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FILE: WAC 06 008 51735 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 television, film, and commercial production company with stated gross annual income of \$550,000 that, according to the Form I-129, has no employees. It seeks to employ the beneficiary as a production trainee for a period of one year.

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 Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition, finding that the petitioner had not established that it has a training program with a fixed schedule, objectives, and a means of evaluation, that it has the manpower to provide the training, that the training is unavailable in the beneficiary's country, and that the beneficiary will not engage in productive employment. The director stated:

The petitioner has provided no additional evidence to support [its assertion] that there was a bona fide training program that has a fixed schedule, objectives, and a means of evaluation[.] [T]he petitioner has not provided any evidence to show that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. It appears to USCIS that the trainee would be used more like an assistant providing productive employment, rather than as a trainee; and, the trainee would be compensated \$250.00 a week. USCIS cannot approve the H-3 classification for a training program [for which] the petitioner is unable to establish[h] why [the] training cannot be obtained in the beneficiary's own country.

The petitioner has not provided evidence to prove that there [are] regular training facilities or personnel to provide the training. There is no evidence that the petitioner has provided the particular training in the past on [a] regular bas[i]s. It seems very clear that the petitioner does not have a training program that has a fixed schedule, objectives, or means of evaluation. A position filed under this category cannot be approved unless it is shown that the petitioner has [the] premises and sufficient personnel to provide training.

On appeal, counsel contends that the director erred in denying the petition. Counsel contends that the petitioner "laid out in detail the different segments of the training course, its objectives, and how those objectives would be met."

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.

As noted previously, the director found that the petitioner had not established that there was a bona fide training program with a fixed schedule, objectives, and a means of evaluation. The director also found that no evidence had been submitted which would show that the beneficiary would not engage in productive employment beyond that which is incidental and necessary to the training. The director found that the petitioner had not established that the training was unavailable in the beneficiary's country. Finally, the director found that the petitioner had not submitted evidence that it had sufficient premises and personnel to provide the training.

Counsel contends that the petitioner has submitted sufficient information regarding its training program.

The AAO agrees with the director and finds that, pursuant to 8 C.F.R. § 214.2(h)(7)(ii)(B), the petitioner has failed to submit an adequate description of its training program. Additionally, the training program does not qualify under 8 C.F.R. § 214.2(h)(7)(iii)(A).

In its September 20, 2005 letter of support, the petitioner stated that its training program would be divided into three parts: business operations, production, and marketing.

The objective of the "business operations" component was to teach the beneficiary "how to run and manage all aspects of a U.S. production/entertainment business, from human resources to accounting to administration." The petitioner specifically noted that "[r]unning a production office is like running any American other [sic] business," and that the beneficiary would learn skills such as how to set up and maintain computerized and paper client records, how to prepare invoices, basic computerized accounting and billing systems, etc.

The objective of the "production" component was to teach the beneficiary to "learn how to produce American feature films, commercials[,] and television shows and be exposed to the tools American [p]roducers utilize to do so." The beneficiary would learn skills such as how to analyze industry market trends, how to sell finished films, etc.

The objective of the “marketing” component was to teach the beneficiary “how we market the finished product for distribution in the United States, targeting television and film companies.” The beneficiary would learn skills such as where to obtain marketing data on competitors, how to create and execute sales and marketing plans, website development, etc.

According to the petitioner, the instructor for each component of its training program would be Bradley Hong.

In its March 12, 2006 response to the director’s request for evidence, the petitioner described the first component of its training program. For example, as noted *supra*, this component of the program (“business operations”) was initially geared toward teaching the beneficiary “how to run and manage all aspects of a U.S. production/entertainment business, from human resources to accounting to administration.” Noting that running a production office was like running any other business, the petitioner stated that the beneficiary was to learn such skills as setting up and maintaining computerized and paper client records, preparing invoices, basic computerized accounting and billing systems, etc.

In addition to these duties, the beneficiary was also to spend the first two months of the training program on considerably more in-depth projects. According to the petitioner, the beneficiary would “get hands-on experience producing a series of our company projects.” The AAO finds that this is a material alteration of this first component of the proposed training program.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO will not consider these alterations made to its training program in response to the director’s request for evidence.

The proposed training program does not comply with 8 C.F.R. § 214.2(h)(7)(ii)(B)(1), as the petitioner has not described the nature of the supervision that the beneficiary would receive, other than the statement that Bradley Hong would be her instructor and Simon Tse her supervisor.

The proposed training program does not comply with 8 C.F.R. § 214.2(h)(7)(ii)(B)(2), as the petitioner has not set forth the proportion of time that will be devoted to productive employment.

The proposed training program does not comply with 8 C.F.R. § 214.2(h)(7)(ii)(B)(3), as the petitioner has not set forth the number of hours that would be spent, respectively, in classroom instruction and in on-the-job training.

As found by the director, furthermore, the proposed training program deals in generalities with no fixed schedule, objectives, or means of evaluation. While the letter of support lists objectives for the training, it does not give a fixed schedule other than the generalized outline of two months for basic operations, seven months for production, and three months for marketing. The petitioner does not describe how the training program will be established.

The director also found that the petitioner does not have sufficient personnel to run the training program. The AAO agrees. The petition indicates that the petitioner has no employees. The organizational chart lists four employees (two of whom are owners) and three independent contractors. While the petitioner states that the beneficiary will be trained by the two co-owners, there is no evidence of record that the

co-owners are employed by the company. Thus, the organizational hierarchy is unclear. The petitioner has not established that it has sufficient personnel conduct the training program.

The director found that the petitioner had not established that the training was unavailable in the beneficiary's country, Japan. On appeal, the petitioner states that the multicultural business atmosphere of the Hollywood film industry is the training ground for its program, which is not available in Japan. The petitioner did not address whether the training in business operations, production, and marketing of films is not available in Japan. The petitioner has not overcome the ground for denial by the director.

The director found that the petitioner had not established that the beneficiary would not be engaged in productive employment. The petitioner did not address this finding on appeal. It appears from the evidence of record that the beneficiary will be the petitioner's sole employee. The petitioner has not established that the beneficiary will not be engaged in productive employment.

Beyond the decision of the director, the proposed training program does not comply with 8 C.F.R. § 214.2(h)(7)(iii)(C), which states that a training program may not be approved which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. Again, the first component of the proposed training program as set forth initially was entitled "business operations" and had the beneficiary learning skills such as setting up and maintaining computerized and paper client records, preparing invoices, basic computerized accounting and billing systems, etc. These were not to be skills intrinsic to the production industry; the petitioner noted specifically that such skills were just like those found in any other business.

The AAO notes that the beneficiary worked as a general manager for Sakura Horikiri USA, Inc., a paper products distributor, from July 2003 until June 2005. According to a letter submitted by that company, the beneficiary was responsible for managing and directing marketing and business development for that company. Accordingly, the AAO finds that, in regards to the first component of the proposed training program, the record reflects that the beneficiary already possesses substantial training and expertise in the proposed field of training.

Moreover, the AAO notes that the petitioner's September 20, 2005 letter of support stated that the beneficiary "gained work experience as a Production Assistant for various U.S. companies during her studies in the Unite[d] States." The petitioner has made no effort to distinguish that work experience from the experience that she would gain from participation in the petitioner's proposed training program. The petitioner has not established that beneficiary does not already possess training and expertise in the proposed training. For this additional reason, the petition may not be approved.

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.