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U.S. Citizenship
and Immigration
Services

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FILE: EAC 07 104 50173 Office: VERMONT SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

Michael T. Kelly
for 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 mail order and retail bakery that seeks to employ the beneficiary as a mail order marketing assistant manager for a period of eight 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 three grounds: (1) 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; (2) that the petitioner had failed to establish that 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; and (3) that the petitioner had failed to establish that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

On appeal, the petitioner 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 a letter of support submitted with the Form I-129, which was filed on February 6, 2007, the petitioner stated the following:

[The beneficiary] will receive on-the-job training in a variety of marketing methods. She will be working 30 hours per week for the duration of her employment. Her skills will be in the areas of mail order catalog development, catalog distribution, web site marketing, and internet marketing. As her English skills improve [the beneficiary] will be introduced to mail order customer service work.

Learning the English language and American culture will have significant life long benefits for [the beneficiary] and her desire to learn our language is genuine. The understanding of our language and culture should further [her] career when she returns to her home city of Recife, Brazil.

Our son was a guest in the home of a friend of [the beneficiary] while he was a Rotary Youth Exchange Student in Recife. Our son learned the Brazilian [sic] language and their culture during his exchange experience there. Now we have an opportunity to show our appreciation by hosting [the beneficiary] at our home her[e] in the United States of America.

In its response to the director's request for additional evidence, received at the service center on May 10, 2007, the petitioner stated that the beneficiary would spend fifteen percent of her time in classroom instruction and fifty percent of her time in productive employment. The petitioner also stated the following:

If [the beneficiary] does well in her training and she wants to continue working in our business we will consider applying for an extension of her work visa.

The petitioner described the objective of its proposed training program as follows:

Provide classroom instruction combined with hands-on teaching of mail order marketing management with a special emphasis on the interrelationships of mail, phone, and internet sales and promotion.

The petitioner also submitted a course syllabus with its response to the director's request for additional evidence. According to the petitioner, the proposed training program would be divided into seven components. The first component of the training would last for one week and consist of an introduction to the program.

The second component of the proposed training program, entitled "Mail order promotion methods," would also last one week. During this time the beneficiary would learn the value of internet promotions and how to use them effectively; learn how to gauge the effectiveness of direct mail; and the proper use of regional/local promotions through television, cable, and radio.

The third component of the proposed training program, entitled "Catalog Development," would last four weeks. During this time the beneficiary would learn about product selection; product positioning; and graphics.

The fourth component of the proposed training program, entitled "Mail order customer service," would last ten weeks. During this time the beneficiary would learn about the importance of customer service; setting policies; policy implementation; and value-added services.

The fifth component of the proposed training program, entitled "Mail order cost management," would last five weeks. During this time the beneficiary would learn to monitor shipments to identify potential problems; form working relationships with suppliers; and negotiate better shipping rates.

The sixth component of the proposed training program, entitled "Mail order data management," would last five weeks. During this time the beneficiary would learn about hardware, software, and backup systems.

The seventh component of the proposed training program, entitled "Sales management," would last four weeks. During this time the beneficiary would learn about post-season evaluations; spreadsheets; and sales forecasting.

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 beneficiary would not be engaged in productive employment beyond that incidental and necessary to the training. The AAO agrees. 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 clearly establishes that the beneficiary would engage in productive employment beyond that which is incidental and necessary to the training. As noted previously, the petitioner stated in its initial letter of support that the beneficiary would spend fifty percent of her time in productive employment. On appeal, the petitioner states that the beneficiary would be "shadowed by her teacher" during this time. The AAO notes that the beneficiary will earn \$10 per hour and will engage in approximately fifty percent productive employment. As her English skills improve, she will be tasked with additional customer service duties. The petitioner has not established that such employment is incidental and necessary to the training, which will occupy fifteen percent of her time.

Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(3), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

The director also found that the petitioner had failed to demonstrate that 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 AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(2) requires a demonstration that 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.

The documentation contained in the record clearly establishes that the beneficiary would be working in a position which is in the normal operation of its business and in which citizens and resident workers are regularly employed. On appeal, the petitioner states the following:

My intentions are not to take away employment from citizens and resident workers . . . I am confident we will not take away work from resident workers. The training is not for an employment position we currently have or will in the future. Instead[,] this training entails a number of specific roles that provide a general understanding of mail order marketing. We currently do not have one such role in the normal operation of the business.

The petitioner has misunderstood this ground of the director's denial. The issue is not whether American workers will be displaced. The issue is whether the duties to be performed by the beneficiary are normally performed in the petitioner's business by United States citizens and permanent residents as part of its normal course of business operations. In this case, it is clear that United States citizens and permanent residents are performing such marketing duties. That one single person is not presently performing them is not relevant to such a determination. Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(2).

The director also found that the petitioner had failed to demonstrate 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 AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(H) precludes approval of a petition in which the proposed training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

In his denial, the director noted the petitioner's earlier statement that if the beneficiary wanted to continue working for the petitioner, it would consider applying for an extension of her visa. On appeal, the petitioner states that the training will not result in the ultimate staffing of any position in its operation. Rather, it says that any extension would be for the purpose of continuing a more in-depth training in specific marketing areas. The AAO finds this explanation reasonable, and withdraws that portion of the director's decision finding the contrary.

In accordance with the previous discussion, the AAO 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 additional reasons.

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, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the 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 record does not establish that the type of training offered by the petitioner is unavailable in Brazil, the beneficiary's home country. There is no evidence in the record to indicate that she cannot obtain training in mail order promotion methods; catalog development; and sales management. Nor is it evident from the record that the beneficiary cannot obtain English language instruction in Brazil. The petitioner has failed to satisfy the criteria at 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5).

The regulations at 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2) and (3) require the petitioner to submit a statement setting forth the proportion of time that will be devoted to productive employment and showing the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. As noted previously, the petitioner has stated that the beneficiary would spend fifteen percent of her time in classroom instruction and fifty percent of her time in productive employment. However, the petitioner has not accounted for the remaining thirty-five percent. The petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2) and (3).

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.