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FILE: WAC 06 051 51010 Office: CALIFORNIA SERVICE CENTER Date: SEP 10 2007

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, a construction company, seeks to employ the beneficiary as a project manager 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 five grounds: (1) that the petitioner had failed to demonstrate that it has sufficiently trained manpower to provide the training specified; (2) that the petitioner had failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training; (3) that the petitioner had not established that the beneficiary will not engage in productive employment; (4) that the petitioner had failed to demonstrate that the beneficiary would not be placed in a position which is in the normal operation of the petitioner's business; and (5) that the petitioner had failed to establish that the proposed training program deals in generalities with no fixed schedule, objectives, or means of evaluation.

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 the program description submitted with the petitioner's November 22, 2005 letter of support, the petitioner stated that it specializes in the construction of medical and dental offices which, according to the petitioner, is a type of commercial office construction that requires special knowledge of the utilities required for special equipment unique to medical and dental practices. The petitioner stated the following:

In its future plan to go Global and open future subsidiaries and/or branch[es] in other countries, [the petitioner] has designed this pilot training program for qualified foreign nationals, with the goal and aspiration that upon completion of this US training, the trainee will be fully qualified to operate and manage a sister company or subsidiary based on foreign soil.

The course goal is to introduce the student/trainee to the construction design, estimating techniques[,] and methodologies and construction procedure for building Dental and Medical Offices. The student/trainee will be exposed to an organized approach to interpretation of designs, performing construction estimating tasks[s] leading to the development of a construction budget and construction phase.

Since construction of Dental and Medical Offices is an industry specialize[d] field, the training program requires trainee candidates who have at least 10-years of experience in the construction industry . . . This minimum experience requirement was set based on the common knowledge that a trainee with no prior experience in the other field of commercial building will not be able to comprehend the intricacies and special requirements of building a dental and medical office.

The petitioner stated that the proposed training program would consist of four components. The first phase, entitled "Introduction to the Construction of Dental and Medical Offices," would last for six weeks. During this time, it appears that the beneficiary would attend three sessions per week, with each session lasting four hours.¹ According to the petitioner:

This program phase is designed to introduce the trainee, and present him with an overview of the Construction of Dental and Medical Offices and to present the fact as to how this specialization differs from other types of commercial offices [sic] construction. Student will be introduced to the different features that are unique to a dental and medical office, to include special equipments [sic], cabinetry and special carpentry, lighting fixtures and plumbing fixtures, and power supply.

¹ The AAO is unable to determine the precise breakdown. In the program manual, the petitioner stated the following: "3 sessions of 4-hours sessions." On appeal, counsel states the following: "4-hours sessions for classroom instruction, 4-hours on the job training." Neither counsel nor the petitioner have ever stated, clearly, how many sessions there would be during this phase, or the total amount of classroom instruction the beneficiary would receive during this phase.

The petitioner stated that the methods of learning to be utilized during this time would include a film showing completed projects, as well as giving the beneficiary brochures and other information regarding special equipment common to dental and medical offices.

The second phase, entitled "Pre-Construction Phase & Design," would last for twelve weeks. During this time, it appears that the beneficiary would attend three sessions per week, with each session lasting four hours.² According to the petitioner, the objective of this phase would be to "learn and understand the special designs and layout required for a dental and medical office." The beneficiary would "learn general design consideration, size requirement for operatory, sterile room[,] and mechanical/equipment." During this phase the beneficiary would read construction drawings and review and develop an understanding of design criteria.

The third phase, entitled "Construction Estimating for Bidding & Contract Negotiation," would last for sixteen weeks. During this time, it appears that the beneficiary would attend four sessions per week, with each session lasting for six hours.³ The petitioner stated that the objective of this phase was "to introduce the trainee to construction estimating techniques and methodologies for pricing Dental and Medical offices."

The fourth phase, entitled "Construction Supervision and Management," would last for twenty weeks. During this time, it also appears that the beneficiary would attend four sessions per week, with each session lasting for six hours.⁴ The petitioner stated that during this period, the beneficiary would be exposed to actual construction through site visits to construction projects. He would also participate in meetings and learn to use construction management software.

The AAO agrees with the director 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 demonstrate that it has sufficiently trained manpower to provide the training specified. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition in which the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified. In his denial, the director stated the following:

² Again, the AAO is unable to determine the precise breakdown. In the program manual, the petitioner stated the following: "3 sessions of 4-hours sessions." On appeal, counsel states the following: "4-hours sessions for classroom instruction, 4-hours on the job training." Neither counsel nor the petitioner have ever stated, clearly, how many sessions there would be during this phase, or the total amount of classroom instruction the beneficiary would receive during this phase

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The petitioner states that the training would be conducted principally by the staff with other sessions to be conducted by dental equipment consultants and architects who will be tapped to share input on a case to case basis.

