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U.S. Citizenship  
and Immigration  
Services

D4

FILE: EAC 06 210 51844 Office: VERMONT SERVICE CENTER Date: **MAY 30 2008**

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:

SELF-REPRESENTED

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.

*James Blinzinger, for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, 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 in an automobile repair and tire services business that seeks to employ the beneficiary as an accounting clerk for a period of two years. 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 Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that: (1) the petitioner had failed to demonstrate that the proposed training program is unavailable in the beneficiary's home country; (2) the petitioner had failed to demonstrate that the beneficiary would not engage in productive employment; and (3) the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad.

On appeal, the petitioner contends that the director erred in denying the petition.

Section 101(a)(15)(H)(iii) of the Act, 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part, the following:

- (ii) Evidence required for petition involving alien trainee—
  - (A) Conditions. The petitioner is required to demonstrate that:
    - (1) The proposed training is not available in the alien's own country;
    - (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
    - (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

- (4) The training will benefit the beneficiary in pursuing a career outside the United States.
- (B) Description of training program. Each petition for a trainee must include a statement which:
  - (1) Describes the type of training and supervision to be given, and the structure of the training program;
  - (2) Sets forth the proportion of time that will be devoted to productive employment;
  - (3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;
  - (4) Describes the career abroad for which the training will prepare the alien;
  - (5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and
  - (6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.
- (iii) Restrictions on training program for alien trainee. A training program may not be approved which:
  - (A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;
  - (B) Is incompatible with the nature of the petitioner's business or enterprise;
  - (C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;
  - (D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
  - (E) Will result in productive employment beyond that which is incidental and necessary to the training;

- (F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;
- (G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or
- (H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

In its initial filing, the petitioner did not submit a detailed description of its training program. The petitioner's proposed training program consisted of three accounting courses and four accounting software applications. On October 18, 2006, the director requested evidence from the petitioner including a detailed description of the training to be provided and listing the number of full-time trainers on the petitioner's staff and the number of hours that will be devoted to classroom instruction, on-the-job training, and productive employment. In response to the director's request for evidence, the petitioner submitted additional information and a copy of its employment contract with the beneficiary. In its letter in response to the director's request for evidence (RFE), the petitioner states the following:

[The petitioner has] recently developed a structured training program for the purpose of training an individual to own and operate a franchise tire and auto repair business. [The beneficiary] will be [the petitioner's] first trainee.

The proposed training program will be divided into three different courses: Financial Accounting; Managerial Accounting; and Introduction to Systems Control and Auditing. Each course will be taught by the petitioner's owner. The petitioner states that she is

uniquely qualified to train [the beneficiary] for several reasons: (1) [She] has approximately ten years of experience teaching accounting and business courses at the undergraduate and graduate level; (2) [She] is a licensed Certified Public Accountant; (3) [She] owns and operates two Big O Tires and Auto Repair franchises in Reno, Nevada; [and] (4) [She] has been in business for almost eight years.

According to the petitioner's June 27, 2006 letter of support, the beneficiary will be given reading assignments from textbooks and the petitioner's owner will spend 1.5 hours two mornings per week going over the reading assignments. Therefore, the training program will consist of approximately 3 classroom hours per week. In addition, the beneficiary will spend approximately 20 hours a week in on-the-job training. In its letter of support, the petitioner described the beneficiary's on-the-job training as the performance of accounting duties. In its response to the director's RFE, the petition included an employment contract between itself and the beneficiary. According to the employment contract, the beneficiary will have the following duties:

1. Processing accounts receivable and accounts payable;
2. Preparing payroll and processing payroll taxes;
3. Preparing and analyzing monthly reports on sales and gross profit;

4. Processing work orders for customers through the point of sale system;
5. Preparing estimates for repair work through All-Data software; [and]
6. Closing and end of day procedures.

The proposed training program does not explain how the beneficiary will be evaluated during the training program or how the beneficiary will be trained with regards to franchises. Furthermore, in its response to the RFE, the petitioner stated that its business had grown to the extent that it needed part-time help and that the beneficiary would be able to fill that need while receiving on-the-job training.

