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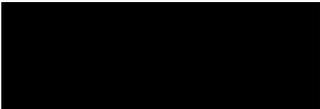
U.S. Citizenship
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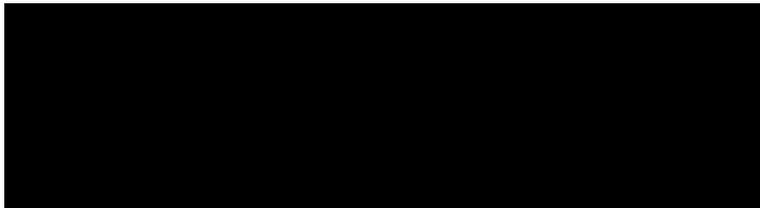
DU

FILE: WAC 04 249 50362 Office: CALIFORNIA SERVICE CENTER Date: **OCT 14 2005**

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 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.

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 sustained. The petition will be approved.

The petitioner is an international restaurant franchise that seeks to employ the beneficiary as a restaurant management trainee. The director determined that the petitioner did not establish that the training was unavailable in the beneficiary's home country. The director also found that the training had no fixed schedule, objective or means of evaluation and that the petitioner did not establish that it had the physical premises or sufficiently trained manpower to provide the proposed training. The director stated that the petitioner did not demonstrate that the beneficiary will not be placed in a position which is in the normal operation of the business, or that the beneficiary would not engage in productive employment beyond that which is incidental and necessary to the training. On appeal, counsel submits a brief.

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 of proceeding before the AAO contains: (1) Form I-129; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the petitioner did not establish that the training was unavailable in the beneficiary's home country.

On appeal, counsel asserts that the director erred by ignoring evidence previously submitted to establish that the corporate headquarters is obligated to provide trained management staff to newly opened franchise restaurants overseas, and that this training is only available at the petitioner's headquarters. The AAO concurs. The petitioner provided documentation from the three restaurants that were scheduled to be opened in the coming year overseas, which support its claim that that it is responsible for providing management training. In addition, in reviewing the petitioner's website, it is noted that the petitioner does not have any restaurants in the beneficiary's home country of Belgium, negating the possibility that the proposed training could be available in that country.

The director also found that the training program would place the beneficiary in a position that is in the normal operation of its business and that the beneficiary would be engaged in productive employment beyond that which is necessary and incidental to the training. Counsel asserts that the trainee will be paid \$30,000 annually during the training period, but that this amount is small in comparison to the \$65,000 he will earn upon completion of the training. While the AAO notes that this remuneration is significant, there is no indication that the beneficiary will be employed in anything other than a training capacity. In addition, while the training is primarily on-the-job training, this does not equate to a position in the normal operation of the petitioner's business.

The director determined that the training had no fixed schedule, objectives or means of evaluation and that the petitioner did not establish that it had the physical premises or sufficiently trained manpower to provide the proposed training. The petitioner is a \$40 million dollar business, with multiple restaurant sites. The petitioner stated that most of the training would occur at one of its restaurants, and listed the names of the department heads who would provide the training. The AAO finds that the petitioner has sufficiently trained manpower and the physical premises to provide the proposed training. While the training is primarily on-the-job, rather than classroom-based, the petitioner has established that this type of training is both appropriate and expected within its industry. The objectives of the proposed training are clear, and the petitioner stated the means of evaluation.

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 appeal is sustained. The petition is approved.