U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 162 50768 Office: CALIFORNIA SERVICE CENTER Date: FEB 2 4 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 petitioner filed the nonimmigrant petition seeking to classify the beneficiary as a nonimmigrant 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 petitioner, a Federal Aviation Authority (FAA) approved flight school, seeks to employ the beneficiary as a pilot trainee for a period of one year.

The director denied the petition on two separate and alternative grounds. Specifically, the director concluded that the petitioner had failed to establish: (1) that its proposed training program is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training; and (2) that the beneficiary would not receive training provided primarily at or by a vocational institution.

On appeal, the petitioner submits additional evidence to establish that it will provide the beneficiary with coursework "complementary to flight training" that is "different and additional to that obtained in a vocational school." The petitioner also submits additional evidence in support of its claim that the beneficiary does not possess substantial training and expertise in the proposed field of training.

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.

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E), H-3 classification applies to an alien who is coming 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, or
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> *(2)* As a participant in a special education exchange visitor program which provides for practical training and experience in the education of children with physical, mental or emotional disabilities.

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—
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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.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) a Notice of Intent to Deny and the petitioner's response; (3) the director's denial letter; and (4) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The first issue addressed by the director is whether the training program offered by the petitioner is on behalf of a beneficiary who already possesses substantial training and expertise in the field, as prohibited by 8 C.F.R. § 214.2(h)(7)(iii)(C).

In a letter dated May 6, 2008, the petitioner stated that its one-year training program is "designed to provide trainees with expertise in all areas of flying single and multi-engine airplanes." The petitioner explained that its program is designed for candidates with "some pilot-related education." With respect to the beneficiary's background, the petitioner stated the following:

> [The beneficiary] is a good candidate for our program. He engaged in a basic training program with the International Airline Training Academy in Tucson, AZ and works for China Eastern Airline, Co, Ltd in China. This company has recommended him as a capable and responsible professional. We expect that after completion of our one-year training program, [the beneficiary] will be well prepared to take the skills that he has learned to China and assume the Pilot Position with China Eastern Airline, Co, Ltd.

The petitioner attached a "Pilot Training Course Summary" which summarizes the content of eight courses to be completed during the H-3 training program. The courses include: Private Pilot Airplane Single Engine Land; Instrument Rating Airplane, Commercial Pilot Airplane Single Engine Land; Multiengine Rating Airplane; Advanced Maneuvers/Spin Familiarization; Airline Transport Pilot Ground; Turbine Transition; and High Performance/High Altitude Practical Experience. The petitioner indicated that pilots enrolled in the course will complete 250 flight hours and over 200 hours of ground training.

The petitioner submitted a copy of the beneficiary's Form I-20 M-N, which indicates that he was admitted to the United States as an M-1 vocational student on December 15, 2006 to complete a 12-month flight training course at the International Airline Training Academy in Tucson, Arizona. The stated purpose of his attendance at the school was to prepare him to be an "Airline/Commercial/Professional Pilot." The training was paid for by China Eastern Airlines Co., Ltd.

The petitioner also submitted what appears to be an excerpt from the beneficiary's flight record for 2008, specifically, for the months of January through March 2008. The record shows that the beneficiary has logged a total of 120.8 hours of flight time "to date." The page designated for completion of the beneficiary's "Certificates, Ratings and Operating Privileges Earned" is blank.

The director issued a Notice of Intent to Deny (NOID) the petition on June 5, 2008. The director observed that the beneficiary already possesses substantial training and expertise in the proposed field of training. The director instructed the petitioner to provide evidence to show how the proposed training differs from the expertise that the beneficiary already possesses, and how it differs from the training he received as an M-1 student. The director indicated that the evidence should include detailed letters verifying the beneficiary's employment history and providing detailed descriptions of the beneficiary's prior positions and training.

