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FILE: EAC 06 234 51885 Office: VERMONT SERVICE CENTER Date: JAN 09 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 The director's decision will be withdrawn and the matter remanded to the service center for entry of a new decision.

The petitioner, a stone fabricator and installer, seeks to employ the beneficiary as a trainee for a period of eighteen 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 beneficiary would not engage in productive employment; (2) that the petitioner had failed to indicate the benefit which would accrue to the petitioner for providing the training; (3) that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, the beneficiary's home country; (4) that the petitioner had failed to establish that it has a well-established training program; and (5) that the petitioner had failed to demonstrate that it has 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 its July 19, 2006 letter of support, the petitioner described itself as follows:

[The petitioner is] a full service company engaged in the fabrication and installation of marble, granite, and engineered stone for kitchen countertops, bathroom vanities, fireplaces, and other similar projects. We provide classic styling as well as the latest in stone fabrication and installation for both commercial and residential projects. Offering various services ranging from demolition to completion under the roof, we save our customers both time and costs to ensure quality results. Our dedication to customer satisfaction, prompt reliable service, high quality performance, and reasonable prices has resulted in a proven track record amongst suppliers and has earned the confidence of real estate builders to work with our company. . .

The petitioner explained its aim in offering the retraining program as follows:

Utilizing our profits and our connections with our clients and vendors, we have been seeing to expand our operations and expand outside the U.S. to make our name known worldwide. . . .

* * *

After completing our training program, we will employ [the beneficiary] as a Quality Assurance Manager, to plan, direct, and coordinate activities as well as ensure that goals or objectives are accomplished in our . . . Asia branch office. We have an established in house training program to provide [the beneficiary] in all areas of business management for our particular industry. As a Quality Assurance Manager for our company, [the beneficiary] will assist us with increasing business profitability and name recognition worldwide.

The goals and objectives of the proposed training program were explained as follows:

[The goal of the proposed training program is to] educate the Quality Assurance Trainee in all areas of [the petitioner's] assurance and control methods with regards to the tile industry, and provide the trainee with a range of professional skills relating to the specialized operations and management techniques utilized by the company.

The petitioner explained that the beneficiary would spend 80 percent of his time in academic instruction and 20 percent of his time in supervised training. The petitioner emphasized that the beneficiary would not spend any time in productive employment.

The petitioner stated that the proposed training program would consist of three phases, each of which would last six months: (1) Development; (2) Assurance, Coordination, and Management; and (3) Communications and Service.

The Development phase of the proposed training program would consist of two components. The first component of this phase would consist of an orientation to the petitioner's company. During this time,

the beneficiary would participate in orientation and introductory sessions concerning the organizational structure, policies, operations, and management procedures of the company. During the second component of this phase, entitled "Purchasing," the beneficiary would gain in-depth knowledge and capabilities in purchasing products and accessories from manufacturers with emphasis on forecasting inventory levels, monitoring the availability of items in the market, and examining sample products.

The Assurance, Coordination, and Management phase would consist of three components. During the first component of this phase, entitled "Quality Assurance Management," the beneficiary would learn to ensure that the quality of equipment and supplies acquired, received, fabricated, converted, modified, maintained, overhauled, stored, or issued conforms to established quality standards and technical requirements. During the second component of his phase, entitled "Shipping Coordination," the beneficiary would gain in-depth knowledge and capabilities in shipping and product standards with emphasis on production management, quality control, process documentation, and product design. During the third component, entitled "Inventory Management," the beneficiary would gain the skills to adequately determine the availability of each product and material.

The Communications and Service phase would consist of two components. During the first component of this phase, entitled "Communications," the beneficiary would gain in-depth knowledge and skills in effective communication skills. During the second component of this phase, entitled "Repair," the beneficiary would learn about polishing and repairing granite.

The petitioner submitted further details regarding each phase in its March 8, 2007 response to the director's request for additional evidence.

The director found that the petitioner had failed to establish that the beneficiary would not engage in productive employment. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires the petitioner 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 the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a petition in which the beneficiary would perform productive employment beyond that which is incidental and necessary to the training.

The director stated the following in his denial:

Even though you have indicated that a majority of training will be received in classroom instruction, it would appear that to obtain the information indicated that the beneficiary would be required to work alongside others in your organization in the daily duties of their day and would likely be required to assume some of the duties upon being provided limited instruction.

The petitioner states the following on appeal:

[The petitioner] consistently states that trainees will not be involved in any productive employment. This was stated in the initial filing of this petition, in the response to the request for evidence for this petition, and in the previously approved H-3 petitions . . . Our company does not utilize, nor rely upon trainees to perform productive work. Instead, they are specifically hired to undergo training to enable them to assume positions in our future overseas branch. The trainees' knowledge and experience would not permit them to actively participate in or contribute to our company on a productive level.

While it does appear that the beneficiary would engage in a limited amount of productive employment, such as polishing and repairing granite, it appears that such duties would comprise a very small percentage of the duties of the program. Given the petitioner's detailed description of its proposed training program, the AAO finds 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 record does not indicate that the beneficiary will engage in productive employment beyond what is necessary and incidental to 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).

The director found that the petitioner had failed to indicate the benefit that would accrue to the petitioner for providing the training. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(6) requires the petitioner to describe the benefit that will accrue to the petitioner for providing the training.

The petitioner states that it plans to open a branch in the Philippines. The purpose of the proposed training program is to train the beneficiary so that he will be able to assume the role of a quality assurance manager in the branch office so that he can "plan, direct, and coordinate activities as well as ensure that goals or objectives are accomplished." The AAO finds this explanation reasonable.

The petitioner has described the benefit it will receive as a result of providing the training. It has satisfied 8 C.F.R. § 214.2(h)(7)(ii)(B)(6).

The director found that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, 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 facility. The AAO finds that, in this particular case, the petitioner has established that the proposed training is not available in the Philippines, 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).

The director also found that the petitioner had failed to demonstrate the existence of a well-structured training program. The AAO disagrees. 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 outline of the proposed training program's schedule; even further details exist in the record. The petitioner has provided extensive details regarding what the beneficiary would actually be doing over the course of the eighteen-month training period. The AAO finds that the petitioner has established that its proposed training does not deal in generalities with no fixed schedule, objectives, or means of evaluation. The AAO therefore finds that the petitioner has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

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

The AAO notes that the petitioner has 188 employees, and that it has provided the names of the persons who would supervise the beneficiary. The AAO finds the petitioner's explanation and submission reasonable. The AAO finds that the petitioner has established that it has the personnel to provide the training specified. The petitioner has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G).

For all of these reasons, the petitioner has overcome the grounds of the director's denial, and the director's decision is withdrawn.

However, the petition as presently constituted may not be approved. 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 that the beneficiary will aid it in establishing operations in the Philippines. 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 the Philippines, petitioner must document that it actually has plans to commence operations in the Philippines 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 the Philippines. 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)). The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4). Therefore, the petition may not be approved at this time.

However, the director did not focus directly on this issue.

Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director will afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the petitioner has established that the proposed training would benefit the beneficiary in pursuing a career outside the United States. Specifically, the petitioner must submit documentary evidence of its plans for expansion into the Philippines. Absent such information, the record does not establish that the proposed training would benefit the beneficiary in pursuing a career outside the United States, since the proposed training is specific to the petitioner and the only setting in which he would utilize these skills would be for the petitioner in the Philippines. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's March 29, 2007 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.