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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 99 214 50888 Office: California Service Center Date: AUG 2 1 2000

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)

Public Copy

IN BEHALF OF PETITIONER: [redacted]

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INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition remanded for further consideration.

The petitioner is a software development company. It seeks classification of the beneficiary as an operations management trainee for a period of 20 months. The director determined that the beneficiary already possessed substantial training and expertise in the proposed field of training.

On appeal, counsel states that the Service 's decision was based on incorrect conclusions and a misinterpretation of the evidence.

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 to 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 petitioner's training program requires 20 months for completion. The petitioner wishes to provide the beneficiary with

formal managerial training in operations management and in its specific operating procedures.

The record indicates that the beneficiary received an Associate degree in Business Administration with an emphasis in marketing from [redacted] in June [redacted] The beneficiary also has an Associate degree in Liberal Studies from the same college in June [redacted] However, in reviewing the beneficiary's transcript, it does not show that the beneficiary already received the training being provided by the petitioner. Therefore, the beneficiary does not have substantial training and expertise in the proposed field of training. However, this petition cannot be approved for other reasons.

The petitioner's training program deals in generalities with no fixed schedule. The training program does not include the number of hours that will be spent in each course and the means by which each instructor will be evaluating the trainee. The petitioner states that the president and his four subordinates at the petitioner's facility will be doing the training. However, the training program does not state who will be conducting each training module and how each instructor will be evaluating the beneficiary.

The beneficiary will be earning $480 per week as a full-time trainee. The trainee will rotate through various departments for supervised practical training in computer equipment, business operations, marketing, administration, and the actual product development, systems support and implementation. The training will be conducted through direct instruction for two hours and supervised practical training for four hours. The beneficiary will also have direct instruction with occasional periodic practical training during business operations for an additional two hours. Approximately 60% of the program will be supervised practical training and direct instruction with periodic practical training. The petitioner has not shown that the beneficiary will not be engaged in productive employment beyond that necessary and incidental to the training.

The president of the petitioning company will supervise and oversee the training of the beneficiary. The petitioner has not explained how he will be responsible for the beneficiary's overall supervision and still be able to perform his duties as president.

The beneficiary was given full-time optional practical training in business/marketing for 12 months beginning on September 1, 1998 and ending on August 31, 1999. The beneficiary worked as the assistant manager at [redacted] from August 4, 1998 through February 14, 1999. She was responsible for supervising kitchen activities, food production, customer and food service and organized catering events. In addition, she worked for the

petitioner as the accounts payable clerk and accounts receivable and collections administrator from February 15, 1999. The letter does not indicate what the beneficiary's duties and responsibilities were in these positions. Absent such information, the Service is unable to determine whether this training program is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

Since these issues were not reflected in the director's decision, this matter will be remanded to allow the petitioner time to submit additional evidence in support of the petition. The director may also request any additional evidence deemed warranted. As in any petition proceeding, the burden of proof rests with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action and consideration consistent with the above discussion and entry of a new decision.