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

(b)(6)

DATE: MAR 2 4 2014 OFFICE: VERMONT SERVICE CENTER

IN RE: Petitioner:
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:

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 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 The director's decision will be withdrawn in part and affirmed in part.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 business that sells and repairs used and new cars. In order to employ the beneficiary in what it designates as an automotive technician trainee position for a period of 24 months, the petitioner seeks to classify him 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: (1) contain a statement describing the type of training and supervision to be given, and the structure of the training program; (2) establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (3) establish that the proposed training is not available in the alien's own country; (4) establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States; and (5) establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training.

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.

As will be discussed below, the AAO finds that the evidence of record overcomes the director's findings that the evidence of record failed to establish: (1) that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; and (2) that the proposed training will benefit the beneficiary in pursuing a career outside the United States. 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. Consequently, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition. Specifically, the AAO finds that the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation.[1] For this additional reason, the petition must also be denied.

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[1] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

I. Standard of Review

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.
>
> 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;
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> (*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

The petitioner described itself in its April 5, 2012 letter of support as follows:

> [The petitioner] is an [sic] [d]ealer where we selling [sic] and repair new [and] used cars. Our clients will find a big selection of cars, trucks, and SUVs for new [and] used cars. We serve customers with a large inventory of quality new [and] used [The petitioner] is also a source of pre-owned cars and trucks[.]
>
> As a full service dealership, along with our Finance departments, [the petitioner] offers an award-winning dependable service [and] parts department and body shop onsite readily available to aid in the maintenance of your vehicle.

IV. The Beneficiary

The beneficiary, a citizen of Venezuela, earned an occupational associate's degree in automotive service technology from the in 2011.[2] Prior to that educational experience, the had certified his competence in the following four areas of automotive care: (1) engine repair; (2) brakes; (3) electrical and electronic systems; and (4) heating and air conditioning.

The beneficiary stated on his resume that he performed "all types of major and minor repairs on cars at a shop in Venezuela for six years."

V. The Proposed Training Program

In its April 25, 2012 letter of support, the petitioner described the training program as follows:

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[2] The beneficiary was granted an M-1 visa in order to enter the United States and participate in this educational program.

> [The petitioner] has a long-established, in-house training program to provide its trainees with expertise in all areas of corporate finance. Our training program for Automotive/Automobile Technology provides parallel training in the labor, maintenance and repair of cars. This training program in its entirety covers a two[ ] year[ ] period.

The petitioner stated further that the training program would include two components: (1) a formal classroom instruction component – which would include both formal classroom training and on-the-job training – that would last 12 months; and (2) a work assignment component, which would also last 12 months.

The petitioner described the formal classroom instruction component of the training program as follows:

> The trainee will receive 12 months of formal classroom instruction and on the job training at our [d]ealership in [redacted] During this period the trainee will complete numerous web based and hands on [redacted] training courses. [redacted] provides course completion data to our dealership weekly. One Business Manager and [t]wo Service Consultants will provide the trainee with an extensive experience in automotive/automobile technology.

The petitioner described the work assignment component of the training program as follows:

> The trainee will be assigned on different works and projects.
>
> The work assignments will be for 12 months. During this period of the program, the trainee will work with our dealer agency, making repairs and maintenance according to services instruction [sic].

The petitioner also submitted a document entitled "Training Syllabus" when it filed the petition. However, that syllabus only covered the first six months of the training program.

Finally, the petitioner submitted a document entitled "Statement," in which it claimed that the beneficiary would spend fifty percent of his time in formal classroom instruction, and fifty percent of his time in on-the-job training and rotational assignments in various departments.

The director requested additional evidence and information regarding the proposed training program in his December 17, 2012 RFE. In its January 9, 2013 letter, the petitioner described the training program as being "specifically linked to [redacted] products."

In her February 25, 2013 letter submitted in response to the RFE, counsel stated that the first component of the training program – formal classroom instruction and on-the-job training – would last 18 months (in contrast to the petitioner's initial claim that it would last 12 months), and that the second

component – work assignments – would last six months (in contrast to the petitioner's initial claim that it would also last 12 months).

On appeal, counsel claims – again, in contrast to the assertions made by the petitioner, that the beneficiary would spend 75 percent of his time receiving classroom instruction and 25 percent of his time in rotational training. Counsel also claims – again, in contrast to the earlier statements made by the petitioner – that the "trainee's rotational assignment will comprise [his] on-the-job training."

VI. Statement Describing the Type of Training and Supervision to be Given, and the Structure of the Training Program; Generalities with No Fixed Schedule, Objectives, or Means of Evaluation

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) requires the petitioner to submit a statement describing the type of training and supervision to be given, and the structure of the training program, and 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."

As noted in section V above, the evidence of record contains conflicting information regarding the structure of the training program. Again, the petitioner initially claimed that the training program would include two components: (1) a formal classroom instruction component which would include both formal classroom training and on-the-job training; and (2) a work assignment component. The petitioner claimed that each of these two components would last 12 months. The petitioner also claimed at that time that the beneficiary would spend fifty percent of his time in formal classroom instruction and fifty percent of his time in on-the-job training and rotational assignments in various departments.

However, the entire structure of the training program was amended in response to the director's RFE.[3] Again, counsel claimed at that point that the first component of the training program – formal classroom instruction and on-the-job training – would last 18 months (in contrast to the petitioner's initial claim that it would last 12 months), and that the second component – work assignments – would last six months (in contrast to the petitioner's initial claim that it would also last 12 months).

