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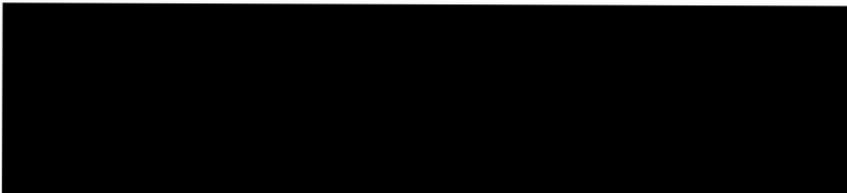


FILE: EAC 07 197 53564 Office: VERMONT SERVICE CENTER Date: JUN 09 200

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

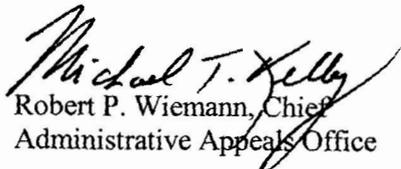
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

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.

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 an architectural firm that 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 three grounds: (1) that the petitioner had failed to establish that the proposed training program has clearly defined objectives and a means of evaluation; (2) that the petitioner had failed to establish that the proposed training program would not be primarily of a productive nature; and (3) that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career outside the United States.

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 June 25, 2007 letter of support, the petitioner stated the following:

We are providing [the] training since [the beneficiary] has great promise for a future employment in the marketing of professional architecture and related services and the proposed training is not available in Russia. While the profession of architecture is well developed in Russia, the marketing of these services is largely undeveloped. We also believe that she would become a source of future commissions for our company.

* * *

Our interest in this program is not wholly altruistic. In the past, we have found that trainees become a source of significant future business when their clients require a higher degree of competence [than] they are able to provide themselves. . . .

The description of the proposed training program submitted at the time the petition was filed indicated that the program would be divided into twelve components: (1) managerial information gathering; (2) marketing research; (3) media planning; (4) a competitive proposal composition; (5) pricing strategies; (6) marketing department cross training, and graphic design and visual representation; (7) corporate and multi-media presentations; (8) business development; (9) customer acquisition and retention; (10) team building and leadership; (11) competitive strategy in the marketplace; and (12) brand development and website content composition. The petitioner explained that less than forty percent of the beneficiary's time would be devoted to the petitioner's real projects or parts of its projects.

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 establish that the proposed training program has clearly defined objectives and a means of evaluation. The AAO agrees in part with the director's finding, and disagrees in part. 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 will first address the director's finding that the petitioner's proposed training program, as set forth in the record of proceeding, lacks a means of evaluation. The AAO agrees with the director's finding in this regard. The petitioner's means of evaluation is mentioned briefly in two places. In the petitioner's original description of the proposed training program, the petitioner stated that the beneficiary's specific work projects would be subject to critique "by two or three other professionals in the firm," and the petitioner's August 6, 2007 response to the director's request for additional evidence states that the beneficiary's periods of productive employment would be subject to "specific review."

The means of evaluation is discussed at no other point in the record of proceeding. Like the director, the AAO finds the description of the petitioner's means of evaluation deficient. As the record of proceeding currently stands, the AAO is left with no meaningful information as to how the beneficiary is to be evaluated. That information is required by the regulation. On appeal, counsel and the petitioner have elected not to respond to this portion of the director's denial. Thus, they have not overcome that portion of the director's denial.

The AAO turns next to the director's finding that the petitioner's proposed training program lacks clearly defined objectives. The AAO disagrees. The AAO finds the petitioner's description of the objectives of the proposed training program as set forth in the petitioner's initial submission—to train the beneficiary so that she may become a future source of commissions for the company—reasonable, and withdraws that portion of the director's decision finding otherwise.

Although the petitioner has overcome one ground of the director's denial of the petition under 8 C.F.R. § 214.2(h)(7)(iii)(A), it has failed to overcome the other. Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director also found that the petitioner had failed to establish that the proposed training program would not be primarily of a productive nature. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires the petitioner to establish that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training, and 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program that would result in productive employment beyond that which is incidental and necessary to the training.

In its June 25, 2007 letter of support, the petitioner stated the following:

Any productive employment is to provide the reality necessary for training at a [sic] advanced professional level.

In its description of the proposed training program that was submitted with the letter of support, the petitioner stated the following:

Less than 40% of the time is devoted to real projects or parts of projects at a progressively difficult level. The productive employment gives the trainee the reality which enhances the training.

In his July 11, 2007 request for additional evidence, the director stated, in pertinent part, the following:

Submit additional evidence explaining how much time will be devoted to productive employment.

