(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 30 2014 OFFICE: VERMONT SERVICE CENTER FILE: [redacted]

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:

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

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 The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 64-employee "culinary/restaurant" established in 2012. In order to employ the beneficiary in what it designates as a sous-chef trainee position for a period of 24 months, the petitioner seeks to classify her as a nonimmigrant alien 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 director denied the petition, concluding that the evidence of record failed to establish: (1) that the beneficiary does not already possess substantial training and expertise in the proposed field of training; (2) that the training program was not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (3) 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; (4) that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (5) that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training; and (6) that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition. The director also found that the petitioner had failed to submit a statement indicating the reasons why the training cannot be obtained in the beneficiary's country and why it is necessary for her to be trained in the United States.

The record of proceeding before the AAO 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.

Upon review of the entire record of proceeding, the AAO finds that the evidence of record overcomes the director's findings that the petitioner failed: (1) to establish that the proposed training program was not designed in order to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (2) 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; (3) to submit a statement indicating the reasons why the training cannot be obtained in the beneficiary's country and why it is necessary for her to be trained in the United States; and (4) to establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition.

Accordingly, the AAO withdraws those particular findings. However, the evidence of record does not overcome the director's remaining three grounds for denying the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

I. Standard of Review

As a preliminary matter, and in light of counsel's statements regarding the applicable standard of review in this case, the AAO affirms that, in the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> * * *
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> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> * * *
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> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
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> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

The AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO finds that the director's determination that the petitioner did not establish its eligibility for the benefit sought was correct. Upon its review of the entire record of proceeding, and with close

attention and due regard to all of the evidence submitted in support of this petition, both separately and in the aggregate, the AAO finds that the evidence of record does not establish that the petitioner's claim that the proposed training program meets the requirements of the H-3 program is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim is "more likely than not" or "probably" true.

II. 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:

> (i) *Alien trainee.* The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. This category shall not apply to physicians, who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.
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> * * *
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> (ii) *Evidence required for petition involving alien trainee—*
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> (A) *Conditions.* The petitioner is required to demonstrate that:
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> (*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.

III. The Petitioner

In its November 27, 2012 letter of support, the petitioner described itself as an upscale restaurant serving authentic Northern Italian cuisine. It stated on the Form I-129 that it was established in 2012, has 64 employees, and claimed a gross annual income of $3,000,000 "to date."

The record of proceeding contains, *inter alia*, evidence and information regarding the petitioner's corporate structure; the qualifications of the petitioner's Executive Chef; copies of menu selections; and copies of multiple favorable reviews and other praise the petitioner and its food has received. On appeal, counsel argues that "[the petitioner's] menu reflects experienced and considered planning and exquisite dishes consistent with the fine dining nature of the restaurant."

IV. The Beneficiary

The beneficiary, a citizen of Colombia, earned a bachelor's degree in Food Service Management from in Florida, in 2011.

The beneficiary described three work experiences on her resume. She first claimed that from April 2008 until November 2009, she worked as a "prep cook and pastry chef" in an "apprentice position," and described this experience as follows:

> Started as a prep cook and then line cook and finally Pastry Chef handling all desserts for the entire restaurant . . . After completing the internship [the restaurant] offered me a job as the Head Pastry Chef of the restaurant.

The beneficiary claimed that she next worked as a "Tournant Chef"[1] from May 2011 until April 2012, and described the experience as follows:

> Helped in catering events. Mainly in charge of the fish station. Complete knowledge of all stations in the restaurant: pizza station, salad/wrap station and fish station.

Finally, the beneficiary worked for the petitioner, pursuant to a grant of Optional Practical Training status awarded pursuant to her F-1 student visa status, as a "Garde Manger Chef"[2] from May 2012 until at least[3] November 2012," and described the experience as follows:

> In charge of the antipasti station in conjunction with the dessert and tagliere.

In its November 27, 2012 letter, the petitioner stated the following with regard to the beneficiary:

> [The beneficiary's] educational background has given her a strong culinary foundation and a management philosophy, which became evident to us when she started working at [the petitoner].
>
> Since starting at [the petitioner] in May 2012, [the beneficiary] has been working at the Antipasti station, where she is responsible for appetizers, including the tagliere (assorted plates of cold cuts such as prosciutto and cheeses) and for plating the desserts. During her practical training with us, [the beneficiary] has shown that she is a motivated learner with much potential in the culinary arts industry. Her attitude and drive to learn are key to becoming a successful Sous-Chef. Her motivation and promising talent, coupled with her strong educational background in the culinary arts and food services management, make her an ideal candidate for this training program.

