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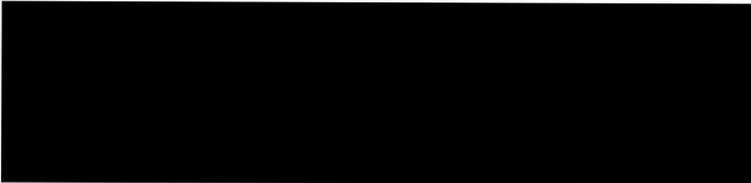
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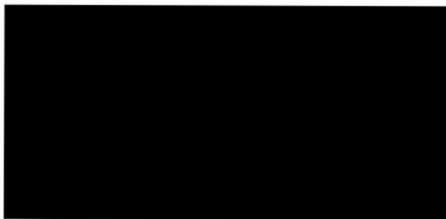


FILE: EAC 07 093 50859 Office: VERMONT SERVICE CENTER Date: OCT 29 2008

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

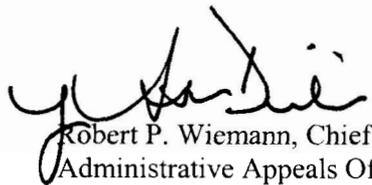
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

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 manufacturer and distributor of dry screening, washing, crushing, and recycling equipment for the quarry, mining, landfill, and waste management industries. It seeks to employ the beneficiary as a trainee for a period of twelve 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 six grounds: (1) that the petitioner had failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (2) that the petitioner had failed to demonstrate that the proposed training is unavailable in the beneficiary's home country; (3) 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; (4) that the petitioner had failed to submit evidence explaining how much time will be devoted to productive employment; (5) that the petitioner had failed to submit evidence to explain how much time would be spent in classroom instruction, and how much time would be spent in on-the-job training; and (6) that the petitioner had failed to demonstrate that the proposed training does not deal in generalities with no fixed schedule, objectives, or means of evaluation.

On appeal, counsel contends that the director erred in denying the petition. Specifically, counsel states that the director interpreted the law erroneously, and did not correctly apply the law to the facts of the case.

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 the "Training Program Overview" submitted at the time the petition was filed, the petitioner stated that the proposed training program would be composed of three phases. The first phase, which would last eight weeks, was described as follows:

[This phase] provides instruction with approximately 85% being in the classroom. The purpose of this phase is to underscore the importance of market context (product history, regulatory environment, social norms) and to provide familiarity with that context in the United States.

The second phase, which would last thirty-three weeks, was described as follows:

[This phase] provides intensive product training in specified products with approximately 80% being practical training with various types of machinery. The purpose of this phase is to ensure a thorough knowledge of major products and their applications in the United States.

The third phase, which would last eight weeks, was described as follows:

[This phase] provides training in plans and presentations with approximately 80% being independent research and marketing strategy formulation. The purpose of this phase is to develop skill in identifying and developing marketing opportunities in a developing market.

In its letter of support, the petitioner stated the following:

A breakdown of the core program reveals circa 75% of time is in classroom instruction, the balance [in] onsite review and presence (non-participatory) at a range of sales and marketing meetings.

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 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. The record contains no documentary evidence of the petitioner's ability to provide the classroom training specified in the petition, as it contains no pictures, floorplans, or any other evidence of its physical plant. Nor has the petitioner established that it has sufficiently trained manpower to provide the training. The petitioner states that its owner and general manager will provide direct supervision of the marketing and sales aspects of the proposed training

program, that [REDACTED] will assist with the program, that a company in Louisville, Kentucky (the petitioner is located in American Canyon, California, and indicated on the Form I-129 that the training program would take place there) “will provide training on the specific machinery in the training program,” and that [REDACTED] would be the “liaison” at that company. The petitioner has failed to provide the qualifications of the individuals who would provide the training, and counsel’s unsupported statement on appeal that these three individuals are “well-qualified” is not supported by the record. The AAO notes that the director specifically requested that the petitioner submit the resumes of the instructors in his request for additional evidence, and that the petitioner elected not to provide them. Nor has the petitioner explained how, if it does not employ full-time trainers, the individuals who will provide the training will perform their normal duties. It has failed to establish that it has sufficiently trained manpower to provide the training outlined in the petition. For all of these reasons, 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition.

The director also found that the petitioner had failed to demonstrate that the proposed training is unavailable in the beneficiary’s home country. The AAO agrees. 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 petitioner addressed this issue in its April 24, 2007 response to the director’s request for additional evidence, stating, in pertinent part the following:

The training program offers specific benefits that are unavailable in Northern Ireland. The application of crushing, screening[,] and recycling machinery vary according to geology, industry[,] and recycling requirements. The machinery—which tends to be massive and complex—must be adapted according to the user’s requirements, and this requires integration of several diverse machines in the same environment (e.g., primary and secondary crushers primarily [as well as] finishing screeners). Accordingly, the rich variety of and greater scale of industry in the United States provides the trainee with an accelerated learning opportunity compared with his home country.

