U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 23 2014 OFFICE: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiaries:

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

for Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

I. BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 7,700-employee aircraft company with a gross revenue of $595 million. In order to train the beneficiaries in what it designates as "Flight and Service Mechanic" positions for a period of six months, the petitioner seeks to classify them as nonimmigrant 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 director denied the petition on each of three grounds, namely, that the evidence of record did not establish: (1) that similar training is unavailable in the beneficiaries' own country; (2) that the beneficiaries do not already possess substantial training and expertise in the proposed field of training; and (3) that the beneficiaries would not engage in productive employment beyond that incidental and necessary to the training.

The record of proceeding before us contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

II. STANDARD OF REVIEW

We conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. Upon applying that standard in our review of the entire record of proceeding, as expanded by the submissions on appeal, we find that the totality of the evidence before us is sufficient to overcome the grounds upon which the director based her decision to deny the petition. Accordingly, the appeal will be sustained, and the petition will be approved.

III. THE LAW

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)(1)(ii)(E) states, in pertinent part, the following:

An 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. . . .

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.

IV. ANALYSIS

A. Unavailability of Similar Training in the Beneficiary's Own Country

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) proscribes approval of a petition in which the petitioner fails to establish that similar training is unavailable in the beneficiary's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requires the petitioner to submit a statement which 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. We find the evidence of record sufficient to satisfy these

requirements, and the director's contrary determination is hereby withdrawn.

In her May 30, 2014 decision denying the petition, the director stated that the question to be addressed is not whether the petitioner itself offers the proposed training in the beneficiaries' country, but whether the training itself is unavailable in the beneficiaries' home country. The director is correct. However, in this particular case, the petitioner has submitted voluminous evidence which, in the aggregate, establishes both (1) that the proposed training necessarily centers around the petitioner's proprietary manufacturing processes and other business practices; and also (2) that the petitioner cannot, at the present time, offer this training anywhere else in the world other than at the training site specified in the petition. A training program that centers around a petitioner's proprietary business practices can satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) when both of these factors are present, as they are in the record before us.

B. Substantial Training and Expertise in the Proposed Field of Training

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) proscribes approval of an H-3 petition submitted on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. We find that the evidence of record, as supplemented by the submissions on appeal, establishes that the petitioner's training plan for the beneficiaries does not fall within the category prohibited at 8 C.F.R. § 214.2(h)(7)(iii)(C). The director's contrary determination is hereby withdrawn.

The director's decision noted the beneficiaries' prior work experience, and we agree that the beneficiaries possess expertise as flight and service mechanics. However, as the petitioner correctly notes on appeal, the aviation field is very broad, and the beneficiaries gained their prior work experience as flight and service mechanics in the field of commercial aviation. As the evidence of record amply demonstrates, the proposed training relates to the general-aviation field, and not to the field of commercial aviation.

The beneficiaries' prior work experience also differs from the training proposed here in another important aspect. In their previous roles, the beneficiaries serviced aircraft that had already been manufactured – the petitioner referred to this type of work as "after-sales servicing." The petitioner, however, seeks to train the beneficiaries to perform mechanical work during the manufacturing phase of each aircraft. On appeal, the petitioner submits evidence regarding the differences between after-sales servicing and mechanical work that is performed during the manufacturing of an aircraft.

A trainee may already be a professional in his or her own right and possess substantial knowledge in a given field. However, as indicated above, under certain circumstances that individual may permissibly use an H-3 training program to further his or her skills or career through company-specific training that is only available in the United States. We note again that the evidence of record demonstrates that the proposed training program necessarily focuses on the petitioner's proprietary manufacturing processes and other business practices with a view to applying them in overseas employment where they would be required, and that the beneficiaries appear to have no

prior work experience with the petitioner. When these factors are present, as is the case here, the field of training may be narrowed to the business practices of a specific company.

For all of the above reasons, upon applying the preponderance of the evidence standard as enunciated in *Matter of Chawathe* we find that the evidence of record before us on appeal overcomes the director's determination that approval of the petitioner's training plan is prohibited by the restriction at 8 C.F.R. § 214.2(h)(7)(iii)(C). Accordingly, we also withdraw this basis for denying the petition.

C. Productive Employment Beyond That Incidental and Necessary to the Training

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) requires that the evidence of record demonstrate that "[t]he beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training"; and, as a corollary, 8 C.F.R. § 214.2(h)(7)(iii)(E) proscribes approval of a training program which "[w]ill result in productive employment beyond that which is incidental and necessary to the training."