The response identified two staff of the petitioner as the instructors, however the response did not address the skills and training of those two who would provide the alien's training. Additionally, the petitioner has not explained how the two would still be able to perform their professional duties in addition to providing the training and supervising and evaluating [of] the alien.

On appeal, counsel offers the following rebuttal:

[The petitioner] is a general construction company specializing in the construction of dental and medical offices that subcontracts its obligations to another party in order to ensure the successful completion of projects . . . This is how they are able to successfully juggle various large-scale construction projects at once and complete over 350 commercial projects throughout the Greater Los Angeles area since the start of its operations.

Subsequently, the employees at [the petitioner] supervise the work of their subcontractors and therefore have enough time to train, supervise, and evaluate the Beneficiary. The trainers . . . work an average of 60 hours per week. It is not uncommon for the staff to work additional hours to guarantee that the job is completed efficiently and successfully. Therefore [trainers' names withheld] will make room in their schedule to educate the Beneficiary so that this individual will have the know how and business savvy of managing construction design, estimating techniques[,] and methodologies for building dental and medical offices in [the petitioner's] Philippines branch office . . . even if it means extending their work hours to ensure that they have enough time to complete their professional duties and train the Beneficiary.

Counsel also submitted the resumes of the individuals who would conduct the training. The AAO finds counsel's explanation and submission reasonable. The AAO therefore agrees that the petitioner has established that it has sufficiently trained manpower to provide the training specified and therefore withdraws that portion of the director's denial to the contrary.

The director also found that the petitioner had failed to establish that the beneficiary does not already possess substantial knowledge and skills 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 its November 22, 2005 letter of support, the petitioner stated the following:

[The beneficiary] does not possess either the qualification or practical experience necessary to be a project manager for dental and medical office [construction] and he needs to undergo a formal training in order to develop this capacity in this specialization. Therefore, the training program is by no means a tool to enhance [the beneficiary's]

previously acquired skills, but rather a tool absolutely necessary for [the beneficiary] in order for him to further his career with our overseas operation.

In its August 9, 2006 response to the director's request for additional evidence, the petitioner stated the following:

[The beneficiary] has studied in the field of Civil Engineering from the University of San Carlos in the Philippines. Further, he has over 18 years of progressive professional expertise in engineering, contracting and managing with architectural firms, construction companies, and project development companies, *which is unrelated to the construction of dental and medical office[s]*. His past employment includes construction companies whose line of business is in the construction of Water Impounding Dams, Roads and Bridges, School Building[s] and Offices, Tenant Improvement for Commercial Retail Space[,] and Office Space [italics in original].

Despite his knowledge in [the] construction industry, he lacks the comprehensive aptitude that [the petitioner] requires of [its] Project Manager Trainee for dental and medical offices. The training, as previously indicated, will provide [the beneficiary] with the necessary skills to enhance his career abroad.

In his denial, the director found that the evidence was "insufficient to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training."

On appeal, counsel states the following:

The construction industry is a vast field, and as such, each company or person entering construction has to specialize and train for a particular type of construction discipline before he or she can actually engage in it. . . .

General construction and medical construction vary greatly because of the sophisticated mechanical systems that are required for medical/dental offices such as electrical and plumbing systems, special construction for the X-ray rooms, and equipment that requires special installation. . . .

Each piece of equipment must be strategically placed within the area provided for optimal use and efficiency. Due to design features distinct only to medical and dental offices, those with extensive construction experience, who lack knowledge in medical and dental construction, must receive specialized training in this area in order to successfully complete a project.

Therefore, although the Beneficiary has earned a bachelor's degree in civil engineering and has acquired more than 18 years of professional experience in construction, his area of expertise is in general construction. . . .

The AAO disagrees with counsel's analysis. As conceded by counsel, the beneficiary "has acquired more than 18 years of professional experience in construction." While participating in the proposed training

program may “provide [the beneficiary] with the necessary skills to enhance his career abroad”⁵ and is “a tool absolutely necessary for [the beneficiary] in order for him to further his career with our overseas operation,”⁶ the purpose of the nonimmigrant classification is not to enhance the career prospects of highly qualified professionals. A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masayama*, 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 question is whether the beneficiary already possesses substantial training and expertise in the field, not whether he possesses training and expertise regarding the petitioner’s company or whether he can enhance his career prospects by obtaining further specialization in a field in which he already possesses substantial training and experience.

The beneficiary possesses a degree in a relevant field of study, and has worked in a similar field for many years. The record establishes that he has substantial training and expertise in the field. Accordingly, the AAO finds that approval of the petitioner’s proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(C).

The director also found that the petitioner had not established that the beneficiary would not engage in productive employment. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires the petitioner to establish that the beneficiary would 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, and the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a petition in which the beneficiary would perform productive employment beyond that which is incidental and necessary to the training.