The director denied the petition on February 1, 2007. 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 demonstrate that the proposed training is not available in the beneficiary's country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien's own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

In its response to the director's RFE, the petitioner stated that

Although accounting and auditing training may be available in Poland, there is no university or technical school that combines those fields with the hands-on experience of working with and learning our industry specific point-of-sale software, how to order and manage inventory, how to use a labor guide to price jobs for increased profits, how to set up internal controls to prevent employee theft and misuse of assets, how to produce effective advertising, customer relations, and human resource management. [The petitioner believes that] the combination of learning the day-to-day operations of the business juxtaposed with the accounting and auditing class work will provide a unique opportunity for [the beneficiary] that she cannot obtain anywhere else. This program has been specifically designed for the tire and auto industry.

\* \* \*

[The petitioner] utilizes the advanced technical software available for [its] industry that is not available now in Poland.

On appeal, the petitioner states the following:

It is the methods of operating/managing the business that are not available in Poland. These methods are what she will learn from [the petitioner's] training program, not the auto repair business itself. Additionally, there are no franchise auto repair businesses in

Poland (and there are only a few in the U.S.). [The beneficiary] would like to learn how to franchise auto repair in her home country.

As stated previously, during the proposed training program, the beneficiary will be studying accounting textbooks and performing accounting duties for the petitioner. On appeal, the petitioner states that the training will instruct the beneficiary on operating and managing the business and that the beneficiary will learn about franchises. However, the petitioner has not demonstrated that she is qualified to provide training in setting up a new franchise in the United States or in Poland. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The proposed training program as previously described only covers instruction in accounting and on-the-job duties related to accounting. Furthermore, the AAO notes that in its letter of support, the petitioner stated that the beneficiary would assume the “financing and accounting functions” and not the operational or management functions of the beneficiary’s family business in Poland. The AAO finds that these changes to the program are not mere clarifications but rather an attempt to materially alter the training program in response to the denial. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has not submitted evidence establishing that the training offered in this program is not available in Poland. The record contains no evidence, other than the assertions of the petitioner, that the type of training offered in the proposed training program is unavailable in the beneficiary’s home country. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, the petitioner has not satisfied the criteria at 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5).

The director also found that the petitioner had failed to demonstrate that the beneficiary would not engage in productive employment beyond that necessary and incidental to the training program. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires a demonstration that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program which will result in productive employment beyond that which is incidental and necessary to the training.

In its response to the RFE, the petitioner included a copy of its employment contract with the beneficiary listing the beneficiary’s job duties. As stated above, the petitioner stated that its business had grown to the extent that it needed part-time help and that the beneficiary would be able to fill that need while receiving on-the-job training. Moreover, on appeal the petitioner asserts that the beneficiary will engage in productive employment. The petitioner states that “although [the beneficiary] will be engaged in productive employment, that “hands-on” training/employment is only part-time (incidental) and extremely necessary to the training process.” However, the petitioner then adds that it does not have to use the beneficiary to fill the part-time position and that it can hire someone else if “it is an issue.” Thus, although the petitioner argues that the productive employment is necessary for the training, it also states that its need for someone to fill that position is separate and apart from the training program. The petitioner cannot claim that the productive employment is necessary to the program while simultaneously

claiming that it can hire someone else to perform the productive employment. The productive employment is either necessary to the training program, or it is not. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

Finally, the director found that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad. The AAO disagrees, and finds reasonable the assertion that there is a market in Poland for the type of training that the beneficiary would receive in the proposed training program. As such, the AAO withdraws this portion of the director's denial.

Beyond the director's decision the petitioner has failed to demonstrate 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 AAO notes that the beneficiary is to spend approximately three hours per week in classroom instruction, and approximately 17 hours per week in productive employment. The AAO finds that devoting such a high proportion of the beneficiary's time to productive employment will place the beneficiary in the normal operation of the business. The petitioner has not established that the beneficiary will not be engaged in productive employment in relation to others at the company. For this additional reason, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

Beyond the director's decision the petitioner also failed to demonstrate that its proposed training program does not deal in generalities. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a proposed training program that deals in generalities with no fixed schedule, objectives, or means of evaluation.

The AAO notes that the director afforded the petitioner the opportunity to supplement the record with a more detailed description of its proposed training program in her October 18, 2006 request for additional evidence. Nevertheless, the record does not explain how the beneficiary is to be evaluated. The AAO therefore finds that the petitioner has failed to explain how the beneficiary will be evaluated. For this additional reason, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A).

For the reasons set forth in the preceding discussion, the AAO finds that the petitioner has failed to overcome the director's denial of the petition. Accordingly, the AAO will not disturb the director's denial of the petition.

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.