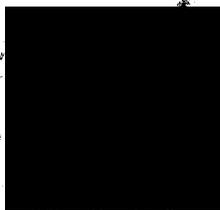


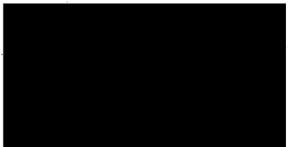
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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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prevent clearly unwarranted  
invasion of personal privacy

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



AUG 25 2003

FILE: SRC 01 273 50845 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:

SELF-REPRESENTED

**PUBLIC COPY**

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, 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 appeal will be dismissed.

The petitioner is a donut shop. It seeks classification of the beneficiary as a custom baker for an undetermined time period. The director determined that the position 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 petitioner's physical plant did not allow for appropriate classroom training as required by 8 C.F.R. § 214.2(h)(7)(iii).

On appeal, the petitioner submits a statement. The petitioner states, in part, that he is unable to find an employee who is willing to work 12 hours per day, seven days per week.

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 petitioner states on appeal that he is in urgent need of workers because the hours at his donut shop are long and difficult and the unemployment rate in his town is very low, so he is not able to find employees who are willing to do the work.

The record, as it is presently constituted, contains a copy of the training program describing the type of training and supervision to be given and the structure of the training program. The training will take place in the lobby of the donut shop for one to two hours a day and will "include reviews of previous days' activities." The beneficiary will participate in six hours of on-the-job training each day. The petitioner stated: "On-the-job training will be held constantly and enable a blending of class work with practical work. OTJ [sic] consist [sic] of six hours spend [sic] baking at the donut shop."

The director denied the petition because the training program was primarily on-the-job training. The Bureau has held in *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965) that, where a "beneficiary would be involved in full-time productive employment and that any training received would be incidental," the beneficiary is not eligible for an H-3 visa.

Beyond the decision of the director, the Bureau finds that the petition may not be approved pursuant to 8 C.F.R. § 214.2(h)(7)(iii). In addition to the determination that the beneficiary would primarily be involved in on-the-job training, it is clear that the training program devised by the petitioner violates several other elements of the regulation.

The petitioner stated that the beneficiary is unable to gain the knowledge in his own country that he would receive in the United States because "There is no donut shop in Cambodia at this time." Given this information, and that the proposed training focuses on actual donut making rather than entrepreneurship or owning and

operating a donut store, it does not appear that the beneficiary will use the knowledge or skill gained outside the United States. 8 C.F.R. § 214.2(h)(7)(iii)(D) forbids approving a training program in this instance.

In both the petitioner's appeal and his original petition, he emphasized his need for employees and his difficulty in finding them locally. In addition, the petitioner stated that the beneficiary would spend six hours a day in on-the-job training "baking at the donut shop." This information indicates that the beneficiary will be working in "productive employment beyond that which is incidental and necessary to the training," again a situation in which the regulation forbids the approval of a petition. See 8 C.F.R. § 214.2(h)(7)(iii)(E).

The petitioner has stated that he is unable to find workers from the local labor force and there is nothing in the record to indicate that the beneficiary will be returning to Cambodia to utilize the skills acquired through the training. It appears that the petitioner may have designed the program "to recruit and train aliens for the ultimate staffing of domestic operations in the United States," again ensuring that the petition can not be approved according to 8 C.F.R. § 214.2(h)(7)(iii)(F).

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.