In its August 6, 2007 response, the petitioner stated the following:

As previously explained, the "productive employment" is for the purpose of providing an element of reality in the training to make it more effective. Any productive employment is also subject to specific review by a qualified professional to ensure that it is error-free and at the professional level for which the client has paid. The time devoted to these exercises approximates 33% to 35%.

In his August 23, 2007 denial, the director stated the following:

This Service is not convinced that the nature of the employment will not be primarily of a productive nature.

The AAO finds no reason to doubt the petitioner's statement that the beneficiary would spend between 33 and 35 percent of her time in productive employment. However, the AAO finds that while spending such a large percentage of the beneficiary's time in productive employment may be necessary, without additional information regarding what the beneficiary will actually be doing while he is participating in

the petitioner's proposed training program,¹ the record does not establish that such employment is incidental to the training. The petitioner has failed to demonstrate that the beneficiary would not engage in productive employment beyond that necessary and incidental to the training program.

Finally, the director found that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career outside the United States. The AAO disagrees. 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.

In his denial, the director stated the following:

The record fails to contain any documentation from prospective employers in Russia stating that the beneficiary would be employed or desirous for employment upon the completion of the proffered training program.

The AAO disagrees. The petitioner's response to the director's request for additional evidence contained a letter from Penetron, the company in Russia for which the beneficiary will be employed upon completion of the training program. The petitioner has satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4), and the AAO withdraws that portion of the director's decision that states otherwise.

On appeal, counsel asserts that the director's denial relied upon grounds not raised in his request for additional evidence, and that therefore the petitioner was denied procedural due process of law, as it was not afforded the opportunity to address those grounds before the petition was denied. Counsel requests that an additional request for evidence be issued. The AAO, however, denies that request. Even if the director committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to again supplement the record with new evidence.

Pursuant to the preceding discussion, the AAO finds that the petitioner has failed to overcome the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petition may not be approved for two additional reasons. As noted previously, 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 has already addressed the components of this regulation relating to fixed objectives and means of evaluation, as those were grounds of the director's denial. However, the AAO finds further that the proposed training program deals in generalities.

Much of the information submitted by the petitioner is vague in nature and leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. For example, the marketing research component of the proposed training program would last one month. However, the petitioner's description of how the beneficiary would spend this period of time consists of a two-sentence summary. The petitioner states that, during this time, the beneficiary would learn the steps of marketing research, questionnaire construction, data analysis, evaluation of research costs to results achieved, and applications of marketing research to marketing decision areas, and that the beneficiary would exercise

¹ Later in its decision the AAO further develops its analysis regarding the general nature of the petitioner's description of the proposed training program.

the knowledge received through a project involving data collection and analysis. Such a vague, generalized description does not explain what the beneficiary would actually be doing on a day-to-day basis. While it is true that the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, the description provided is inadequate.

The petitioner's description of much of the rest of its proposed training program suffers similar deficiencies. The "competitive strategy in the marketplace" component of the proposed training program would last one month. Again, the petitioner's description of how the beneficiary would spend this period of time is presented in a two-sentence summary. The petitioner states that the beneficiary is to learn about the petitioner's competitive strategy and engage in strategic action and interaction, strategic models, brands as a source of competitive advantage, and methods for comparing competitive offers and strategies. Again, such a vague and generalized description leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis.

The petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. It has failed to establish that its proposed training program does not deal in generalities. For this additional reason, the petitioner has failed to satisfy C.F.R. § 214.2(h)(7)(iii)(A) and, for this additional reason, the petition may not be approved.

Next, the AAO notes that the beneficiary is currently in F-1 nonimmigrant status. She was granted a one-year period of optional practical training, which was to last from July 17, 2006 until July 16, 2007. The instant petition was filed on June 28, 2007, and requested that the beneficiary's F-1 status, upon which basis she was granted the period of optional practical training, be changed to that of H-3. If approved, there would be no gap between the beneficiary's period of optional practical training and her H-3 status. Approval of this petition would, therefore, extend the period of time in the United States for the beneficiary to receive practical training.

However, the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(H) precludes approval of a petition which is designed to extend the total allowable period of practical training previously authorized the beneficiary. Thus, approval of this petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(H). For this additional reason, the petition may not be approved.

Finally, the AAO turns to counsel's assertion on appeal that CIS approved a very similar H-3 petition filed by the petitioner. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, Citizenship and Immigration Services (CIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, if those petitions were approved based on the same evidence contained in the current record, those approvals constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved that nonimmigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana*

Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.