The director stated the following in his denial:

When the learning contents of the proposed training program were analyzed, the methods of learning appear to be non-instructional such as [the] showing of films, requiring the trainee to read brochures and product information and [being] tasked with reading construction drawings, requiring the trainee to prepare detailed estimates of a sample budget, solicit and review quotes from subcontractors and material suppliers, visiting actual construction sites, interacting with clients, architects, dental equipment consultants[,] and construction crews, etc. These activities appear to be typical of the productive work that project engineers perform prior to and during the actual construction projects.

On appeal, counsel states that

[t]hese methods are instructional because they are in the realm of educating and teaching the Beneficiary. Instructional methods are not restricted to the classroom. In fact, the University of Virginia Graduate School of Architecture incorporates similar curriculum into their program.

Counsel also submits information from the University of Florida School of Architecture, contending that it also incorporates such methods into its graduate curriculum. Counsel concludes with the following:

⁵ See the petitioner’s August 9, 2006 response to the director’s request for additional evidence.

⁶ See the petitioner’s November 22, 2005 letter of support.

Based on the graduate programs in architecture by the University of Virginia and the University of Florida, we can conclude that the Petitioner's methods of learning are instructional.

Furthermore, even though the methods of learning are typical of the productive work that project engineers perform, it does not mean that the Beneficiary will be engaged in productive employment. As evidenced in the submitted graduate school programs, **students** are required to analyze construction sites, produce construction drawings, and explore the construction project at every stage. These methods of learning are typical of educational architectural programs [emphasis in original].

The AAO disagrees with counsel's analysis. First, the AAO notes that, while instruction at the institutions identified by counsel in fact contains elements of hands-on training similar to that offered by the petitioner, such as analysis at construction sites, production of construction drawings, etc., those programs also contain a classroom component, while the petitioner's program does not appear to contain such a component.

Given that the beneficiary would perform these tasks for actual projects on which the petitioner is engaged, and that there appears to be no classroom component before engaging in such hands-on learning, the AAO finds that the weight of the evidence in this proceeding fails to establish that the beneficiary would not engage in productive employment.

Accordingly, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(2), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

Finally, the director found that the petitioner had failed to establish that the proposed training program deals 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 director stated the following in his denial:

The petitioner submitted the course outline and modules, and a vague means of evaluation. It did not, however, have a fixed schedule . . . [T]he regulations now specifically state that a training program must have a fixed schedule. The schedule would need to be broken down into significantly more discrete segments, with more information about how the time would be utilized, to meet the terms of the regulations.

The AAO agrees with the director's finding that the proposed training program contains generalities. For example, the beneficiary is to spend six weeks in an "Introduction to the Construction of Dental and Medical Offices." The petitioner states that, during this time, the beneficiary will be introduced to features, such as lighting and plumbing fixtures, that are unique to this type of construction, as well as watching a film and reading brochures. The AAO is left with little beyond this general information as to what the beneficiary will actually be doing, on a day-to-day basis, during this time. While the petitioner is not required to account for every minute of the beneficiary's time, it must provide information as to how the beneficiary would actually be spending the bulk of his time. The AAO finds the petitioner's two-paragraph summary for a 6-week component of the training program insufficient.

The petitioner has submitted a training manual on appeal. The petitioner has not, however, indicated where this manual fits into the training program. The petitioner has not stated which of the four phases of the program would utilize this manual. The AAO also notes that this manual is typed in a large typeface and would not occupy the beneficiary's time for the entire twelve months.

For all of these reasons, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A). The AAO finds that the record fails to demonstrate the existence of a training program that does not deal in generalities with no fixed schedule, objectives, or means of evaluation.

Pursuant to the above discussion, the AAO finds that the petition was properly denied.

The AAO finds, beyond the decision of the director, that the petitioner has also failed to establish that the proposed training is unavailable in the Philippines, the beneficiary's home country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien's own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

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 the petitioner itself offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; 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.

Having excluded the lack of any business efforts by the petitioner from consideration, the AAO is left only with the petitioner's citation to a report issued by the Japan International Cooperation Agency. The petitioner cited to this report in both its letter of support and its response to the director's request for additional evidence. However, the petitioner has not submitted a copy of the report into the record, thus precluding the AAO from reviewing the findings of the report, and therefore diminishing its probative value significantly. Moreover, the AAO notes that the paragraph cited by the petitioner did not state that the training is unavailable in the Philippines. Rather, it stated that most personnel in the construction industry in the Philippines do not have sufficient techniques or skills. The statement that most personnel lack sufficient techniques or skills is not synonymous with a finding that training is unavailable. The AAO notes further that the paragraph quoted by the petitioner did not specifically address construction of medical and dental offices, but general construction only. Nor has the petitioner explained how, if training in the construction of medical and dental offices is unavailable in the Philippines, the offices of doctors and dentists currently practicing in the Philippines were constructed. Accordingly, the AAO finds that approval of the petition is precluded by 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5).

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

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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.