The structure of the training program has been amended once more on appeal. As noted above, counsel now claims that the "trainee's rotational assignment will comprise [his] on-the-job training," and that the beneficiary would spend fully 75 percent of his time in classroom training. Again, when the petition was filed the petitioner separated the on-the-job training and rotational assignment portions into separate components. The on-the-job training portion of the program was placed into the first component of the training program with classroom instruction, and those two portions of the training

[3] USCIS 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)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

program – which, again, together comprised the first component of the program – were to last 12 months of the entire 24-month training program.

Counsel's statements on appeal, therefore, modify the training program in two additional ways. The AAO notes first that if the entire first component of the training program – of which classroom instruction was only a part – were 12 months long (as claimed originally by the petitioner), then there is no way for the beneficiary to spend 75 percent of his time in classroom instruction.

Second, the petitioner's initial submission made clear that on-the-job training portion of the training program would take place during the first component of the training program, and that the rotational work assignments would occur during the second component. In other words, on-the-job training and rotational work assignments were separate and discrete components of the training program. Counsel's claim made on appeal that the "trainee's rotational assignment will comprise [his] on-the-job training" modifies that structure.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

For all of these reasons, the statements of record setting forth the structure of the training program conflict with one another and do not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*), and the AAO agrees with the director's decision to deny the petition on that ground. Accordingly, the appeal will be dismissed and the petition denied on this basis. Furthermore, those conflicts, as well as the multiple changes made to the structure of the training program during the pendency of this petition, are not indicative of a training program that has a fixed schedule, as is required by 8 C.F.R. § 214.2(h)(7)(iii)(A). Beyond the decision of the director, the petition may not be approved for that additional reason. Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

The evidence of record also fails to establish that the training program has a fixed schedule for another reason. When it filed the petition, the petitioner submitted a training manual which outlined the first six months of the training program, and listed several of the classes that the beneficiary would take during the first six months of the training program. Although the petitioner submits a schedule listing the classes the beneficiary would take during the entire 24-month training program on appeal, it is noted that many of those classes have been moved to different sections of the program. For example, several classes that were initially to have been taken during the first three months of the training program are now scheduled for some point between months ten and fourteen. Again, this is not indicative of a training program with a fixed schedule as required by 8 C.F.R. § 214.2(h)(7)(iii)(A). Beyond the decision of the director, the petition may not be approved for this additional reason.

VII. Physical Plant and 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 the physical plant and sufficiently trained manpower to provide the training specified in the petition. The AAO finds the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(G), and the director's contrary finding is hereby withdrawn.

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

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) forbids approval of a petition in which the petitioner fails to establish that similar training is unavailable in the beneficiary's own country. The beneficiary of the instant petition is a citizen of Venezuela.

The director raised this issue in his RFE and, in response, counsel stated the following in her February 25, 2013 letter:

> [T]he unique software and training developed by . . . ***is not available***. This software is a major component of the training program and will take at least 18 months to master.

Counsel also submitted, and quoted from extensively, a news article printed from the internet published on August 1, 2012. In that article, Hugo Chavez, who was at the time the president of Venezuela, stated that planned to increase its annual production of automobiles in Venezuela from 50,000 to 120,000 per year.

On appeal, counsel argues that the training program is also "specifically designed to meet US regulations and standards," and submits information regarding U.S. emissions standards and other environmental issues. Counsel also states the following:

> [The proposed training] program is not offered in schools or universities in Venezuela. It is a specifically devised [program designed to instill American quality standards and methods of implementing these. It will instill in the trainee unique methods of analyzing and solving automotive maintenance issues.

Upon review, the AAO finds that the evidence of record fails to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*). With regard to emissions standards and related environmental issues, it is noted that these particular aspects of the training program were not raised until the appeal, and they will therefore not be considered. As noted earlier, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. at 176.

While counsel's argument regarding American quality standards are acknowledged, the AAO notes that the evidence of record specifically links the training program to standards imposed by (However, the petitioner does not assert that there are no dealerships in Venezuela or, in

the alternative, that the operating standards of dealerships in that country are lower in that country than in the United States, let alone provide evidence demonstrating as such. In other words, the record of proceeding does not establish that the "quality standards and methods" to be imparted by the petitioner cannot be obtained at a facility in Venezuela. Simply 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner has failed to establish that the proposed training is unavailable in Venezuela.

For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*). Accordingly, the appeal will be dismissed and the petition denied on this basis.

IX. Pursuit of a Career Outside of the United States

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) requires the petitioner to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States. The AAO finds the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*), and the director's contrary determination is hereby withdrawn.

X. 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. While the assertions by counsel and petitioner that the proposed training are particular both to the United States and to are acknowledged, the evidence of record simply does not explain how, let alone 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.

XI. Conclusion and Order

The evidence of record overcomes the director's findings that the evidence of record failed to establish: (1) that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; and (2) that the proposed training will benefit the beneficiary in pursuing a career outside the United States. However, the evidence of record does not overcome the director's remaining three grounds for denying the petition. Beyond the decision of the director, the AAO finds additionally that the evidence of record also fails to establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation, which independently precludes approval of the petition as well.[4]

[4] As the current record of proceeding precludes approval of this petition the AAO will not discuss any additional grounds for denial it has observed on appeal.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *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.