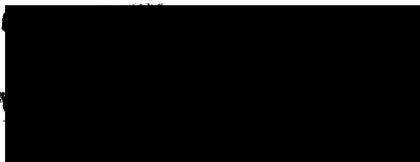




U.S. Citizenship
and Immigration
Services

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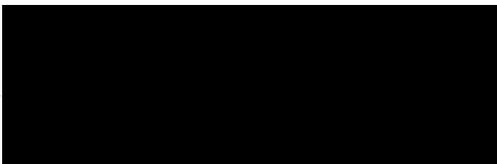


FILE: EAC 04 258 53391 Office: VERMONT SERVICE CENTER Date: JAN 06 2006

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

for *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant that seeks to employ the beneficiary as a trainee. The director determined that the petitioner did not establish that it had materials, evaluations, testing materials and sufficiently trained manpower to provide the proposed training. The director stated that the training is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

On appeal, counsel submits a brief and supporting documentation.

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 of proceeding before the AAO contains: (1) Form I-129; (2) the director's denial letter; and (3) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On appeal, counsel states that the training program of a fine dining restaurant would not be similar to a formalized training program and written materials that would be provided by a bank or an investment banking firm with thousands of employees. Counsel states that the proposed training program meets all of the terms of the regulation. Counsel asserts that since the petitioner is a restaurant, it would be obvious that the training would not take place in a classroom, but in the restaurant in on-the-job training. Counsel further states that the beneficiary does not possess substantial training and expertise in the field of proposed training. Counsel

states that the director's decision stating that materials available from foreign facilities and from the Internet could be utilized to accomplish the goals of the training is simply untrue.

The director determined that the petitioner did not establish that it had materials, evaluations, testing materials and sufficiently trained manpower to provide the proposed training. The director combined several elements of the regulation in making this determination. The AAO finds, however, that there is no evidence that the training program deals with a fixed schedule, objectives, or means of evaluation. The training period is broken into segments ranging from two to five months long, and each segment is described in narrative form. The schedule gives little information regarding what the beneficiary would actually be doing for each segment or how she would be training. It does not provide any specifics to establish that the program does not deal in generalities. On appeal, counsel states that the beneficiary would be "periodically evaluated by the heads of various departments of petitioner as set forth in the training program. Each of the specific individuals mentioned under the headings of each department in petitioner's restaurant will submit evaluation reports on an on-going basis" to the petitioner's owner. This assertion does not provide any evidence regarding the actual means of evaluation, how often it would occur, or the methodology to be used.

The AAO finds that the director's determination that the petitioner does not have sufficiently trained personnel or adequate materials to provide the training is not based on the record. The director's comments on this issue are withdrawn.

The director stated that the training is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. The beneficiary has an associate's degree in culinary arts from the Culinary Institute of America. In reviewing the school's website,¹ it appears that the primary focus of the beneficiary's degree was on developing culinary techniques, although the program description also includes some areas to be covered in the proposed training, such as cost control. The proposed training, however, covers primarily restaurant management topics that were not included in the beneficiary's previous training. The AAO finds that the beneficiary does not already possess substantial training and expertise in the proposed field of training.

The director stated, "It appears that utilization of personnel, materials, foreign educational/training programs, and the Internet, etc., can be utilized to accomplish the goals of the training program." The regulation states that the petitioner is required to show that the proposed training is not available in the beneficiary's home country. It is irrelevant if the training could be obtained through other resources, unless those resources are in the beneficiary's own country. The petitioner stated in its letter of support, "There is no counterpart to the proposed training specified above in [the beneficiary's home country] as New York is far more advanced in automation and other facets of the restaurant business than [in the beneficiary's home country]. Exposure to the areas of training set forth above can only be provided in New York." The petitioner does not, however, provide any corroborating evidence, references or significant details establishing that high-quality restaurant training is not available in the beneficiary's home country. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). There is no information in the proposed training schedule to indicate that the program

¹ www.ciachef.edu/admissions/academics/culinary/aos.asp, accessed December 27, 2005.

provides any level of training beyond that which could be acquired in any fine dining restaurant. The petitioner has not established that the proposed training is unavailable in the beneficiary's home country. 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.

ORDER: The appeal is dismissed. The petition is denied.