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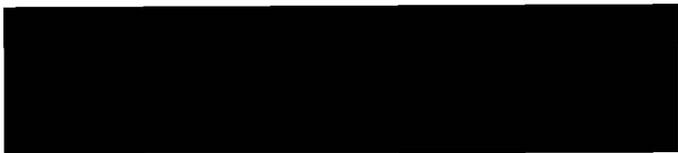


FILE: EAC 08 023 52677 Office: VERMONT SERVICE CENTER Date: OCT 29 2008

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 marble and granite importer that seeks to employ the beneficiary as a trainee for a period of 24 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 four grounds: (1) that the petitioner had failed to demonstrate that the proposed training program is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training; (2) 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; (3) that the petitioner had failed to adequately describe the career abroad for which the proposed training will prepare the beneficiary; and (4) that the petitioner had failed to demonstrate that the petitioner has the physical plant and 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 October 23, 2007 letter of support, the petitioner stated the following:

[The petitioner] is amongst the leading supplier[s] of Marble, Granite, and tumbled stones in the North American market. Materials are usually processed in factories overseas. We distribute materials from India and China in the form of tiles, cut to size for projects, slabs[,] and we also fabricate the Granite Countertops to fit our customer's needs. We also fabricate custom countertops for architects, builders, contractors, and personal homes. We provide excellent craftsmanship at our fabrication shop that hosts Cutting and Crafting machinery.

With regard to why the petitioner is offering the training program, counsel stated the following in his October 29, 2007 letter of support:

The main objectives of the training program are:

1. To train a manager and provide him/her with experience in many subject areas, including management, organization, market analysis, computer research[,] and human resource management.
2. To help foreign employees explore the world outside their country, and to show them the possibilities of global management.

Counsel described the proposed training program as follows:

Petitioner has devised a pilot training program that would provide trainees with the knowledge and skills necessary to successfully perform as an International Business Manager. Petitioner will train a manager and provide him/her with experience in many subject areas, including management, organization, market analysis, computer research[,] as well as human resources management.

In the training program outline submitted with its response to the director's request for additional evidence, the petitioner explained that its proposed training program would consist of four components: (1) Program Finance and Budget; (2) Operations; (3) Educational Program Promotion, Marketing, Sales, and Financing; and (4) Business Policy and Strategy.

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 also found that the petitioner had failed to demonstrate that the proposed training is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

In his December 19, 2007 denial, the director stated the following:

It appears that the beneficiary does not qualify for the training program as she already has substantial training and education in the field. The Service is not persuaded that the proposed training is above and beyond any knowledge that the alien already possesses in this area and could therefore benefit her in pursuing a career abroad in an international business management position. The alien possesses an MBA in International Business . . . and a Bachelor's of Computer Application[s] . . . Because of the alien's previous experience in marketing and management for the industry it would appear that she already possesses skills related the training and it is not evident that she would be learning any new skills. . . .

On appeal, counsel contends that the beneficiary does not possess a master's degree in business administration, as asserted by the director. Rather, he states, the course of study referred to as an "MBA" by the director was actually a one-year training course. The AAO agrees with counsel's analysis; it does not appear as though the beneficiary possesses as master's degree. The AAO further agrees with counsel that the beneficiary does not possess substantial training and expertise in the area of proposed training. It does not appear as though the beneficiary has any work experience, or any educational background, in the petitioner's industry. Also, the proposed training program focuses on the petitioner's own unique business methods. In this particular case, the AAO finds that the petitioner has overcome the director's concerns regarding the beneficiary's credentials, and withdraws that portion of the director's decision.

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)(3) requires the petitioner to demonstrate that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training.

The director stated the following in his denial:

It does not appear that an actual training program exists. Rather, it appears that the beneficiary will be employed by you in a productive capacity and that any training received would be as a result of practical application of her skills and incidental to her employment.

Counsel states the following on appeal:

Petitioner submits that an actual training program does exist and that the Beneficiary will not be employed by the Petitioner in a productive capacity except as necessary and incidental to the training program . . . Starting from the end of the third phase of the training program, the Beneficiary will be expected to perform productive responsibilities with minimal supervision. The Beneficiary will employ all the skills she has learned during the training program and such tasks will constitute a minimum of 15-20% of the training hours. This exercise is necessary and necessary to the training program.

The AAO agrees with the director's analysis. The record contains very little detail regarding what the beneficiary will actually be doing on a day-to-day basis throughout the training program. When this fact is considered relative to the fact that the petitioner has only three full-time employees, of whom two are to

be the beneficiary's trainers, the assertion that the beneficiary would not be performing productive employment for the petitioner, beyond that incidental and necessary to the training, is not supported by the record. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3).

The director also found that the petitioner had failed to establish that the proposed training will 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)(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 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.

The director stated the following in his denial:

Given the non-existence of the petitioner's business operations in India, a training program geared toward the petitioner's specific business practices and operational way of doing business has no merit. Having the intent to commence overseas business operations upon the beneficiary's successful completion of the U.S. training is not a valid basis for seeking an H[-]3 alien trainee.

While the AAO agrees with the director's statements, the petitioner has, on appeal, submitted evidence to establish that it was in fact conducting business in India before the petition was filed. Accordingly, the AAO withdraws this portion of the director's decision.

Finally, the director found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). **The AAO agrees.**

In its December 6, 2007 response to the director's request for additional evidence, the petitioner stated that two individuals would provide the training: (1) Bharat Patel; and (2) Prathik Patel. According to the petitioner, Bharat Patel would supervise the beneficiary daily, and Prathik Patel would supervise the beneficiary "once to twice per week."

However, the AAO notes that these individuals occupy important positions within the petitioner's organization, and counsel does not explain how those individuals' regular duties will be accomplished while they are providing training to the beneficiary over the course of 24 months. Nor does counsel indicate how the petitioner's business will be able to function if two of its three full-time employees are supervising the beneficiary.

Nor has the petitioner submitted any information regarding the qualifications of any of these individuals to provide the training, or explained exactly which parts of the program they will supervise. Without such information, the AAO is unable to make a determination that the petitioner has sufficiently trained manpower to provide the training specified in the petition. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(G).

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)(B)(1) requires the petitioner to set forth, with specificity, the type of training and supervision to be given, and the structure of the training program. The information contained in the record of proceeding remains 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. Goals and objectives are presented, but lists of goals and objectives are not substitutes for descriptions of how those goals and objectives are to be accomplished; the petitioner has not explained what the beneficiary will actually be doing during this time. Nor is any other evidence submitted, such as sample lesson plans, which would assist the AAO in determining how the beneficiary would be spending her time. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute, or even every single day, of the training program. However, the petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing on a daily basis while participating in the proposed training program. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(1). For this additional reason, the petition may not be approved.

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 previous discussion of the vague and generalized nature of the petitioner's description of the proposed training program. Again, while the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute, or even every single day, of the training program, in this case it has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, while participating in the proposed training program. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of this petition. 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.