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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

SEP 04 2003

FILE: SRC 02 057 51508 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Director of the Texas Service Center denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a food production company. It seeks classification of the beneficiary for a position training for "operations, maintenance and repair of automated food machine." 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 training as required by 8 C.F.R. § 214.2(h)(7)(iii).

The petitioner did not submit a brief or any additional information upon notification of the certification to the AAO.

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 a copy of the training program describing the type of training and the structure of the training program. The training includes segments on manufacturing of food computer automation; operation of machine on the line; maintenance of machine; maintenance of machine on the floor; troubleshooting the machine on the floor; repair of machine, as well as other areas. It is never explained exactly what the machine is or what it does. The training will take place either "outside classroom" or "in classroom." In the response to the director's request for evidence, counsel stated that the training includes 3000 hours in practical training, 1000 hours in classroom instruction and 1000 hours in on-the-job training. This equates to 125 40-hour weeks (with no holidays), although the training schedule only includes 101 weeks (with holidays) working 8am-5pm.

The director requested additional evidence, specifically that the petitioner describe the physical plant and classroom facilities. Counsel responded that, "The plant has three offices and a large holding and distribution area." Counsel also included photographs of the training facilities as had been requested. Counsel supplied seven photographs with no explanations: two showed office space; two were of large units that seem to be freezers or refrigerators; one photograph is of open space; and two pictures appear to be of a kitchen facility (one showing three workers preparing food and one showing a large mixer). There is nothing that appears to be a classroom facility and nothing that is clearly a "machine" that is on the line or on the floor, as described in the training modules. The petitioner has not established that the physical plant allows for appropriate training of the beneficiary.

The director also 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. In this case, however, the information supplied by counsel and by the petitioner supports the claim that a training program exists beyond the on-the-job training component. The Bureau finds that this ground for denying the petitioner's application is not substantiated.

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 "Deals 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.

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.

ORDER: The director's decision is affirmed. The petition is denied.