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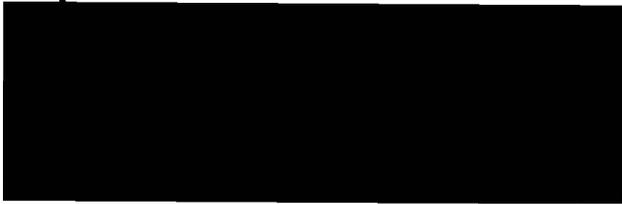
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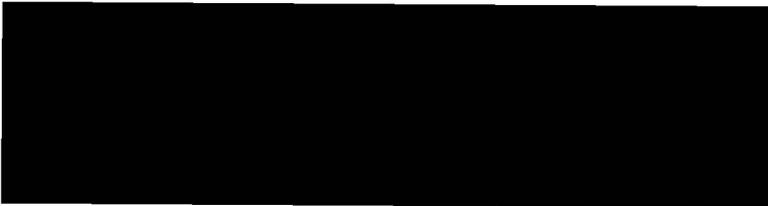


FILE: WAC 07 156 50243 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 2008

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 private school that seeks to employ the beneficiary as a trainee for a period of thirteen 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 two grounds: (1) that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary; and (2) that the petitioner had failed to demonstrate that the beneficiary would not engage in productive employment beyond that which is incidental and necessary to the training; and (3) that the petitioner had failed to demonstrate 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.

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 April 16, 2007 letter of support, the petitioner stated the following:

The School was founded in 1989 to provide its students with an outstanding education and to encourage the full development of each student, using the resources of an internationally-recognized bilingual education system. The School has fifty employees and volunteer workers to help with administrative work.

With regard to why it is providing the training, the petitioner stated the following:

The petitioner will benefit indirectly from the training. By offering training to foreign nationals, the school will promote its cross-cultural awareness within the community, its students[,] and parents. Upon completion of the training, the trainee will return to China to work for a total immersion program. The School's mission is to foster such programs across the world.

The petitioner described its proposed training program as follows:

[T]he training program consists of formal instruction, hands-on training[,] and rotational observation from pre-kindergarten to fifth grade programs.

As described above, the principal purpose of the training is to provide trainees an understanding of the U.S. total immersion programs in Japanese, Chinese[,] and Spanish languages. The trainees will observe and become familiar with the professional benefits and challenges of teachers in a total immersion program such as increased autonomy, creating new curricula and assessment tools, team teaching, and challenges with various cultural values, beliefs[,] and behaviors. . . .

The School believes that successful teachers in a total immersion program must be very familiar with the structure and goals of the program. Teachers must believe in the program and bilingual education. It is the school's mission to foster total immersion programs across the world and build its network of contacts abroad.

In the training program outline submitted at the time the petition was filed, the petitioner explained that the proposed training program would last 52 weeks.¹ It would consist of eight components. The first component, which would consist of an orientation period, would last two weeks. During the second component, which would last eight weeks, the beneficiary would spend four hours per day observing and assisting pre-kindergarten teachers in the classroom, and two hours per day receiving classroom instruction. During the third component, which would last seven weeks, the beneficiary would spend four hours per day observing and assisting in low-kindergarten classes, and two hours per day receiving classroom instruction. During the fourth component, which would last seven weeks, the beneficiary would spend four hours per day observing and assisting the kindergarten teachers in the classroom, and two hours per day receiving classroom instruction. During the fifth component, which would last seven weeks, the beneficiary would spend four hours per day observing and assisting the first grade teachers in the classroom, and two hours per day receiving classroom instruction. During the sixth component, which would last seven weeks, the beneficiary would spend four hours per day observing and assisting the second and third grade teachers in the classroom, and two hours per day receiving classroom

¹ However, on the Form I-129, the petitioner requested an approval period of 13 months. The petitioner does not explain what the beneficiary would be doing during the extra month.

instruction. During the seventh component, which would last seven weeks, the beneficiary would spend four hours per day observing and assisting the fourth and fifth grade teachers in the classroom, and two hours per day receiving classroom instruction. Finally, the eighth component of the petitioner's training would last seven weeks, and would consist of a "debriefing."

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 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, upon returning to his home country, the beneficiary would "return to China to work for a total immersion program." Finding this description inadequate, the director stated the following in her June 26, 2007 request for additional evidence:

The evidence indicates that the training is in a field in which it is unlikely that the knowledge or skill will be used outside the United States when the beneficiary returns to his or her home country. . .

Explain how the knowledge or skills acquired in the training program will benefit the beneficiary in pursuing a career outside the United States.

In her September 17, 2007 response to the director's request for additional evidence, counsel stated the following:

The focus of the program is to apply American standards and teaching techniques while using a foreign language. Because the foundation of the program are [sic] American standards, this program is not available in China. . .

In China, [the petitioner] had developed a sister school relationship with [REDACTED] Jia Zhou Experimental Elementary School. The school shares ideas and the students from the two schools are encouraged to communicate with each other. [The petitioner's] sister school in China would be delighted to offer the beneficiary a position upon the termination of the [t]raining program in the U.S. The skills and knowledge that the beneficiary would develop with regard to U.S. teaching techniques and curriculum as they apply in a Chinese setting would provide a unique set of opportunities for the children attending ou[r] Chinese sister school.