The AAO agrees with the director’s analysis. 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 similar training would take longer in the beneficiary’s home country, or whether such training would be inferior to that available in the United States. Whether similar training in the beneficiary’s home country would take longer to complete or would be inferior is not material; 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. Whether a training program offered by a United States employer is better than a similar program in a foreign country does not establish eligibility under this regulation. Further, no evidence has been provided to document the petitioner’s assertions. 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 record as presently constituted does not satisfy 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 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 agrees. 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 February 23, 2007 request for additional evidence, the director requested, among other items, the following:

Provide evidence of the following information regarding the beneficiary:

- 1.) Names of all employers, dates of employment, and places of employment for the past eight years. . . .

* * *

- 4.) If the alien's employment is or has been intermittent, seasonal, or an aggregate of six months or less per year, submit evidence of that employment. Such evidence may include a letter from you explaining the employment. . . .

However, counsel and the petitioner elected not to respond to this portion of the director's request for additional evidence, and have also elected not to respond to this portion of the director's denial. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masauyama*, 11 I&N Dec. 157 (Reg. Comm. 1965); *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965); *Matter of Koyama*, 11 I&N Dec. 424 (Reg. Comm. 1965). The petitioner has failed to respond to the director's concerns in this regard; it has therefore failed to overcome them. Accordingly, approval of the petitioner's proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(C).

The director found that the petitioner had failed to submit evidence explaining how much time will be devoted to productive employment, and that it had failed to explain how much time would be spent in classroom instruction, and how much time would be spent in on-the-job training. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(2) requires the petitioner to set forth the proportion of time that will be devoted to productive employment, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires a statement from the petitioner that shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training.

As noted previously, in the "Training Program Overview" submitted at the time the petition was filed, the petitioner stated that, during the first phase of the proposed training program, the beneficiary would spend 85% of his time in classroom instruction. According to the figures provided by the petitioner, the beneficiary would spend, at most, 20% of his time in the second and third phases of the training program in classroom instruction. However, it also stated that the beneficiary would spend 75% of the training program in classroom instruction.

Accordingly, the director requested the following, among other items, in his February 23, 2007 request for additional evidence:

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

Submit additional evidence to explain how much time will be spent in classroom instruction and how much will be spent in on-the-job training. Submit a breakdown of the percentage of time spent in classroom instruction and the percentage of time spent in on-the-job training.

In its April 24, 2007 response to the director's for evidence, the petitioner elected not to respond to the director's request.

On appeal, counsel states the following:

As indicated in the record in this matter, contrary to the Center Director's decision the petition and supporting documentation fully satisfied the requirements for a training program.

The petitioner's assertions are deficient, as the record contains conflicting information regarding the amount of time that the beneficiary will spend in classroom instruction. Again, at the time of filing the petitioner stated that, during the first phase of the proposed training program, the beneficiary would spend 85% of his time in classroom instruction. According to the figures provided by the petitioner, the beneficiary would spend, at most, 20% of his time in the second and third phases of the training program in classroom instruction.

The first phase of the program would last eight weeks. The beneficiary is to spend 85% of this time, or 34 days, in classroom instruction. The second phase of the program would last thirty-three weeks. According to the training schedule, the beneficiary would spend, at most, 20% of this time, or 33 days, in classroom instruction. The third phase of the program would last eight weeks. According to the training schedule, the beneficiary would spend, at most, 20% of this time, or 8 days, in classroom instruction. In total, the training schedule indicates that during the three phases of the proposed training program the beneficiary would spend, at most, 75 days in classroom instruction. Spending 75 days of a 12-month training program in classroom instruction amounts to the beneficiary spending less than one-third (approximately 31%) of his time in classroom instruction. The beneficiary's spending approximately 31% of his time in classroom instruction conflicts directly with the petitioner's statement that the beneficiary would spend 75% of his time in classroom instruction. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The director's request for additional information was, therefore, warranted.

As noted previously, counsel and the petitioner elected not to respond to this portion of the director's request for additional evidence. On appeal, counsel refers the AAO to information already contained in the record of proceeding, which was before the director at the time he issued both his request for evidence and the denial. Counsel and the petitioner were twice afforded the opportunity, via the request for additional evidence and the appellate process, to supplement the record with additional evidence, but have two times elected not to do so. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The record is still unclear as to

how much time the beneficiary is to spend in classroom instruction and in on-the-job training. The petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2) and (3).

Finally, the director found that the petitioner had failed to establish that it has an established training program that does not deal in generalities with no fixed schedule, objectives, or means of evaluation. The AAO agrees. 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 agrees with the director. 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 or copies of reading materials, which would assist the AAO in determining how the beneficiary would be spending his 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 for much of the proposed training program, and counsel elects not to provide additional information regarding what the beneficiary will actually be doing on appeal. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

For the reasons set forth in the preceding discussion, the AAO will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.