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U.S. Citizenship
and Immigration
Services

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DA

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FILE: EAC 05 241 50904 Office: VERMONT SERVICE CENTER Date:

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:

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 helicopter flight training school that seeks to employ the beneficiary as a “commercial rotocraft pilot/certified flight instructor” for a period of two years. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

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 on two grounds: (1) that the beneficiary already possesses substantial training and expertise in the proposed field of training; and (2) that the beneficiary would not be receiving training, but would rather be working for the petitioner as an instructor.

On appeal, counsel contends that the director erred in denying the petition.

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.

According to the Form I-129, the proposed training program would last two years. The syllabus submitted with the petitioner's August 31, 2005 letter of support indicated that the proposed training program would consist of two components: (1) ground training; and (2) flight training.

The ground training component, which would last 350 hours, is referred to in the syllabus as classroom instruction. In this component of the training program, the beneficiary would instruct the petitioner's students in 32 areas: (1) general aerodynamics; (2) aerodynamics of flight I; (3) aerodynamics of flight II; (4) load and load factors; (5) function of the controls; (6) engine and engine instruments I; (7) engine and engine instruments II; (8) flight instruments; (9) other helicopter components and their functions; (10) preflight instructions; (11) introduction to the helicopter flight manual; (12) weight and balance; (13) helicopter performance; (14) hazards of helicopter flight; (15) precautionary measures and critical conditions; (16) safe and efficient helicopter operations; (17) radio communication I; (18) radio communication II; (19) ATC procedures and operations at uncontrolled airfields; (20) use of the airman's information manual and FAA advisory circulars I; (21) use of the airman's information manual and FAA advisory circulars II; (22) national airspace system I; (23) national airspace system II; (24) helicopter flight maneuvers I; (25) helicopter flight maneuvers II; (26) helicopter emergency procedures; (27) confined area, pinnacle, and ridgeline operations; (28) navigation and navigational equipment; (29) radio navigation; (30) federal aviation regulations I; (31) federal aviation regulations II; and (32) weather.

The second component of the proposed training program would consist of 750 hours of flight training. This component, which would last for 750 hours, would consist of three stages. In the first stage, which would last 215 hours, the beneficiary would instruct the petitioner's students on the foundation of future helicopter training. He would help students become familiar with the Schweizer 300Bi helicopter and gain proficiency in all maneuvers necessary for their first supervised solo flight. In the second stage, which would last 265 hours, the beneficiary would instruct the petitioner's students on advanced maneuvers in preparation for the introduction of off-airport operations. In the third stage, which would last 270 hours, the beneficiary would instruct the petitioner's students in maneuvers and procedures necessary for a cross-country flight. The petitioner's students would learn operations within the air traffic control environment and develop the skills necessary for solo flights to unfamiliar airports. The beneficiary would also instruct the petitioner's students so as to increase their proficiency in preparation for the final flight check.

The AAO agrees with the director that the petitioner's proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

The director found that the beneficiary already possesses substantial training and expertise in the proposed field of training. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The AAO first notes, as did the director, that the beneficiary would not receive actual training or instruction as part of the petitioner's proposed training program. Rather, he would provide training to the petitioner's students, which does not coincide with the definition of a trainee.

The AAO also notes that the beneficiary was previously issued a J-1 visa so that he could train at another helicopter flight training institution, which is inconsistent with a finding that the beneficiary does not

already possess substantial training and expertise in the proposed field of training. On appeal, counsel states the following:

Beneficiary seeks to enter a training program with a goal of obtaining his Airport Transport Pilot (ATP), certificate, rotorcraft category. The training program and curriculum is specific to this licensure. Although Beneficiary possesses some training in the field of helicopter piloting, he does not possess the ATP license. The ATP license is a standard requirement for helicopter pilots in the helicopter industry. Therefore, the Beneficiary, while possessing a certain amount of training and expertise in his field, cannot be said to possess "substantial training and expertise in the proposed field of training." It is the standard in the industry for a pilot to have his ATP certification in order to advance in his career. Petitioner and Beneficiary have already affirmed that such training and certification is not available in Beneficiary's home country, and that such training would greatly benefit Beneficiary's career.

The AAO does not agree with counsel's analysis. A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masauyama*, 11 I&N Dec. 157 (Reg. Comm. 1965); *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965); *Matter of Koyama*, 11 I&N Dec. 424 (Reg. Comm. 1965). The record establishes that the beneficiary has received substantial training as a helicopter pilot. Accordingly, the petitioner's proposed training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(1).