V. The Proposed Training Program

In its November 27, 2012 letter, the petitioner stated that the proposed training program was designed "for culinary graduates, such as [the beneficiary], who have demonstrated a high level of achievement and promise," and that it would provide the beneficiary with "the knowledge, skill, and experience

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[1] The Food Network describes a tournant chef as "an experienced chef that rotates from station to station to fill in wherever needed." Food Network, Food Encyclopedia, "Brigade System," http://www.foodterms.com/encyclopedia/brigade-system/index.html (last visited Jan. 9, 2014).

[2] The Food Network describes such a position as follows:

> The garde manger (or chef garde manger) is the person or station responsible for cold pantry items such as salads, pâtés, chaud-froids and other decorative dishes. The term *garde manger* also refers to the area in which such foods are prepared and stored.

Id.

[3] The instant petition was filed on November 30, 2012.

needed to become a Sous-Chef."

The petitioner stated that the training program would have two "aspects": (1) training under whom the petitioner described as a "renowned chef"; and (2) hands-on training and rotations at each of the petitioner's stations.

In the training program description attached to the letter of support, the petitioner stated the following:

> All sous chefs need a high degree of training and professional experience before they are able to manage and maintain their own kitchen operation. The primary objective of this on-the-job training is to allow [the beneficiary] to learn how to work in every area of the kitchen. In order to accomplish this, [the beneficiary] will rotate throughout the different stations in the kitchen, spending four to six months at each kitchen station before moving on to a different one. At each kitchen station, she will learn from Chef who is the executive Chef of the restaurant and the two sous chefs, and
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> A well-trained cook should be able to cook service on a new station every day. This is possible, but to truly master the skills and techniques asked of a cook on an individual station on a daily basis takes time and dedication. The willingness and passion needed to perform the same task, day after day, always training, learning[,] and pursuing the idea of perfection is the important skill that transforms a cook into a chef. The trainee will view and learn all of the necessary fundamentals to operate a restaurant during her time at [the petitioner], but it will be her dedication to mastering a station and all it has to offer, one station at a time, with the understanding of an everlasting pursuit of perfection that will truly bring her the title of Sous Chef.

According to the petitioner, throughout the duration of the training program the beneficiary would undergo on-the-job training for 8 hours each day, five days per week. During this time the beneficiary would receive on-the-job training at each of the petitioner's stations: (1) Antipasti; (2) Grill; (3) Risotto; (4) Pasta; (5) Saute; and (6) Sous-Chef. The petitioner stated that this period of on-the-job training would constitute 85 percent of the training program.

The petitioner claimed that during the first portion of the training program, the beneficiary would undergo on-the-job training at the petitioner's antipasti station, and it listed three objectives of this phase:

- Preparing the antipasti in the correct timeframe in order to provide the most timely service to all customers at each table in the restaurant;
- Learning how to prepare the components of cold appetizers, which range from salads and cheese plates to terrines and antipasti platters; and
- Learning to perform any number of additional tasks requested by the chef or sous chef.

The petitioner stated that this period of the training program would last for six months, and that during this time the beneficiary would be supervised by Chef

The petitioner claimed that during the second portion of the training program, the beneficiary would undergo on-the-job training at the petitioner's grill station, and it listed four objectives of this phase:

- Mastering the timing and proper temperatures of different proteins, while corresponding with other stations in the kitchen to bring a quality product to the table at the same time as the other stations;
- Learning how to properly cook different proteins to specific temperatures in an oven and on a grill;
- Learning how to manage timing and proper prioritization in this station; and
- Acquiring the ability to determine which table takes precedence over others.

The petitioner stated that this period of the training program would last between four and six months, and that during this time the beneficiary would be supervised by Chef

The petitioner claimed that during the third portion of the training program, the beneficiary would undergo on-the-job training at the petitioner's risotto station, and it listed the following objective of this phase:

- Acquiring a better understanding of timing and seasoning skills in order to achieve the proper consistency of a risotto.

The petitioner stated that this period of the training program would last between four and six months, and that during this time the beneficiary would be supervised by Chef

The petitioner claimed that during the fourth portion of the training program, the beneficiary would undergo on-the-job training at the petitioner's pasta station, and it listed the following objectives of this phase:

- Mastering volume cooking;
- Learning the proper way to cook pasta "al dente"; and
- Learning finesse so as to allow the sauce to reach perfect consistency with the pasta.

