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FILE: EAC 08 064 50366 Office: VERMONT SERVICE CENTER Date: SEP 18 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.

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 landscaping company that seeks to employ the beneficiaries as management trainees for a period of eight 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 notice of intent to deny the petition; (3) the petitioner's response to the director's notice; (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 the basis of his determination that the petitioner had failed to establish that the proposed training will 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 December 20, 2007 letter in support of the petition, the petitioner stated the following:

[The petitioner] is a member of the American Fence Association and has been one of the nation's premier sources for fencing needs since 1996. [The petitioner] has one of the largest and most complete inventories of quality fence products in the nation including custom made wood fences, split rails, ornamental aluminum, and PVC-vinyl. Brands sold include AquaGuard, Delgard, and Fortis Vinyl.

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

The program is designed to prepare the participant to manage or assume a key role in a contemplated start-up expansion branch [in] Mexico.

The petitioner described the proposed training program as follows:

The participants interact with management, in-house trainers (master craftsmen), external training vendors, and senior staff. Specifically, [the petitioner] employs a team of seasoned foremen, site managers[,] and team leaders who are the program sponsors, and day-to-day managers. Additionally, participants are provided with a mentor from the Executive management team who acts as a leadership sponsor of the program. These sponsors meet regularly with the participants and provide feedback to program management as well as to the participants directly on their progress. . .

The petitioner explained that the proposed training program would consist of four rotations: (1) General Business Administration; (2) Leadership and Team Building: How to Build, Manage, and Keep Successful Teams; (3) Contracting and Project Management; and (4) Customer Service, Billing, and Recap. During the first rotation, the beneficiaries would spend 60 percent of their time in classroom instruction and 40 percent of their time in on-the-job training. During the second rotation, the beneficiaries would spend 50 percent of their time in classroom instruction and 50 percent of their time in the field, shadowing supervisors. During the third rotation, the beneficiaries would spend 50 percent of their time in classroom instruction and 40 percent of their time shadowing senior managers involved in the petitioner's contracting process. During the fourth rotation, the beneficiaries would spend ten percent of their time in classroom instruction and 90 percent of their time in on-the-job training.

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.

In his February 25, 2008 denial, the director stated the following:

The petitioner uses the sentence, "To this end Petitioner has selected individuals who have worked for the petitioner previously, who speak Spanish, and who are native to Mexico as their experience and understanding of this **potential** new market is essential to Petitioner's ability to "hit the ground running" in the Mexican market, **should it open a branch office there**" [emphasis in original]. The USCIS is not persuaded that the

petitioner is indeed going to open a branch office in Mexico. At this time, the petitioner does not have definite plans to place the beneficiaries in jobs outside the United States at the conclusion of the proposed training. . .

In her March 25, 2008 appellate brief, counsel states the following:

The Petitioner's training program is designed to prepare the participant to manage an expansion branch overseas. Specifically, [the petitioner] is considering opening an expansion branch in [the beneficiaries'] home country of Mexico and this is one of the reasons why the Petitioner is so excited to have them participate in its training program. This coupled with the fact that Petitioner is also opening its second office in Delaware, makes this the perfect training opportunity as program participants will be able to participate in the opening of a [petitioner] branch at a crucial point in the process. . . .

The Service states that it is not convinced that Petitioner will open up an expansion branch in Mexico, taking issue with the language included in the Petitioner's H-3 support letter because such letter states "should it open a branch there." Respectfully, the Service is making it impossible for the Petitioner to open such a branch by denying it the ability to launch a branch with a high probability of success by denying it the opportunity to train workers in its unique corporate philosophies at its headquarters in West Chester, Pennsylvania. The language "should it open a branch in Mexico" reflects Petitioner's understanding that it needs a strong workforce trained in its tried methods to justify the risk of opening an expansion branch in another country. . . .

The AAO agrees with the director. According to the petitioner, the entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. However, if the beneficiaries' newfound knowledge will be specific to the petitioner, an operation run by the petitioner would be the only setting in which they would be able to use the knowledge.

The petitioner asserts that it may employ the beneficiaries in Mexico upon successful completion of the proposed training program. However, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiaries becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). If the proposed training is specific to the petitioner, as the petitioner asserts, and the only setting in which the beneficiaries could utilize their skills would be for the petitioner in Mexico, the petitioner must document that, at the time the petition was filed, it actually had plans to commence operations in Mexico upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiaries. Nor has the petitioner submitted any evidence, beyond the assertions of record, to demonstrate that it is in the process of setting up operations in Mexico. 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 not satisfied 8 C.F.R. §§ 214.2(h)(7)(2)(A)(4) or 214.2(h)(7)(ii)(B)(4), and the petition was properly denied.

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 eight additional reasons.

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.

