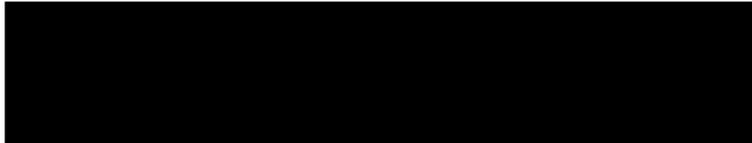


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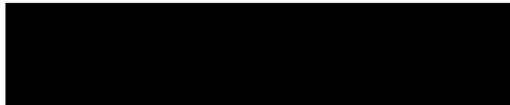
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FILE: EAC 06 253 50837 Office: VERMONT SERVICE CENTER Date: **DEC 04 2007**

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.

For Michael T. Kelly
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 woodflooring company that seeks to employ the beneficiary as a trainee for a period of sixteen months. 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 petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on five grounds: (1) that the petitioner had failed to establish that the proposed training is unavailable in Venezuela, the beneficiary's home country; (2) that the petitioner had failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training; (3) that the petitioner had failed to set forth the proportion of time that would be spent, respectively, in classroom instruction and in on-the-job training; (4) that the petitioner had failed to establish that the beneficiary would not be engaged in productive employment, unless such employment is incidental and necessary to the training; and (5) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified.

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.

In the program syllabus that accompanied the Form I-129 at the time the petition was initially filed, the petitioner stated the following:

The purpose of this training program is to provide [the beneficiary] with a range of specific professional skills relating to the specialized techniques utilized in the installation of floor covering in the flooring industry. [The beneficiary] will be training with a division of our company that specializes in designing and developing customized solutions that are based on the demands of the flooring industry.

According to the petitioner, the proposed training program would be divided into five components. The first component of the proposed training program would last for six months and consist of an introduction to the program. During this time the beneficiary would receive training and education on all aspects of the hardwood floor finishing industry.

The second component of the proposed training program would last for four months and consist of an introduction to the petitioner's products and related services. During this time the beneficiary would acquire in-depth knowledge of all the aspects of the petitioner's functions and applications.

The third component of the proposed training program, entitled "Types of Wood and Climate Conditions," would last for two months. During this time the beneficiary would receive training on the petitioner's products and how different variations of woodflooring products adhere in specific climates and traffic.

The fourth component of the proposed training program, entitled "Home Décor," would last for one month. During this time the beneficiary would learn how to help customers make design statements and decisions when picking particular types or styles of wood.

The fifth component of the proposed training program, entitled "Marketing and Business Management," would last for three months. During this time the beneficiary would learn how to effectively manage the petitioner's business efficiently. As the beneficiary will be expected to supervise operations in the petitioner's future Latin American expansion office, the skills acquired during this component would be critical.

The petitioner stated that the beneficiary would spend fifty percent of his time in direct instruction and fifty percent of his time in supervised practical training. He would spend five percent of his time in the entire program on incidental productive employment.

Upon review, 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 petitioner had failed to establish that the proposed training could not be obtained in Venezuela, the beneficiary's home country. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires the petitioner to demonstrate that the proposed training is not available in the alien's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires a statement from the

petitioner indicating the reasons why the proposed training cannot be obtained in the alien's home country and why it is necessary for the alien to be trained in the United States.

The AAO notes that the question to be addressed when attempting to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5) is not whether the petitioner offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

In the present case, however, the entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Moreover, the petitioner in this particular case has submitted evidence to demonstrate that its business practices are sufficiently unique that such knowledge could not be obtained at another woodflooring facility. The AAO finds that, in this particular case, the petitioner has established that the proposed training is not available in Venezuela, and finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Accordingly, the AAO withdraws that portion of the director's decision stating the contrary.

The director found that the beneficiary already possesses substantial training and expertise in the proposed field of training. The AAO disagrees. 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.

On appeal, counsel submits evidence regarding the beneficiary's education and work experience. He does not appear to have a background in the petitioner's industry. The AAO therefore finds that the beneficiary does not possess substantial training and expertise in the proposed field of training, and it withdraws that portion of the director's decision stating the contrary.

The director also found that the petitioner had failed to set forth the proportion of time that would be spent, respectively, in classroom instruction and in on-the-job training. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires a statement from the petitioner showing the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training.

In the program syllabus submitted at the time the petition was filed, the petitioner stated that the beneficiary would spend fifty percent of his time in direct instruction and fifty percent of his time in supervised practical training. The petitioner clarified that by "direct instruction," it was referring to direct academic instruction. The AAO finds that this information satisfies 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) and withdraws that portion of the director's decision stating the contrary.

The director also found that the petitioner had failed to establish that the beneficiary would not be engaged in productive employment beyond that incidental and necessary to the training. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(3) requires a demonstration that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. 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 record does not indicate that the beneficiary will engage in productive employment beyond what is necessary and incidental for the training. The AAO therefore finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(ii)(3) and 214.2(h)(7)(iii)(E), and withdraws that portion of the director's decision finding the contrary.

Finally, the director found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition that does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified.

In his denial, the director stated the following:

[I]t is noted that you have four employees; it is unclear how you could dedicate 25% of your staff to the beneficiary's training.

On appeal, counsel offers the following rebuttal:

It is because the Petitioner has only four employees that it cannot afford to send one of its employees to head its efforts into the expansion of the company overseas. The beneficiary's training consists of rotating between instructors. Therefore, the time each instructor will dedicate away from his or her normal duties will be minimal when compared with the time they would have to dedicate to the foreign expansion of the company.

The AAO finds counsel's explanation deficient. The AAO notes first that in the petitioner has stated that all aspects of the training program allocated to direct instruction and practical training will be coordinated and/or supervised by the petitioner's president and sales manager. Given that the time allocated to these two components of the training program will, according to the petitioner, consume 95 percent of the beneficiary's time (i.e., 38 hours per week), it is unclear to the AAO how these two individuals will be able to attend to their other responsibilities, or who will attend to such responsibilities in their absence. The petitioner has not demonstrated that it has sufficiently trained manpower to provide the training specified. As such, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(G).

Accordingly, the AAO's agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa.

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

The regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States. As noted previously, the AAO has found the petitioner in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Again, the question to be addressed when attempting to satisfy these two criteria is not whether the petitioner offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

As noted by the AAO, however, in the present case, the entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices.

Having made such a demonstration, however, the petitioner is compelled to further demonstrate that there is a setting in which the beneficiary will be able to use his newfound knowledge. Since his newfound knowledge will be specific to the petitioner, an operation run by the petitioner would be the only setting in which he would be able to use the knowledge.

The petitioner has asserted, as has counsel, that the beneficiary will aid it in establishing operations in Latin America. However, the question is not whether CIS or the AAO believes the petitioner, it is whether the petitioner has met the regulatory requirements. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this particular case, since the proposed training is specific to the petitioner, and the only setting in which the beneficiary would utilize his skills would be for the petitioner in Latin America, petitioner must document that it actually has plans to commence operations in Latin America upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence to demonstrate that it is in the process of setting up operations in Latin America. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4).

Finally, the AAO finds that the petitioner has failed to demonstrate that the proposed training program has a means of evaluation. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a petition that deals in generalities with no fixed schedule, objectives, or means of evaluation. The record does not indicate how the beneficiary will be evaluated. The petitioner therefore has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

For all of these reasons, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.