The petitioner stated that this period of the training program would last between four and six months, and that during this time the beneficiary would be supervised by Chef

The petitioner claimed that during the fifth portion of the training program, the beneficiary would

undergo on-the-job training at the petitioner's sauté station, and it listed the following objectives of this phase:

- Completely mastering the cooking of several dishes at one time during the dinner rush; and
- Mastering communications with the antipasti, risotto, pasta, and grill stations.

The petitioner stated that this period of the training program would last between four and six months, and that during this time the beneficiary would be supervised by Chef

Finally, the petitioner claimed that during the sixth portion of the training program, the beneficiary would undergo on-the-job training at the petitioner's sous-chef station, and it listed the following objectives of this phase:

- Bringing together the knowledge, skills, and experience acquired in the other stations in order to direct the petitioner's kitchen staff to ensure that its quality, preparation, presentation, and timing standards are met;
- Learning to develop recipes and menu items;
- Learning to assess the quality and freshness of all ingredients and products;
- Developing proper ordering practices;
- Developing proper pricing and cost practices; and
- Ensuring that all stations comply with all sanitation and safe foods practices.

The petitioner stated that this period of the training program would last between four and six months, and that during this time the beneficiary would be supervised by Chef

The petitioner claimed that in addition to the on-the-job training specified above, which would comprise 85 percent of the training program, the beneficiary would spend 15 percent of her time in classroom instruction. According to the petitioner, the classroom instruction portion of the training program would consist of three components: (1) software training; (2) wine classes; and (3) Italian language classes.

The petitioner described the first component of the classroom training portion of the classroom program as follows:

> The trainee will learn to become proficient in the software [the petitioner] uses to maximize efficiency and profitability.

The petitioner described the second component of the classroom training portion of the classroom

program as follows:

> The trainee will learn about Italian wines by taking wine classes at the school in Florida (upon petition approval). A thorough knowledge of Italian wines will enhance the trainee's ability to develop recipes and plan menus and pair dishes with appropriate wines.

Finally, the petitioner described the third component of the classroom training portion of the classroom program as follows:

> The trainee will be taking Italian language classes at the school in Florida (upon petition approval).

In its November 27, 2012 letter the petitioner stated the following with regard to the career abroad for which the training will prepare the beneficiary:

> Upon completion of our comprehensive training program, [the beneficiary] intends to return to Colombia to apply her training for a career as a Sous-Chef in a restaurant in Colombia's improving culinary world. She will be well-equipped to excel in such an endeavor. [The beneficiary] intends to open an Italian restaurant in Colombia within two to three years after returning to Colombia.

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

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) forbids approval of an H-3 petition filed on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The beneficiary's educational background and work experience were discussed above. In his decision denying the petition, the director stated that "[b]ased on the evidence it is found that the beneficiary already possesses years of experience as a chef and apprentice."

Counsel makes two arguments in rebuttal to this finding. First, counsel argues that the beneficiary's previous work experience is not relevant, because the proposed training program involves training as a Sous-Chef. Second, counsel claims that the beneficiary has "limited work experience." The AAO find neither argument persuasive.

A. Counsel's Argument With Regard to the Claimed Differences Between the Proposed Sous-Chef Training and the Beneficiary's Prior Training and Expertise

Counsel argues first that "the record is clear that the beneficiary will be training to be a Sous-Chef, not a chef nor to learn food service management." While reasonable, counsel's argument fails in this particular case.

If the sous-chef training that the beneficiary is to receive must be considered separately from her prior training and expertise, then the same principle must also be applied to the evidence contained in the record of proceeding regarding the training program proposed here.

As noted above, the petitioner stated in its training program description that the beneficiary would spend fifteen percent of her time in classroom training, and it identified three components of such training: (1) software training; (2) wine classes; and (3) Italian language classes. However, none of these three components appear to be specifically geared toward Sous-Chef training. To the contrary, these classes could arguably be relevant to multiple positions within the petitioner's establishment. Thus, only 85 percent of the training program is specifically geared to Sous-Chef training, and that entire time would be spent in on-the-job training gained via work experience. However, while it is conceded that practical experience will increase a person's efficiency in any line of endeavor, the intent of the statute involved here is to train rather than to gain experience. *Matter of Koyama*, 11 I&N Dec. 424, 425 (Reg. Comm'r 1965).