On appeal, counsel states the following:

Petitioner's training program is unique in that it focuses on Petitioner's [sic] and incorporates Petitioner's more than 12 years of experience in this industry. Petitioner's proprietary marketing strategies, and proprietary and/or custom product application methods combined with its focus and commitment to providing outstanding customer service is what has permitted the company to not only survive, but thrive in the competitive fencing/landscape/hardscape market. The key coordination of strategy and collaboration between service providers . . . and customer service is what makes the Petitioner unique. To accomplish its mission, Petitioner's internal informal training program was further developed and designed to compliment its proprietary marketing and performance strategies and to embrace Mexico's status as an emerging economic force. . . .

In the alternative . . . we submit Petitioner's training program qualifies as a[n] H-3 training program because Section 8 C.F.R. § 214.2(h)(7) which governs H-3 trainee visas does not preclude the granting of H-3 status even when such training is available in the beneficiary's home country . . . As 8 C.F.R. § 214.2(h)(7) does not in its plain language preclude a grant of H-3 status if a comparable training program is available in the beneficiary's home country, we respectfully submit that no such requirement was meant to be imposed.

The AAO agrees with the director. First, the AAO rejects counsel's assertions that the regulation "does not preclude the granting of H-3 status even when such training is available in the beneficiary's home country" and that "no such requirement was meant to be imposed." To the contrary, and as noted previously, 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.

Further, the AAO finds unconvincing counsel's assertion that it is the petitioner's proprietary approach to the fencing/landscaping/hardscaping market that makes the program unique to the United States. The record contains no evidence, beyond the unsupported assertions of counsel, that the petitioner's business practices and methods are unique. The statement that it is the petitioner's "coordination of strategy and collaboration between service providers" that makes it unique is insufficiently general. The petitioner's description of the training program is too broad to permit the AAO to determine that the skills to be imparted via the training could not be obtained elsewhere.

Finally, the AAO notes that no evidence has been submitted to document counsel's assertions regarding the unavailability of the training in Mexico. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has failed to establish that the proposed training is unavailable in the beneficiaries' home country. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(5), and 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) precludes approval of the petition. For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(1) requires the petitioner to describe the type of training and supervision to be given, and the structure of the training program. According to the Form I-129, the proposed training program would last eight months. In its December 20, 2007 letter of support, the petitioner described the first six months of the training program. However, it did not explain what would happen during the final two months. Thus, there is no description in the record of proceeding for one-fourth of the proposed training program. The petitioner has failed to describe the structure of its entire 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)(ii)(B)(2) requires the petitioner to set forth the proportion of time that will be devoted to productive employment. The petitioner has failed to set forth the proportion of time during the last quarter of the proposed training program that will be devoted to productive employment. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(2). For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires the petitioner to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. The petitioner has failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training during the last quarter of the proposed training program. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(3). 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. First, the AAO again notes the lack of any information in the record regarding what would occur during the last quarter of the proposed training program. Second, the petitioner's description of its proposed training program remains generalized and vague in nature, and leaves the AAO with little idea of what the beneficiaries would actually be doing on a day-to-day basis. The petitioner is not required to provide an exhaustive account of how the beneficiaries are to spend every minute of the training program, but the description provided is inadequate. Third, the petitioner's schedule itself is general in that it is impossible for the AAO to determine when one rotation of the program ends and another begins. For example, the first rotation begins in the first month and ends in the third month, and the second rotation begins in the third month and ends in the fourth month. It is unclear at what point in the third month the first rotation ends and the second rotation begins. The rest of the proposed schedule suffers the same deficiency, which is not indicative of a training program with a fixed schedule that does not deal in generalities. For all of these

reasons, 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.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of beneficiaries who already possess substantial training and expertise in the proposed field of training. The beneficiaries have previously worked for the petitioner in H-2B status, and the petitioner has failed to explain how their H-2B work experience differs from that which would be provided in the training program proposed here, particularly in view of the fact that the petitioner's stated aim is to train the beneficiaries on its own business practices. A proposed training program must provide actual training to the beneficiaries and not simply increase their 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). Although the petitioner proposes to train the beneficiaries, the record establishes that the beneficiaries have substantial training and expertise in the field. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of this petition. For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition that does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition. The record as presently constituted lacks floor plans, photographs, and other evidence verifying that the petitioner has the physical plant to provide the training. Nor does the record contain biographical information regarding the qualifications of the individuals who are to provide the training. The petitioner has failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition. For this additional reason, the petition may not be approved.

Finally, the AAO notes the following statement by counsel on appeal:

Specifically, Petitioner stated that a total of 340 hours of classroom instruction (130 hours in professional development and 210 hours of classroom instruction) [sic]. Petitioner would like to take this opportunity to clarify that the 340 hours referenced refers to instruction with outside education and professional developmental service providers such as the University of Pennsylvania Expansion Program. . . .

As such, the petition may not be approved. 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.