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FILE: EAC 06 086 51798 Office: VERMONT SERVICE CENTER Date: NOV 17 2006

IN RE: Petitioner:
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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a dental office with stated gross annual income of \$450,000 and one employee. It seeks to employ the beneficiary in a training position as a part-time (24 hours per week) bilingual dental assistant for an "estimated" period of two years.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition, stating, in relevant part, the following:

You submitted a letter indicating the proposed training would consist of on-the-job training. Although requested, you did not submit documentation to establish that you have an actual, well-structured training program or the number of hours to be spent in classroom instruction and on-the-job training. Further, you did not submit evidence to establish that you can employ a full-time trainer and simultaneously [operate] a training program and a business. The Service does not find it credible that you can, with only one employee, employ a full-time trainer and simultaneously operate a training program and a business in a viable fashion.

You state that the beneficiary would be paid \$10 per hour to start and would fulfill the role of an in-office assistant. It appears that the proposed position will place the beneficiary in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed. Further, you have not established the proportion of time that will be devoted to productive employment or that the employment is incidental and necessary to the training.

In addition, you have not demonstrated that the proposed training is not available in the alien's country. It is noted that you state the proposed position would prepare the beneficiary for a trade in her home country; however, you also indicate the possibility of future employment in your office. A training program may not be approved that is designed to train aliens for the staffing of domestic operations in the United States.

On appeal, the petitioner asserts that the director misunderstood the petition, and that the reality of training a dental assistant is far from the director's understanding of such training.

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, the following:

- (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 AAO agrees with the director that the petitioner's proposed training program does not meet these requirements.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien's own country. On appeal, the petitioner concedes that training as a dental assistant is available in the beneficiary's own country, stating that "[y]ou can get training as a dental assistant anywhere in the world. . . ."

The petitioner contends, however, that training as a bilingual dental assistant must occur in "a special bi-lingual environment such as my office." As such, the petitioner is distinguishing the proposed training program from training programs at other dental offices on the basis of the English language skills that the beneficiary would receive while there. However, the petitioner has not explained why the beneficiary could not acquire such English language skills in an English training program in Japan. Moreover, the petitioner states the following:

During the course of training, [the] beneficiary will attend the course of English as a second language outside the office to improve her English communication skill[s].

This acknowledgement further undermines the petitioner's training program, as the petitioner has attempted to distinguish the training the beneficiary would receive in its training program from similar training at other dental offices on the basis of the bilingual nature of the petitioner's office. The petitioner has not established that English language instruction courses are unavailable in Japan.

Accordingly, the petitioner's proposed training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(1).

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires a demonstration that, while participating in the proposed training program, the beneficiary would 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.

The petitioner has stated that it currently employs a dental assistant and that it has employed dental assistants in the past. Employment of dental assistants takes place in the normal operation of a dental office, and citizens and resident workers are regularly employed in such positions. Accordingly, the petitioner's proposed training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

The regulation at 8 C.F.R. § 214.2(h)(7)(A)(ii)(3) requires a demonstration that the beneficiary would not engage in productive employment unless such employment is incidental and necessary to the training. The AAO notes that nearly all of the beneficiary's training would involve productive employment, as the beneficiary's training schedule would depend upon the petitioner's patient schedule. While such training may be necessary, it is not incidental.

On appeal, the petitioner states that "[t]here will be difficult[y] to divide clearly between actual training and the incidental role of productive employment you have mentioned." However, the petitioner has not established that the beneficiary will not be engaged in productive employment. Accordingly, the petitioner's proposed training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3).

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(2) requires the petitioner to submit a statement which sets forth the proportion of time that will be devoted to productive employment. The petitioner has not complied with this regulation and, as noted previously, has stated that it is "difficult to divide clearly between actual training and the incidental role of productive employment." However, such a statement is required by the regulation. Accordingly, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(B)(2).

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires the petitioner to submit a statement which shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. As noted *supra*, such a statement has not been submitted. Accordingly, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(B)(3).

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement indicating 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. The petitioner has submitted such a statement. However, as noted previously, the AAO finds the petitioner's explanation deficient.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes CIS from approving a proposed training program which deals in generalities with no fixed schedule, objectives, or means of evaluation. The AAO finds that the training program proposed here deals in such generalities, as there appears to be no fixed schedule. As noted previously, the petitioner has stated on appeal that the beneficiary's training schedule would depend upon the petitioner's patient schedule. The Form I-129 indicates that the training program would last 24 hours per week, but the petitioner states on appeal that it would last 30 to 35 hours per week. In its response to the director's request for additional evidence, the petitioner stated that the proposed training program "would be estimated for 2 years." On appeal, the petitioner states that its proposed training program would last "two to three years." This is not indicative of a fixed schedule.

Nor did the petitioner's detailed description of the training program provide evidence of a fixed schedule. The petitioner's response to the director's request for additional evidence stated that the proposed training program would consist of five components: (1) dental terminology and infection control; (2) chairside assistance, starting from operative dentistry; (3) mixing impression materials and pouring models; (4) learning to prepare and take x-rays; and (5) preparing and assisting in oral surgery. The only

indication of any timeframe or schedule was the petitioner's statement that the first component would last "about 4 months." This is not indicative of a fixed schedule.

On appeal the petitioner states that "I do have a book of training manual if you would like to check it out." However, the training manual has not been submitted. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Nor has there been any indication that there will be any means of evaluation. Accordingly, approval of the proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) specifically precludes CIS from approving a proposed training program that would result in productive employment beyond that which is incidental and necessary to the training. As indicated previously, the AAO finds that the employment of the beneficiary would not be incidental to the petitioner's dental practice. Accordingly, approval of the proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes CIS from approving a proposed training program that would recruit and train aliens for the ultimate staffing of domestic operations in the United States. In its response to the director's request for additional evidence, the petitioner stated that there was a possibility of future employment at its office. While the petitioner states on appeal that "we will make sure she will go back to her home country after the training," this statement conflicts with the petitioner's earlier statement. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, approval of the proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(F).

The director denied the change of status request because he denied the petition and as a result of the beneficiary's departure from the United States during the pendency of the application. Questions regarding the beneficiary's maintenance of valid nonimmigrant status are beyond the scope of the AAO's jurisdiction.

For the reasons set forth in the preceding discussion, the AAO will not disturb the director's denial of the petition.

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 appeal is dismissed. The petition is denied.