B. Counsel's Arguments Regarding the Beneficiary's Limited Work Experience.

Counsel's second argument with regard to 8 C.F.R. § 214.2(h)(7)(iii)(C) is similarly unpersuasive. Counsel states the following:

> [T]he record is clear that the beneficiary, a recent college graduate, has limited work experience.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) forbids approval of an H-3 petition filed on behalf of a beneficiary who already possesses substantial *training and expertise* in the proposed field of training. "Training and expertise" is not limited to work experience. Thus, a petition involving a beneficiary with little work experience could nonetheless still potentially trigger the prohibition contained in 8 C.F.R. § 214.2(h)(7)(iii)(C) if he or she possesses other types of training and expertise. Consequently, even if the AAO agreed with counsel that the beneficiary has "limited work experience," which it does not, that factor alone would not necessarily mean that 8 C.F.R. § 214.2(h)(7)(iii)(C) had been satisfied. In similar fashion, the fact that an individual earned college credit for a work experience would not mean that the work experience did not constitute training and/or experience, as counsel seems to imply.

Counsel also argues as follows:

> The only piece of evidence evaluated by USCIS was the [beneficiary's] resume, which it relied upon to erroneously conclude that the trainee is an experienced chef. Specifically, USCIS stated that the trainee "held an apprentice position from April 2008 through November 2009 at [redacted]"] Yet, the resume clearly shows that this was an internship for which the [beneficiary] received college credit[.]

By using the word "yet," counsel seems to imply that the director referred to this work experience as an apprenticeship in error. However, it was the beneficiary's resume, submitted by the petitioner,

which described this 19-month period experience as an "Apprentice Position."

Finally, counsel argues the following on appeal:

> There is no reasonable interpretation of the evidence that permits the conclusion that the beneficiary already has years of experience as a chef.

The evidence of record, however, does not support this assertion. As indicated above, the beneficiary's resume states that she worked in an apprentice position as a prep cook and pastry chef for a period of 19 months, as a tournant chef for a period of eleven months, and as a garde manger chef, for the petitioner, for a period of seven months. The beneficiary's resume, therefore, states that the beneficiary has at least 37 months of experience as a chef.

For all of these reasons, counsel's assertions regarding the beneficiary's limited work experience are not persuasive.

C. The Evidence of Record Fails to Distinguish the Beneficiary's Prior Training and Expertise From the Training She Will Receive Through the Proposed Training Program

As discussed, the AAO has found counsel's arguments made on appeal in rebuttal to the director's decision unpersuasive. The AAO has conducted a thorough review of the evidence of record, and it finds that the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(C).

Counsel's arguments regarding the differences between the beneficiary's training and expertise and the knowledge to be imparted via the proposed training program are duly noted. However, taking into account the findings made in parts A and B of this section, the AAO finds that given the beneficiary's education, training, and employment (both with the petitioner and with other employers), the evidence of record does not establish that the skills the beneficiary already possesses would differ substantially from the training proposed here.

The evidence of record does not satisfy 8 C.F.R. § 214.2(h)(7)(iii)(C). Accordingly, the appeal will be dismissed and the petition denied on this basis.

VII. Training Program Designed to Recruit and Train Aliens for Ultimate Staffing of Domestic Operations in the United States

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) forbids approval of a petition where the evidence of record fails to establish that the training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. In reaching his conclusion that 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes approval of this petition, the director identified "the vague information provided in the training program."

As will be discussed in further detail below, the AAO agrees with the director that the evidence of record fails to describe the proposed training program in sufficient detail. However, the AAO

nonetheless disagrees with the director's findings with regard to 8 C.F.R. § 214.2(h)(7)(iii)(F).

While not sufficient to establish every element of the petitioner's claim, the evidence of record nonetheless satisfies 8 C.F.R. § 214.2(h)(7)(iii)(F) in that it establishes the training program was not designed to recruit and train aliens for the ultimate staffing of the petitioner's domestic operations in the United States. Therefore, this portion of the director's decision is hereby withdrawn.

VIII. Placement In a Position Which is in the Normal Operation of the Business and In Which Citizens and Resident Workers are Regularly Employed

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*2*) forbids approval of a petition in which the evidence of record fails to establish that 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. The director did not fully explain his rationale for denying the petition on this ground.

The AAO finds the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*2*), and this portion of the director's decision is hereby withdrawn.

