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U.S. Citizenship
and Immigration
Services

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FILE: EAC 08 007 53669 Office: VERMONT SERVICE CENTER Date: NOV 17 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:

[REDACTED]

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.


John F. Grissom, Acting 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 The director's decision will be withdrawn and the matter remanded to the director for entry of a decision consistent with this opinion.

The petitioner is a magic tricks retailer, distributor, online store, and wholesaler that that seeks to employ the beneficiaries as trainees for a period of eighteen months. The petitioner, therefore, endeavors to classify the beneficiaries as nonimmigrant worker trainees 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 four grounds: (1) that the petitioner had failed to establish that the training is unavailable in the beneficiaries' home country; (2) that the petitioner had failed to show how much time the beneficiaries would spend in productive employment; (3) 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; and (4) that the petitioner had failed to establish that it has an actual and well-structured training program.

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 October 4, 2007 letter of support, the petitioner stated the following:

[The petitioner] is in the business of selling magic. We actually sell magic products, but to effectively sell magic products we have to sell the idea of Magic. Thus each of our employees has to effectively become a Magician. As a Magician, he lures the buyer into wanting to also become a Magician, and consequently buy our products.

Most people accept the role of the magician as a professional entertainer who pretends to do the impossible for the amusement of his audience. At our retail locations, our employees perform at that level of excellence. We have invented the idea of selling magic retail. We are taking magic out of its secret chambers and bringing it to the masses. It is our objective to lead every buyer into believing that they will be the next Houdini.

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

The object of this training program is to create a small core of experts whom our company can send overseas to its expanding locations, to in turn train local sales personnel in the art [of] selling [the petitioner's] products. This brand of magic is uniquely American, and we want to keep that American flavor of magic as we transport our business overseas.

In the training program outline submitted with counsel's December 11, 2007 response to the director's request for additional evidence, the petitioner explained that its proposed training program would consist of five separate phases: (1) the first phase, entitled "Creating a Magical Mission: Beginner's Phase," would last two months; (2) the second phase, entitled "Magic Tricks, Articles, and Skills to Sell Them: Intermediate Phase," would last four months; (3) the third phase, entitled "Finding the Best Gadgets and Magic to Promote and Sell: Advanced Phase," would last four months; (4) the fourth phase, entitled "Business Planning: Advanced Phase," would last five months; and (5) the fifth phase, entitled "Managing Career and Business: Expert Phase/Conclusions," would last three months.

The director found that the petitioner had failed to establish that the proposed training is unavailable in Israel, the beneficiaries' home country. The AAO disagrees. 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.

On appeal, the petitioner submits letters from competitors, attesting to the unavailability of similar training in Israel. As noted by counsel, "[o]ne of the very important features of the training is that the trainees will learn how to perform magic tricks with the unique magic merchandise and devices, which is available only at [the petitioner]." The record establishes that the training that the petitioner proposes to offer the beneficiaries is unique to its own business model. This evidence regarding the uniqueness of the petitioner's training program was not before the director at the time he entered his decision, and the AAO finds the assertions of counsel and the petitioner reasonable. The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to show how much time the beneficiaries would spend in productive employment; 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; and that the petitioner had failed to establish that it has an actual, well-structured training program, as required by 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(1), (2), and (3). The AAO disagrees. On appeal, the petitioner submits a

detailed outline of the training program. This outline provides a detailed schedule of how the beneficiaries would spend their time while participating in the training program; provides sample reading materials; provides the names of lecture topics; and addresses the director's concerns vis-à-vis the percentage of time to be spent in productive employment and the number of hours that will be spent in classroom instruction and in on-the-job training. In this particular case, the AAO finds that the petitioner's submission has satisfied the director's concerns, and it withdraws that portion of the director's decision finding otherwise.

Accordingly, the petitioner has overcome each of the grounds of the director's denial, and the director's decision is withdrawn in its entirety. However, the petition as presently constituted may not be approved.

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. In its October 4, 2007 letter of support, the petitioner stated the following with regard to supervision:

At all times during the training program, the trainees will be under the direct and immediate supervision of the senior staff of the company coordinating that particular aspect of the training program.

The petitioner, however, has provided no information regarding the qualifications of the members of the "senior staff of the company" who will provide the training. The AAO does not question the qualifications of the petitioner's president to provide the training; his qualifications were set forth amply in the petition. However, the record does not indicate that he would be the sole individual to provide the training, and the qualifications of the other individuals who would assist in the training have not been established. If the petitioner is asserting that its president would be the sole individual providing the training, the AAO questions how he would be able to attend to his normal duties while providing full-time training for a period of 18 months.

However, as this was not one of the grounds for denial, the director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the petitioner has sufficiently trained manpower to provide the training specified, in accordance with 8 C.F.R. § 214.2(h)(7)(iii)(G). Specifically, the petitioner must demonstrate that the senior staff members referenced in the petition are qualified to provide the training. If the petitioner's president, whose qualifications to provide the training have been demonstrated, will be the sole trainer, then the petitioner must address how his normal duties will be performed while he trains the beneficiaries. The director shall then render a new decision based on the evidence of record.

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 January 24, 2008 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.