

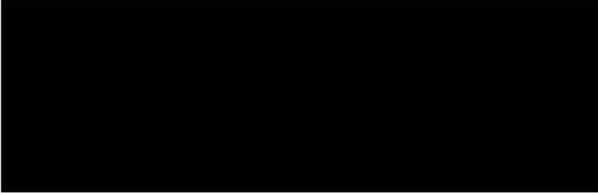


U.S. Citizenship
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FILE: EAC 07 131 50270 Office: VERMONT SERVICE CENTER

Date: JUN 09 20

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:

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.

for *Michael T. Kelly*
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 is a heavy machinery manufacturer and distributor that seeks to employ the beneficiary as a 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 two grounds: (1) that the petitioner had failed to submit evidence explaining how much time will be devoted to productive employment; and (2) that the petitioner had failed to submit evidence to explain how much time would be spent in classroom instruction, and how much time would be spent in on-the-job training.

On appeal, counsel contends that the director erred in denying the petition. Specifically, counsel states that the director interpreted the law erroneously, and did not correctly apply the law to the facts of this case.

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 "Training Program Overview" submitted at the time the petition was filed, the petitioner stated that the proposed training program would be composed of three components. The first phase, which would last eight weeks, was described as follows:

[This phase] provides instruction with approximately 85% being in the classroom. The purpose of this phase is to underscore the importance of market context (product history, regulatory environment, social norms) and to provide familiarity with that context in the United States.

The second phase, which would last thirty-three weeks, was described as follows:

[This phase] provides intensive product training in specified products with approximately 80% being practical training with various types of machinery. The purpose of this phase is to ensure a thorough knowledge of major products and their applications in the United States.

The third phase, which would last eight weeks, was described as follows:

[This phase] provides training in plans and presentations with approximately 80% being independent research and marketing strategy formulation. The purpose of this phase is to develop skill in identifying and developing marketing opportunities in a developing market.

In its letter of support, the petitioner stated the following:

A breakdown of the core program reveals circa 75% of time is in classroom instruction, the balance [in] onsite review and presence (non-participatory) at a range of sales and marketing meetings.

Upon review, the AAO agrees with the director's finding 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 submit evidence explaining how much time will be devoted to productive employment, and that it had failed to explain how much time would be spent in classroom instruction, and how much time would be spent in on-the-job training. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(2) requires the petitioner to set forth the proportion of time that will be devoted to productive employment, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires a statement from the petitioner that shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training.

As noted previously, in the "Training Program Overview" submitted at the time the petition was filed, the petitioner stated that, during the first phase of the proposed training program, the beneficiary would spend 85% of his time in classroom instruction. According to the figures provided by the petitioner, the beneficiary would spend, at most, 20% of his time in the second and third phases of the training program in classroom instruction. However, it also stated that the beneficiary would spend 75% of the training program in classroom instruction.

Accordingly, the director requested the following, among other items, in his April 17, 2007 request for additional evidence:

Submit additional evidence to explain how much time will be devoted to productive employment.

In its May 16, 2007 response to the director's for evidence, the petitioner elected not to respond to the director's request. The petitioner's failure to respond to this portion of the request for additional evidence comprised one of the director's two grounds of denial.

On appeal, counsel states the following:

As indicated in the record in this matter, contrary to the Center Director's decision the petition and supporting documentation fully satisfied the requirements for a training program. The denial letter stated that the petitioner had not submitted sufficient evidence to as to how much of the training program would be devoted to productive employment and how much time will be spent in classroom instruction. However, [the] petitioner had in fact submitted sufficient information in that regard. Specifically, in the petition package [the] petitioner submitted a statement by the petitioner that "circa 75% of time is in classroom instruction, the balance onsite review and presence (non participatory) at a range of sales and marketing meetings."

Counsel's rebuttal is deficient, as the record contains conflicting information regarding the amount of time that the beneficiary will spend in classroom instruction. Again, at the time of filing the petitioner stated that, during the first phase of the proposed training program, the beneficiary would spend 85% of his time in classroom instruction. According to the figures provided by the petitioner, the beneficiary would spend, at most, 20% of his time in the second and third phases of the training program in classroom instruction.

The first phase of the program would last eight weeks. The beneficiary is to spend 85% of this time, or 34 days, in classroom instruction. The second phase of the program would last thirty-three weeks. According to the training schedule, the beneficiary would spend, at most, 20% of this time, or 33 days, in classroom instruction. The third phase of the program would last eight weeks. According to the training schedule, the beneficiary would spend, at most, 20% of this time, or 8 days, in classroom instruction. In total, the training schedule indicates that during the three phases of the proposed training program the beneficiary would spend, at most, 75 days in classroom instruction. Spending 75 days of a 12-month training program in classroom instruction amounts to the beneficiary spending less than one-third (approximately 31%) of his time in classroom instruction. The beneficiary's spending approximately 31% of his time in classroom instruction conflicts directly with the petitioner's statement that the beneficiary would spend 75% of his time in classroom instruction. 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). The director's request for additional information was, therefore, warranted.

As noted previously, counsel and the petitioner elected not to respond to this portion of the director's request for additional evidence. On appeal, counsel refers the AAO to information already contained in the record of proceeding, which was before the director at the time he issued both his request for evidence and the denial. Counsel and the petitioner were twice afforded the opportunity, via the request for additional evidence and the appellate process, to supplement the record with additional evidence, but have two times elected not to do so. The failure to submit requested evidence that precludes a material line of

inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The record is still unclear as to how much time the beneficiary is to spend in classroom instruction and in on-the-job training. The petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2) and (3).

Pursuant to the above discussion, the AAO agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa.

Beyond the decision of the director, the AAO finds that the petition may not be approved for an additional reason.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires the petitioner to demonstrate that the proposed training is not available in the alien's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires a statement from the petitioner indicating the reasons why the proposed training cannot be obtained in the alien's home country and why it is necessary for the alien to be trained in the United States.

The petitioner addressed this issue in its May 16, 2007 response to the director's request for additional evidence, stating the following:

[T]he United States has large and diverse recycling, mineral extraction[,] and construction industries. The size and variety of these industries provide trainees with an accelerated experience in adapting the machinery to a required task and integrating them to a customer's processes and systems. In the trainee's native country it would take many years to gain comparable experience in adapting and integrating the machinery.

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 similar training would take longer in the beneficiary's home country. Whether similar training in the beneficiary's home country would take longer to complete is not material; 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. Whether a training program offered by a United States employer is better than a similar program in a foreign country does not establish eligibility under this regulation. The record as presently constituted does not satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). For this additional reason, the petition may not be approved.

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 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.