trainees. It is determined that this basis for the director's decision to deny cannot be substantiated and the director's comments shall be withdrawn.

The director found that the beneficiaries possessed substantial training and expertise in the proposed field of training because, in reviewing their resumes, she found "All of the beneficiaries either have degrees and or [sic] two or more years in the hospitality industry." Upon review of the beneficiaries' resumes, it appears that most of them have a degree in another subject area

and are in the midst of completing a one-year diploma program in hotel management. In addition, while it is true that most of them have experience in the hospitality industry, few have managerial experience, and none have experience in the United States hospitality industry. Therefore, the beneficiaries are not deemed to possess substantial training and expertise in the area of proposed training, and the director's comments on this issue are withdrawn.

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 sustained that burden.

ORDER: The director's July 9, 2002 decision is overturned. The petition is approved.