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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



SEP 04 2003

FILE: SRC 02 078 52351 Office: TEXAS SERVICE CENTER

Date:

IN RE: Petitioner: [REDACTED]
Beneficiaries: [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

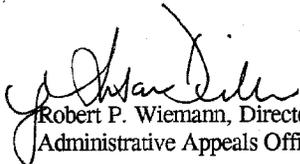
INSTRUCTIONS:

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 an environmental consulting firm. It seeks classification of the beneficiaries for training to support their current positions with the petitioner as [REDACTED] Program Manager [REDACTED], and Business Development Manager (Ms. [REDACTED]). The director determined that the training program consists primarily of on-the-job training, and the proposed training does not establish the beneficiaries' eligibility under Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act).

On appeal, the petitioner submits a brief stating that it had erroneously referred to a portion of the training as "on-the-job training" when it was, in fact, a series of site visits. Additionally, the petitioner modified the training schedule on appeal to include substantially more classroom hours than originally proposed.

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, as it is presently constituted, contains both a chart and a revised chart of the training program, and a listing and revised listing breaking down the classroom segments of the training by date. The record also includes a sample lesson, details about the trainer's qualifications and information about the company.

In the director's decision, she relied primarily on *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965), stating that the Bureau had previously:

[W]ithheld classification as a trainee (H-3) where the beneficiary was to be engaged primarily in on-the-job training. In that case, while the beneficiary was to supplement his training with some classroom instruction, the petition was denied upon a finding that the majority or primary part of the training proposed was to be on-the-job training. In the instant petition, because the proposed training is comprised mostly of on-the-job training, the proposed training does not establish the beneficiary's eligibility.

The original petition included a table listing 80 classroom hours and 160 on-the-job hours. In the petitioner's response to the director's request for additional evidence, the petitioner stated, "From the table, a total of 240 hours of training will be provided . . . Of that total, 160 hours (67%) will be OJT training." In the same response, the petitioner described the OJT training as consisting of "interviews with ADA clients and visits to facilities." The petitioner states on appeal that it had erred in describing any of the training as on-the-job. "This training was, in fact, field visits: having the trainees meet former ADA

clients to discuss the services ADA had provided, not to perform any work on behalf of ADA. In this sense, we were proposing no on-the-job training in our petition. This was our error." In addition, the petitioner modified the training program in the appeal so that it would include 160 hours of classroom time and 40 hours of field visits.

The director appears to have relied on the petitioner's description of the site visits as on-the-job training in making her decision. The petitioner in its appeal now states that what was previously called on-the-job training, is actually a series of field visits which do not have any element of employment involved. Even if the original designation were accurate, the instant case could be distinguished from *Matter of Sasano*. The beneficiary in that case was to be the petitioner's sole employee whose entire training was to be on-the-job productive employment, supplemented by unscheduled trips to hear university lectures. In contrast, assuming that the information in the original petition was correct, the beneficiaries were scheduled to be in on-the-job training for 67% of the time. While the ratio of on-the-job training to classroom training is high, it would not automatically preclude approval of the training program. The petitioner did not submit detailed information, either with the initial petition, in response to the request for additional evidence, or on appeal, regarding the proposed activities of the beneficiaries on the field visits; therefore, it is not possible to determine whether the visits constitute productive employment or whether they would outweigh the classroom time in determining whether the training should be denied on that basis. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Bureau regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). When filing the petition, the petitioner stated that on-the-job training would constitute 67 percent of the training. On appeal, the petitioner states that on-the-job training would constitute only 20 percent of the training, with 80 percent of training time devoted to classroom instruction. It appears that the petitioner has materially changed the nature of the training program to conform to Bureau requirement. As stated previously, a petitioner must establish that the training program offered to the beneficiaries when the petition was filed meets applicable requirements. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As significant changes have been made to the training program, the

Bureau cannot find that the petitioner has complied with the regulations at 8 C.F.R. § 214.2(h)(7)(ii)(B). The petitioner has not resolved the inconsistencies in the record regarding the true nature of the training. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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)(A). This regulation forbids approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation." There is no indication in any of the evidence submitted that there is an evaluation structure in place for this training program. In addition, the section of the program that involves field visits appears to have no fixed schedule beyond spending one or two days at each site. There is no detail as to exactly how that time would be spent.

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.