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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

SEP 04 2003

FILE: SRC 02 131 52410 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 the Bureau of Citizenship and Immigration Services (Bureau) 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 the matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further action.

The petitioner is a non-profit hospital, medical center and research institution. It seeks extension of classification of the beneficiary for a position as a dental trainee. The director determined that the training program consists primarily of on-the-job training, and the training does not establish the beneficiary's eligibility under Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act). The director also stated that the training program is on behalf of a beneficiary who already possesses substantial training and expertise; as such, the training program may not be approved, per 8 C.F.R. § 214.2(h)(7)(iii)(C).

On appeal, counsel submits a brief stating that the Bureau erred in its decision because the director misapplied the case law relied upon in determining that the training is primarily on-the-job training. In addition, counsel states that the beneficiary's previous education in Colombia was not of a type that should preclude her from the petitioner's training program.

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, as it is presently constituted, contains a copy of the training program describing the type of training and the structure of the training program. In addition, in response to the director's request for additional evidence, the petitioner stated that a typical week for the first nine months of training would include 14 hours of classroom instruction, 21 hours of practical training and 10 hours of productive employment. The final three months would include significantly more classroom instruction and practical training, and two of those months would include no productive employment whatsoever.

The director relied on *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965), stating that the Bureau 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.

As counsel states on appeal, 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, as counsel explains, the current beneficiary would be involved in productive employment for "22% of the total hours during the first ten months and 0% of the

final two months." Clearly, the primary focus of this training program is on classroom instruction and practical training, which is an integral part of the clinical training.

For these reasons, it is determined that this basis for the director's decision to deny cannot be substantiated. The director's comments relating to the Sasano decision shall be withdrawn.

The second reason given by the director for denying the petition is that the beneficiary graduated with the equivalent of a dental degree from a university in Colombia. She determined that the training program may not be approved since it "is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training," as prohibited by 8 C.F.R. § 214.2(h)(7)(iii)(C).

Counsel asserts that the Bureau incorrectly determined that simply possessing a degree in a given field equates to substantial training and expertise. Counsel submits that this reasoning violates 8 C.F.R. § 214.2(h)(7)(i), which states that an H-3 trainee seeks entry for the "purpose of receiving training in any field of endeavor, such as . . . the professions." Counsel states, "Obviously, [petitioner] cannot provide dental training to an individual who does not possess a dental degree or its equivalent." The Bureau agrees, and finds that the director erred in her basis for making this determination.

Nevertheless, the petition may not be approved at this time. The director has not determined whether the beneficiary's petition may be approved pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(C), in that she has already spent one year in the same training program for which the petitioner is requesting an extension. The petitioner never addressed why a second year of training would be necessary for the beneficiary or how the training would differ from the year already spent. Presumably, the petitioner initially requested approval for a training period of one year because that is the length of the standard training program. If so, it would seem that the beneficiary now possesses "substantial training and expertise in the proposed field of training," based on the year already spent in the program, rather than due to her education in Colombia. Accordingly, the matter will be remanded to make such a determination and to review all relevant issues. The director may request any additional evidence she deems necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt

of all evidence and representations, the director will enter a new decision.

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.