U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER [redacted] Date: MAY 17 2005

IN RE: Petitioner: [redacted]
Beneficiary:

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) rejected a subsequent appeal on April 7, 2004. On March 2, 2005, the AAO reopened this proceeding on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for purposes of entering a new decision. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction company that seeks to employ the beneficiary as an office trainee. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation 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 director determined that the training involves productive employment beyond that which is incidental to the training. The director also found that the training program deals in generalities with no fixed schedule, objectives or means of evaluation. Finally, the director stated that the petitioner had not established that the training is unavailable in the beneficiary's own country.

On appeal, counsel submits a brief, and a supplemental brief in response to the reopened proceeding.

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:

> (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.

The record of proceeding before the AAO contains: (1) Form I-129; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) Form I-290B and supporting documentation; (6) the AAO's rejection of the appeal; (7) the petitioner's motion to reopen; (8) the director's denial of the motion; (9) the AAO decision reopening the matter; and (10) the petitioner's supplemental brief. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the training program deals in generalities with no fixed schedule, objectives or means of evaluation. The director also determined that the training involves productive employment beyond that which is incidental to the training. Finally, the director stated that the petitioner had not established that the training is unavailable in the beneficiary's own country.

On appeal, counsel states that the petitioner submitted "a lengthy and detailed training program with a fixed schedule and objectives." The AAO disagrees. The training program submitted in response to the director's request for evidence is general, breaking the subject matter into segments to be covered in periods ranging from two weeks to two months. There is little detail about what would be covered in each segment, and there is no provision for a means of evaluation. The regulation explicitly states that no training program may be approved which "deals in generalities with no fixed schedule, objectives, or means of evaluation." The proposed training clearly has no means of evaluation, and the information provided does not establish that the training has a fixed schedule.

The director also found that the beneficiary would be engaged in productive employment beyond that which is incidental to the training. It does not appear that the beneficiary would be engaged in productive employment as the field is highly specialized and would not support an inexperienced worker in a productive capacity.

Finally, the director determined that the petitioner did not establish that the training is unavailable in the beneficiary's home country. In response to the director's request that the petitioner "provide evidence showing why this training cannot be obtained in the beneficiary's own country and why it is necessary for the alien to be trained in the United States," the petitioner stated, "Although CAD training is available in Hungary, CAD as applied to architectural design in wood construction is very rare. In Hungary construction techniques are based on brick and cement. Wood construction is very rare, although it has been gaining more territory recently. Wood construction is an innately West Coast/Californian method." The petitioner provided no evidence to support these statements. 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)).

On appeal, counsel states, "the Petitioner provided letters from Hungary explaining that CAD training involving wood construction is not available in Hungary." The only letter that had been submitted up to that time was one offering the beneficiary a position upon her return to Hungary. It did not reference what training was or was not available in Hungary. In the subsequent motion to reopen, counsel provided a letter from the Ministry of Education in Hungary stating that the proposed training is unavailable. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and submitted it following the appeal, as part of its motion to reopen. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Beyond the decision of the director, the AAO notes that the training program that was proposed when the petition was filed was different from the training submitted in response to the director's request for evidence. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. For this additional reason, the petition may not be approved.

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.