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MAR 08 2005



FILE: WAC 04 109 50279 Office: CALIFORNIA 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:



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 a designer of semiconductor wafer manufacturing equipment. It seeks classification of the beneficiary as a trainee. The director found that the training program had no fixed schedule, objectives or means of evaluation. The director also determined that the petitioner did not establish that the training is unavailable in the beneficiary's home country. Finally, the director stated that the beneficiary would be engaged in productive employment.

On appeal, counsel submits a statement stating that the director erred in making these determinations.

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;

- (5) Describes the career abroad for which the training will prepare the alien;
  - (6) 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
  - (7) 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 and supporting documentation; (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 training program had no fixed schedule, objectives or means of evaluation. The petitioner filed a detailed training program when it filed the petition. The program included a schedule with a breakdown of activities, the subjects to be studied along with the books and journals to be used, and samples of the assessments. In response to the director's request for evidence, the petitioner provided more detail about the topics to be covered during each day of the classroom training. The director determined that the

petitioner had not established that a bona fide training program existed. The AAO finds that the evidence submitted does establish that the petitioner has a training program with a fixed schedule, objectives and means of evaluation as required by the regulations. The director's comments on this issue are withdrawn.

The director also determined that the petitioner did not establish that the training is unavailable in the beneficiary's home country. The petitioner is a United States-based corporation, which is a member of Hermes Group, headquartered in Taiwan. The petitioner has developed the equipment that is the subject of the proposed training. Its employees are the trainers. The beneficiary, an employee of Hermes Group, would be returning to Asia after the training to serve as a field application or technical support expert on this equipment. Since the equipment is unique and was developed by the petitioner in the United States, and the petitioner's trainers are based here, the AAO concurs with counsel and the petitioner that the proposed training is not available in the beneficiary's home country. The director's comments on this matter are also withdrawn.

Finally, the director stated that the beneficiary would be engaged in productive employment. There is nothing in the record to indicate this possibility. The beneficiary has a degree in mechanical engineering, but does not have experience with the petitioner's complex and unique equipment. As there is no evidence in the record to establish that the beneficiary would be engaged in productive employment, the director's remarks 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 decision of the director is withdrawn and the appeal is sustained. The petition is approved.