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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

APR 0 7 2004

FILE: WAC 03 162 53635 Office: CALIFORNIA 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 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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a manufacturer of measurement, semiconductor and electronic components. It seeks to employ the beneficiary as a manufacturing trainee. The director found that the petitioner had not established that the beneficiary would not be placed in a position in the normal operation of business and that the large percentage of on-the-job training included in the program is more likely to be productive employment than training.

On appeal, counsel submits a brief stating that the beneficiary will not be working in the normal operation of business and that the only productive employment is that which is incidental and necessary to the training.

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 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 of proceeding before the AAO contains, in part: (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 beneficiary would be working in the normal operations of the petitioner's business. On appeal, counsel states that a portion of the training program will involve the beneficiary shadowing a regular worker to learn how the equipment is manufactured, and the processes the worker must go through to perform this job. This is the same information that had been previously submitted in the petitioner's letter of support. While the petitioner also stated that a significant amount of the training would be on-the-job, there is nothing in the record that indicates that the beneficiary would be working in the normal operations of the business. The director's remarks on this issue are withdrawn.

The director also found that since the classroom element of the training only comprised 15 percent of the time, and the remaining 85 percent of the beneficiary's time would be on-the job training, it appeared that the beneficiary would be engaged in productive employment beyond that which is incidental and necessary to the training. On-the-job training is not, by definition, always productive employment. The training program indicates during weeks 3-9 that the beneficiary would be participating as a member of the manufacturing team. In reviewing the elements of the training, however, it is clear that the beneficiary will only be learning rudimentary elements of the production process, and that it is unlikely that she would actually be involved in producing a final product. Even in the weeks that follow, the beneficiary would still be learning how to produce the petitioner's product, and not creating a final market-ready product. It is determined that this basis for the director's decision to deny cannot be substantiated and the director's comments shall be withdrawn.

In view of the foregoing, it is concluded that the petitioner has demonstrated that the beneficiary would not be working in the normal operations of the petitioner's business, and that the on-the-job component of the training is a critical part of the training and not productive employment.

Nevertheless, the petition may not be approved at this time. The director did not address the issue of whether the structure and schedule of the training program meet the requirements of the regulations. The training schedule as currently presented does not provide enough detail to establish that it does not deal in generalities. Therefore, the matter shall be returned to the director for a new determination to address this other issue.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the training schedule meets the terms of the regulations, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 2, 2003 decision is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.