In support of her assertions, counsel submitted a September 1, 2007 letter from the [REDACTED], Jia Zhou Experimental Elementary School, which stated the following:

We heard about [the beneficiary] being a teacher trainee at your school, we hope he can come back to our school to teach.

In her October 29, 2007 denial, the director found this evidence unconvincing, stating the following:

[T]he evidence fails to show why training in “American standards” would benefit the beneficiary in a career teaching at a school in China, which presumably would have to adhere to a Chinese, not an American, curriculum.

In her December 24, 2007 appellate brief, counsel states the following:

The beneficiary has not just one offer of employment, but multiple offers of employment. The petitioner works with schools across the globe to promote cross-cultural awareness, to foster total immersion programs, and to build its network of contacts abroad. . .

The schools wishing to employ the beneficiary upon his return are not traditional Chinese schools. As their school names indicate, they are “experimental” schools because they are international schools whose students comprise different cultural and language backgrounds. They adhere to educational principals similar to the petitioner, namely immersion language study. The Beijing Zhongshan Experimental School has students enrolled from the United States, Canada, South Korea, Germany, Angola, Switzerland, Thailand, Finland, Sweden[,] and Ireland. These students undergo immersion in the Chinese-language and other language education.

The AAO finds counsel’s explanation deficient. That the beneficiary has multiple offers of employment is irrelevant. When attempting to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(4) and 214.2(h)(7)(ii)(B)(4), it is sufficient to merely demonstrate the beneficiary will be able to obtain employment upon returning to his home country. The petitioner must also demonstrate that such employment would utilize the skills learned in the training program. In the words of the regulation it must describe “the career abroad *for which the training will prepare the alien* (emphasis added).” The petitioner has not presented documentation from any international or experimental school in China indicating that the training to be offered to the beneficiary by the petitioner will prepare him for work in its institution, or describing the benefits of such training for the beneficiary’s eventual employment in China. 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 failed to establish that its proposed training program will benefit the beneficiary in pursuing a career outside the United States. 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 also found that the petitioner had failed to demonstrate that the beneficiary will not engage in productive employment unless such employment is 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.

In her denial, the director stated the following:

In review of the program, USCIS finds that the first 2 weeks will be spent in “Orientation” in which the beneficiary will attend classes on the petitioner’s campus for 6

hours a day. After the first two weeks, however, the petitioner will then be spend[ing] about 6 to 8 weeks in the classroom, beginning first with the pre-kindergarten level, then kindergarten, and ending with the Fourth and Fifth grader level. Once in the classroom, the beneficiary would receive classroom instruction for only 2 hours a day, less than half the period of time he would be assisting in the classroom.

When a training program is characterized as on-the-job training, it is difficult to establish that the training is not principally productive employment.

On appeal, counsel offers the following rebuttal:

The regulations of H-3 trainee programs do not exclude on-the-job training . . . The plain language of these regulations is that on-the-job-training is allowed, as long as productive employment is not beyond that which is incidental and necessary to the training. The petitioner's training program does contain some on-the-job training, but it is limited and meets the requirements of H-3 training programs.

It is true that the beneficiary will spend the 4 hours a day in the petitioner's classrooms "observing and assisting teachers" during weeks 6-8, but the beneficiary will not be engaged in productive employment beyond that which is incidental to the training . . . The best way of conveying an understanding of the benefits and challenges in teaching total immersion programs is through a combination of formal instruction, rotational observation, and hands-on-training. . .

The primary focus of the trainee/beneficiary during their time in the classroom with students is to observe teacher preparation and the interactions between teachers and students, not productive employment. It is true that the trainee/beneficiary will spend some time interacting with students, such as reading stories, but this is only incidental and necessary to the training. It will assist the beneficiary in understanding and reinforcing what he learns in his classroom instruction and observation.

The AAO disagrees with counsel's analysis. The record, as currently constituted, does not support a finding that the beneficiary would not engage in productive employment beyond that which is incidental and necessary to the training. The schedule submitted by the petitioner at the time the petition was filed indicates that the beneficiary will spend less than one third of his time in classroom instruction. The remaining portion of his time will be spent in the classroom with teachers. The AAO does not find convincing counsel's assertion that the beneficiary will spend most of this time (i.e., four hours per day for forty-three weeks) simply observing what the teacher is doing. It finds that the petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(ii)(3) and 214.2(h)(7)(iii)(E).

The director also found that the petitioner had failed to demonstrate 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, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(2). The AAO disagrees. It finds no basis in the record for this conclusion, and withdraws that portion of the director's decision.

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 two additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(I) 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.

As noted previously, counsel has asserted that the beneficiary has job offers from both the [REDACTED], Jia Zhou Experimental Elementary School and the Beijing Zhongshan Experimental School, and that these two schools "adhere to educational principals similar to the petitioner, namely immersion language study." Again, if such is the case, and similar training is unavailable in China, as the petitioner has asserted elsewhere, then it is unclear to the AAO how those schools' current faculty members received their training, if such training is unavailable in China. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(I) or 8 C.F.R. § 214.2(h)(7)(ii)(B)(5). For this additional reason, the petition may not be approved.

Finally, the AAO notes that the petitioner is a school. Because the petitioner is an academic 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 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.