The director also found that the beneficiary would not be receiving training, but would rather be working for the petitioner as an instructor. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires a demonstration that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training, and the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program which will result in productive employment beyond that which is incidental and necessary to the training.

The AAO finds that the beneficiary would be engaged in productive employment for the duration of the program. The petitioner is a helicopter flight training school, and in this program the beneficiary would be an instructor. The AAO further finds that, *contra* to the regulations, any training the beneficiary would receive as a result of this program would in fact be incidental and necessary to the productive employment he would perform.

On appeal, counsel sets forth the procedure for obtaining ATP licensure, which involves a certain amount of flight time. Counsel states that it is almost impossible to fulfill this requirement if the trainee is not also acting as a flight instructor. [REDACTED] Vice-President/Co-owner of the petitioner, states that it is "the helicopter industry standard to serve as a flight instructor in order to build pilot in command time. Otherwise, the ATP applicant would be required to purchase the bulk of his/her flying time at extremely high prices." However, the record does not establish that the instruction the beneficiary will provide on the ground and in the air constitutes training within the meaning of the regulations.

The petitioner must demonstrate that any productive employment in which the beneficiary would engage is incidental and necessary to the training. Such a demonstration, however, has not been made. The record establishes that the beneficiary would spend the entire duration of the program in productive employment; every hour of the 1100-hour program involves the beneficiary providing instruction to, or

supervision of, the petitioner's students. The record does not establish that such employment is incidental to any time the beneficiary might receive training.

On appeal, counsel states that the beneficiary "will not be acting as an instructor in the program." However, this statement conflicts with other evidence of record. First, the AAO notes that, on the Form I-129, the petitioner itself titled the position "Commercial Rotocraft Pilot/Certified Flight Instructor Instrument." Moreover, in its August 31, 2005 letter of support, the petitioner stated that "[p]art of the requirements is [sic] that he be a helicopter pilot/flight instructor." In its September 27, 2005 response to the director's request for evidence, the petitioner repeated that "[p]art of the requirements is [sic] that he be a helicopter pilot/flight instructor." In its November 3, 2005 statement submitted in support of the appeal, the petitioner stated that "[i]t is the helicopter industry standard to serve as a flight instructor in order to build pilot in command time." 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, the AAO finds that the petition was properly denied. Beyond the decision of the director, the AAO finds that the petitioner has failed to establish other regulatory requirements for the trainee visa.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration from the petitioner that the proposed training is not available in the alien's own country. Such a demonstration has not been made here. Although counsel, the petitioner, and the beneficiary have asserted that this type of training is unavailable in the beneficiary's home country, the record contains no evidence, other than these assertions, that the type of training offered in the proposed training program is unavailable in Norway. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not established that this type of training is unavailable in Norway.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) precludes approval of a training program in which the beneficiary 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. As the petitioner is a helicopter flight training school, the AAO finds that employing the beneficiary as a flight instructor would place him in the normal operation of the petitioner's business and in which citizens and resident workers are regularly employed. Accordingly, approval of the petition is precluded.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B) requires a statement from the petitioner that describes the type of training and supervision to be given, and the structure of the training program. The record contains no information regarding the training that the beneficiary is to himself receive, other than that he is to accumulate flight time. Nor has any information regarding his supervision been provided. Accordingly, the petitioner's proposed training program does not sufficiently describe the training program.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a proposed training program that deals in generalities with no fixed schedule, objectives, or means of evaluation. The schedule submitted by the petitioner regarding the training program actually pertains to the petitioner's students training, not the training that the beneficiary would receive. This schedule is silent as to the beneficiary's training. It does not provide a schedule of the training that he would receive, or discuss how he will be evaluated, other than a vague statement that he "shall demonstrate the ability to instruct the subject matter." The petitioner has not established that the beneficiary will receive training in a program with a fixed schedule and means of evaluation. Accordingly, the AAO finds that approval of the petition is precluded in that the proposed training program deals in generalities.

Also, it appears that the petitioner should be considered a vocational school. The petitioner provides instruction in a school-like setting in preparation for a specific career, without providing a degree. Because the petitioner is a vocational institution, the beneficiary is not eligible for H-3 classification. The regulations state that "[a]n H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, *or training provided primarily at or by an academic or vocational institution.*" 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (emphasis added).

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.