IX. Generalities with No Fixed Schedule, Objectives, or Means of Evaluation

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) forbids approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation." In denying the petition on this ground, the director highlighted "the vague information provided in the training program," and stated that the petitioner had not "provided a training program that identifies specific information of what the beneficiary will be doing within your company for the period of requested validity." The AAO agrees.

As noted above, the petitioner stated that the second, third, fourth, fifth, and sixth components of the training program would each last between four and six months. The training program, therefore, lacks a fixed schedule, and for this reason alone must be denied pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(A).

The evidence of record fails to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A) for an additional reason. According to the petitioner, the beneficiary would spend fifteen percent of her time in classroom instruction. The classroom instruction portion of the training program would consist of three components: (1) software training; (2) wine classes; and (3) Italian language classes. However, the petitioner did not explain, with specificity, what the beneficiary would actually be doing during this portion of the training program.

For example, as noted above during the "software training" component of the classroom training the beneficiary would "become proficient in [redacted] the software [the petitioner] uses to maximize efficiency and profitability." [redacted] appears to be the software system used by the petitioner to enter food orders, process food orders, and accept payment. It is not clear how the [redacted] training that the beneficiary would receive would differ from that received by the petitioner's other employees. In any event, the petitioner has not explained how long this portion of the training program would last and

what this training would entail. The petitioner's description of this portion of the training program therefore deals in generalities with no fixed schedules.

Nor has the petitioner identified the point at which the beneficiary would enroll in the wine and Italian language classes. This portion of the training program therefore also lacks a fixed schedule.

The evidence of record does not satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). Accordingly, the appeal will be dismissed and the petition denied on this basis.

X. 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 the evidence of record to 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) forbids approval of a training program which "[w]ill result in productive employment beyond that which is incidental and necessary to the training."

As noted above, the evidence of record indicates that the beneficiary would spend the overwhelming majority of her time in on-the-job training rather than in actual, structured classroom instruction. The petitioner's description of this on-the-job training establishes that it would primarily consist of productive employment.

Although productive employment is not prohibited under the H-3 program, "only minimal productive employment is permitted." 55 Fed. Reg. 2606, 2618 (Jan. 26, 1990).[4] The issue here is whether the beneficiary will engage in productive employment beyond that incidental and necessary to the training, which is expressly prohibited by 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*3*) and 214.2(h)(7)(iii)(E). A petitioner's belief that a certain percentage of time in productive employment is *necessary*, as appears to be the case here, is not sufficient; the petitioner must also demonstrate that, in fact, that amount of productive employment would be necessary, and that it would also be only incidental. The two definitions of "incidental" in *Webster's New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are "1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . ."

The evidence of record indicates that the beneficiary would spend the majority of her time in productive employment, and the AAO finds that it lacks evidence showing that devotion of such a high percentage of her time to such productive employment is both necessary and "incidental" under either definition described above.

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[4] The legacy Immigration and Naturalization Service (INS) was 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, the legacy INS affirmed that "[w]hen a training program is characterized as hands-on training [(as is primarily the case in the instant petition)], 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 evidence of record therefore fails to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) and 8 C.F.R. § 214.2(h)(7)(iii)(E). Accordingly, the appeal will be dismissed and the petition denied on this basis.

XI. Statement Indicating Why the Training Cannot be Obtained in the Beneficiary's Country and Why it is Necessary for the Beneficiary to be Trained in the United States

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) requires the petitioner to submit a statement which "[i]ndicates 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." The record of proceeding contains such a statement, and this portion of the director's decision is hereby withdrawn.

XII. Sufficiently Trained Manpower to Provide the Training Specified in the Petition

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) forbids approval of a petition where the evidence of record fails to establish that the petitioner has sufficiently trained manpower to provide the training specified in the petition.

In denying the petition on this ground, the director questioned how the trainer would be able to "accomplish the duties of the business" while training the beneficiary. The AAO finds that, given the nature of the training proposed here, it is reasonable to assume that the trainer will be able to perform his normal job duties while training the beneficiary, and this portion of the director's decision is hereby withdrawn

XIII. Conclusion

The evidence of record overcomes the director's findings that the petitioner failed: (1) to establish that the proposed training program was not designed in order to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (2) 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; (3) to submit a statement indicating the reasons why the training cannot be obtained in the beneficiary's country and why it is necessary for her to be trained in the United States; and (4) that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition. However, the evidence of record does not overcome the director's remaining three grounds for denying the petition.

Consequently, the appeal will be dismissed and the petition will be denied.

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 not been met.

ORDER: The appeal is dismissed. The petition is denied.