In her decision denying the petition, the director looked to the training-program outline provided when the petition was filed, which called for the beneficiaries to spend the majority of the training program in on-the-job training rather than in structured classroom instruction. The former Immigration and Naturalization Service (INS) addressed this issue when responding to a comment submitted in response to a proposed regulation. The commenter had "stated that the standard for productive labor should be modified so that it can be realistically involved with the training, and the best way to receive training is to do hands on work." In response, INS affirmed that "[w]hen a training program is characterized as hands-on training, it is difficult to establish that the training is not principally productive employment," and that "only minimal productive employment is permitted." 55 Fed. Reg. 2606, 2618 (Jan. 26, 1990). The first issue for us to resolve, therefore, is whether the on-the-job training which constitutes such a large percentage of this training program actually constitutes productive employment. As the legacy INS noted, in a case such as this it will be "difficult to establish that the training program is not principally productive employment." *Id.*

In the precedent decision *Matter of St. Pierre*, 18 I&N Dec. 308 (Reg. Comm'r 1982), INS provided further guidance on training programs involving primarily on-the-job training. In that case, the agency approved an H-3 petition, stating the following: "[a]lthough the beneficiary's training is primarily on-the-job training, no productive labor will be involved because the beneficiary will be merely observing, not conducting field tests." *Id.* at 309. Furthermore, INS found credible the petitioner's assertions that the training could "'only be learned in the work setting,'" and that "'it can only be learned by going into the field with trained professionally qualified regular company personnel.'" *Id.*

We find first that most of the on-the-job training is not actually productive employment. For example, the petitioner has explained that during the on-the-job training portion of the program the beneficiaries "will be micromanaged by our training staff," and that they would receive "constant and instantaneous assessments of their work performed right after each task is completed." The petitioner states the following on appeal:

> The starting price for [this business jet] is $12.5 million, and due to the high cost of the aircraft and each of its components, [the petitioner] does not have idle or "practice" aircraft available for training purposes. As such, all training must be conducted on aircraft that will eventually be sold into the general aviation marketplace, essentially resulting in slow, thoroughly reviewed, non-independent hands-on training that is characterized as "productive employment," in spite of the differences associated with the proposed training program and the functioning of an ordinary aviation manufacturing facility. . . . The only way to obtain the required proficiency in the proposed field of training is via hands-on, learn-by-doing, repetitious preparation.
>
> Clearly, the training and hands-on practice we are proposing is productive only in the sense that it is performed on aircraft that will ultimately [be] sold by [the petitioner] to end-customers. The Beneficiaries will be constantly observed, micromanaged, reviewed, and evaluated, and any hands-on work they perform will immediately [be] checked by their training supervisors and then either corrected or redone by experienced professionals. . . .

Although the petitioner has intermittently referred to the on-the-job training as productive employment, the evidence of record establishes that "productive employment" is not in fact an accurate description of most of that on-the-job training. Specifically, the beneficiaries would not be working independently (i.e., many of the petitioner's personnel would be diverted from their normal tasks to train the beneficiaries), they would be closely and constantly monitored ("micromanaged"), and their work would be immediately checked, evaluated, and corrected if necessary. Further, it appears that the primary motivation for involving the beneficiaries in production is to train the beneficiaries; and the training program's primary emphasis on detailed instruction, close observation, and micro-level supervision and evaluation actually hinders the efficiency of the production in which the beneficiaries would be engaged.

With regard to that portion of the on-the-job training that *is* properly classified as productive employment, the test for whether productive employment is necessary and incidental to the proposed training is not the percentage of time a training program devotes to productive employment. Rather, it is whether that productive employment exceeds a threshold which is beyond that incidental and necessary to the training. *See* 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*), 8 C.F.R. § 214.2(h)(7)(iii)(E); *see also Matter of St. Pierre* at 309. Here, we find no indication that any of the productive employment would go beyond that necessary and incidental to the training.

For all of these reasons, we conclude that the evidence of record on appeal overcomes the 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) and 8 C.F.R. § 214.2(h)(7)(iii)(E) grounds for denial that the director specified in her decision.

V. CONCLUSION AND ORDER

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has been met.

ORDER: The director's decision dated May 30, 2014 is withdrawn. The petition is approved.