



U.S. Citizenship
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FILE: SRC 06 007 50709 Office: TEXAS SERVICE CENTER Date: OCT 05 2006

IN RE: Petitioner:
Beneficiaries:



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 commercial painting and drywall company that seeks to employ the beneficiaries in a training program as drywall finishers/painters for a period of three 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, finding that the petitioner had failed to demonstrate (1) that the beneficiaries would not be involved in productive employment; (2) that the beneficiaries would not be placed in a position which is in the normal operation of the business and in which American citizens and resident workers are regularly employed; and (3) that after the beneficiaries had been trained they would return to their home country and utilize the training they had received in the United States.

On appeal, counsel contends that the director erred in denying the petition, stating on the Form I-290B that it "felt that the petition was not understood by the U.S. Citizenship and Immigration Services."

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.

As noted previously, the director found that the petitioner had failed to demonstrate that the beneficiaries would not be involved in productive employment or placed in a position which is in the normal operation of the business and in which American citizens and resident workers are regularly employed, and that after completion of the training the beneficiaries would return to their home country to utilize the training they had received.

The AAO agrees with the director and finds that, pursuant to 8 C.F.R. § 214.2(h)(7)(ii)(A), the petitioner has failed to establish that that beneficiaries 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, and that the beneficiaries would not engage in productive employment unless such employment were incidental and necessary to the training.

According to the schedule it submitted with the initial filing, the petitioner's training program would consist of ten elements: (1) safety; (2) OSHA; (3) gyp board finishing; (4) print reading; (5) tool and equipment accountability; (6) employee evaluations; (7) delegation of authority; (8) scheduling and schedule utilization; (9) lift equipment; and (10) media blasting/spray painting. The weekly program would consist of 12 hours of classroom instruction and 28 hours of "hands on" field training.

In her October 25, 2005 request for additional evidence the director among other requests, asked the petitioner whether the beneficiaries would be involved in productive employment and whether the beneficiaries would be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed.

In its response to the director's request, the petitioner stated that the beneficiaries would spend 60% of their time "in field/hands on training" and an additional 10% of their time as a "helper." The petitioner also stated that its training program "is the one utilized for all new employees. . . ."

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) specifically requires a demonstration that in the proposed training program, "[t]he 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." Here, the petitioner has specifically stated that its training program is "utilized for all new employees." On appeal, the petitioner emphasizes that although this program is utilized for all "trainees," there are no plans to offer the beneficiaries permanent positions.

However, whether or not there are plans to offer a permanent position to the beneficiaries is irrelevant in determining whether the proposed program involves a position that is regularly filled in the normal course of the petitioner's business by citizens and resident workers. The petitioner has not established that the beneficiaries would not be filling a position normally filled by citizens and resident workers. Accordingly, the proposed training program does not comply with 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

Similarly, the regulations at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) and 8 C.F.R. § 214.2(h)(7)(iii)(E) requires a demonstration that the beneficiaries would not engage in productive employment, unless such employment is incidental and necessary to the training. As noted previously, 60% of the beneficiaries' time would be spend on "field/hands on training." In its response to the director's request for additional evidence, the petitioner stated that "[a]ll field training is productive work, performed on an existing project." Accordingly, 60% of the beneficiaries' time would be spent performing productive work. Contrary to the petitioner's assertion otherwise, productive work that would occupy 60% of the beneficiaries' time cannot be considered incidental and necessary.

The director also found that the petitioner had not established that the beneficiaries would return to their home country upon completion of the program. The AAO agrees. The petitioner indicated that the beneficiaries, after the proposed training, would be qualified for similar work in the United States. Thus, the petitioner has not established that the training will benefit the beneficiaries in pursuing a career outside the United States, or that it is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. The petitioner may not be approved under 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) or 8 C.F.R. § 214.2(h)(7)(iii)(F).

As such, the petition was properly denied.

Beyond the decision of the director, the AAO has determined that the petition may not be approved for two additional reasons.

First, the proposed training program is not in compliance with 8 C.F.R. § 214.2(h)(7)(iii)(F), which requires a demonstration that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. The petitioner has conceded that its proposed training program "is the one utilized for all new employees [and] successful completion of the program will result in a Craftsman's position working with all of the other Craftsmen in the Corporation, at the same rate of pay and with the same benefits."

Second, the AAO notes that the proposed training program runs from October 2005 through October 2008, for a period of three years. However, training programs that last this long are ineligible to file under this regulation; the maximum period of time allowable for training programs is two years. 8 C.F.R. § 214.2(h)(9)(iii)(C)(1).

For these additional reasons, the petition may not be approved.

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.