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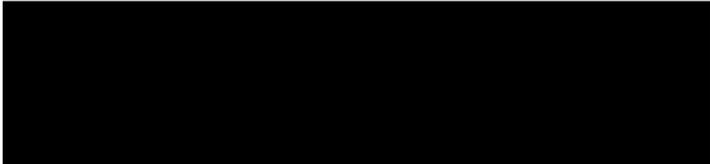
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U.S. Citizenship
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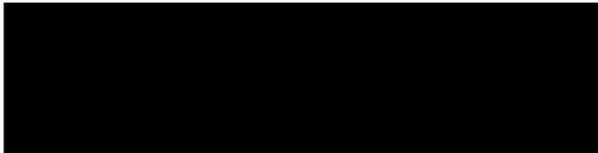


FILE: EAC 07 107 52325 Office: VERMONT SERVICE CENTER Date: **AUG 01 2008**

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:



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 builder that seeks to employ the beneficiary as a business coordinator trainee for a period of 22 months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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 show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; (2) that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary; and (3) that the petitioner had failed to demonstrate that the proposed training is unavailable in Chile, the beneficiary's home country.

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 its letter of support, the petitioner stated the following:

The purpose of the training program is to provide [the beneficiary] with a range of specific professional skills related to the specialized Business Coordination techniques utilized by [the petitioner] in its international and domestic operations. The ultimate purpose of the program is to train the individual to qualify for a management position with [the petitioner] involving eventual assignment in the capacity as Business Coordinator at a branch of the company to be established in Chile or within the Mercosur Community of South America. Business Coordinator skills are in great demand for the highly evolved Chilean economy where the existence of social classes with acquisitive power and discretionary income are an attractive market for the custom home building products that [the petitioner] offers. However, since Chilean universities and technical schools are still not able to graduate enough highly trained students to serve as Business Coordinators for their economy, the training that [the beneficiary] will obtain through this program, will give [the petitioner] a decided market advantage within its sector of the Chilean economy.

The petitioner explained that the proposed training program would be divided into five sections. The first section, entitled "Introduction," would last two months. The second section, entitled "Introduction to Centralized Computer System and Web Interfaces," would last five months. The third section, entitled "Overview of Computer and Information Systems," would last five months. The fourth section, entitled "Management and Administration," would last four months. The fifth section, entitled "Computer Hardware," would last six months.

Upon review, the AAO agrees with the director's finding 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 show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(3). The AAO agrees.

In his March 20, 2007 request for additional evidence, the director notified the petitioner that the outline of the training program provided at the time the petition was filed was unacceptable, and requested evidence to establish how much time the beneficiary would spend in classroom instruction, and how much time he would spend in on-the-job training.

In his June 15, 2007 response to the director's request, counsel stated the following:

[L]earning and training are taking place not in a formal classroom setting, but in the real world setting of [the petitioner's] office and not in a formal classroom, to exclude a hands-on component to teaching would be antithetical to learning and artificial . . . One of the principal criticisms of academic learning has been that there is a real disconnect between what is learned in the classroom and what takes place in the real world of business. . . .

Regarding the Service's request that we "establish how much time will be spent in classroom instruction and how much time will be spent in on-the-job training," it would

be disingenuous of [the petitioner] to affix a percentage or clearly delineate such a boundary.

In his July 18, 2007 appellate brief, counsel states the following:

It is evident that the Service has misunderstood both the letter and spirit of the Petitioner's statement viz a vis [sic] our training program when we wrote that, "It would be disingenuous of [the petitioner] to affix a percentage or clearly delineate such a boundary."

Counsel noted that, in its letter of support, the petitioner had stated that the time period from 9:00 A.M. to 1:00 P.M. would be devoted to "direct instruction," and that the time period from 2:00 P.M. to 6:00 P.M. would be devoted to "supervised practical training." Counsel then states the following:

However, we recognize, and this is the intent of our above referenced statement, that practical day to day situations in a business environment offer unexpected opportunities for unique on the job teaching experiences; opportunities which a traditional academic program is not prepared to respond to because of the static nature of its teaching time slots, but that within the parameters of our program, can be addressed immediately. Therefore an open block of Direct Instruction, such as our 9:00 a.m. to 1:00 p.m. schedule allows us the flexibility of responding to a very practical application of an academic lesson.

Counsel has misunderstood the basis of the director's denial. The director did not deny the petition on this ground because he misunderstood the petitioner's submission. Rather, he denied the petition because that submission does not satisfy the regulation. Whether classroom training is "static" or causes a "disconnect" is not the issue. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) specifically 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. The record lacks such a statement. The petitioner, therefore, has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(B)(3).

The director found that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to describe the career abroad for which the training will prepare the alien.

As noted previously, the petitioner stated in its initial letter of support that the purpose of the proposed training program is to train the beneficiary to assume "a management position with [the petitioner] involving eventual assignment in the capacity as Business Coordinator at a branch of the company to be established in Chile or within the Mercosur Community of South America."

In his June 26, 2007 denial, the director stated the following:

It is not sufficient that the employer's basis for the training program is based on their intent to establish an overseas operation in Chile once the alien is trained in the business's specific practices and operational way of doing business.

The AAO agrees with the director. 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 her skills would be for the petitioner in the Chile or another South American country, the petitioner must document that it actually has plans to commence operations in Chile or another South American country 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, beyond the assertions of record, to demonstrate that it is in the process of setting up operations in Chile or another South American country. 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)). It has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(4) and 214.2(h)(7)(ii)(B)(4).

The director found that the petitioner had failed to establish that the proposed training is unavailable in Chile, the beneficiary's home country. The AAO agrees. 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.

In its letter of support, the petitioner stated the following:

The computer and information operations and management techniques used by our company are the result of almost 10 years of successful operations. The trainee will receive his instruction from professionals who are directly responsible for the success of the company. The United States in general and New York in particular are the centers of the technological and business world; the procedures and practices available here are not in place abroad. The equipment that we utilize in our IT systems represents the latest technology . . . The unique combination of theoretical and practical training in industry-specific IT methods that our New York based company offers is not generally available elsewhere at this time.¹

On appeal, counsel submits internet printouts from several Chilean companies "that are already providing the possibility for Custom Built homes." If such companies exist, and are presently conducting business in Chile, it is unclear to the AAO how such companies are able to recruit managers, if such training is unavailable is in fact unavailable in Chile. Again, it is incumbent upon the petitioner to resolve any

¹ The record does not support the petitioner's assertion that it is a New York-based company. According to its letter of support, the petitioner is located in St. Joseph, Michigan, and the Form I-129 indicates that the proposed training program would take place in St. Joseph, Michigan. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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). The petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5).

Pursuant to the above 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 an additional reason.

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 AAO incorporates here its earlier discussion of the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3). In particular, the AAO specifically notes counsel's statements that "it would be disingenuous of [the petitioner] to affix a percentage or clearly delineate" the percentage of time to be spent in classroom instruction. This is not indicative of a training program with a fixed schedule.

The petitioner has not established that its proposed training program has a fixed schedule. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). For this additional reason, the petition may not be approved.

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.