The petitioner's response to the NOID included a letter dated June 27, 2008, in which it clarified the beneficiary's level of expertise as follows:

> a) The trainee has only received basic aviation training. He has no expertise to qualify to fly as a commercial pilot for hire. He would get a private pilot certificate and possibly an instrument rating, which allows him to fly for pleasure only, not for hire or compensation. As a private pilot, the trainee is allowed to command an aircraft for any non-commercial purpose.
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> * * *
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> c) The trainee will receive training required to finish and receive his commercial pilot certificate (if required). The trainee will undergo further training which will allow him to test and receive an FAA Commercial Pilot Certificate with Instrument and Multi-Engine Ratings as well as passing the FAA Airline Transport Pilot Written Examination. He has not yet received this training.
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> d) The trainee will be learning the commercial aviation industry, with immersion not only in piloting skills, but additional exposure to aircraft maintenance and repair, aircraft ground handling, and other aviation business operations.

The petitioner explained the different training requirements for private and commercial pilots as set forth in Title 14 of the Code of Federal Regulations, Part 61.109.

The petitioner also submitted a flight training chart for the beneficiary, which indicates the minimum ground school and aeronautical experience the beneficiary requires, presumably to meet the regulatory requirements for a commercial pilot license. The chart indicates that the beneficiary requires 104.6 hours of single-engine flight experience, 17 hours of training in a multi-engine aircraft, 55 hours of cross-country flight experience, 64.6 hours of "pilot in command" experience, 10 hours of multiengine "complex" flight experience, and 10 hours of "pilot in command" experience in a multiengine aircraft, as well as a total of 123 hours of ground school instruction.

Finally, the petitioner submitted a letter dated June 19, 2008 from [redacted] Flight Training Department, of China Eastern Airlines Co., Ltd. Mr. [redacted] stated the following:

> This correspondence is to verify that [the beneficiary] worked in CES as a flight cadet; he will be an airline pilot once he finishes his training in USA.
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> * * *
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> [The beneficiary's] current expertise does not qualify him to fly as a commercial pilot. He needs to complete the required training to return to CES as an airline pilot.

In denying the petition, the director did not question the substance of the petitioner's proposed training program. Rather, she questioned the qualifications of the beneficiary. Citing to *Matter of Miyazaki Travel Agency, Inc.*, 10 I&N Dec. 644 (Reg. Comm. 1964) and *Matter of Koyama,* 11 I&N Dec. 424 (Reg. Comm 1965) for support, the director stated the following in her Notice of Decision dated July 24, 2008:

> The record indicates that the beneficiary has been admitted to the United States as a vocational student (M-1) on December 15, 2006. He was sponsored by China Eastern Airlines to attend the International Airline Training Academy and received flight training. This program was for a one year period.
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> * * *
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> Absent a detailed description of the beneficiary's employment history and previous training, the beneficiary may already have substantial training and expertise in the proposed field of training.

Accordingly, the director found that the petitioner had failed to satisfy the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C), which precludes approval of an H-3 training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

On appeal, the petitioner submits a new letter fro of China Eastern Airlines, dated August 30, 2008, stating the beneficiary's experience in the field and the training he still requires. Mr. [redacted] notes that as a flight cadet with the airline, the beneficiary "learned the basic skills for a pilot and assisted pilots in their daily job duties." Mr. [redacted] further specifies the beneficiary's training requirements as follows:

> This training will include: learning and completing the required hours to become a commercial pilot, in addition to gaining expertise with the operation, maintenance and repair of aircraft reciprocating engines, aircraft engine accessories; airframe inspection, repair and maintenance; airport operations; aircraft management and sales; and airport fixed base operations.

The petitioner also submits copies of pertinent Federal aviation regulations outlining licensing and knowledge requirements for different classes of pilots. Finally, the petitioner submits a document outlining "additional areas of expertise that will be provided concurrently with flight training," which indicates that the beneficiary will receive training with respect to aircraft reciprocating engines, engine accessories, airframe inspection, airport operations, aircraft management/sales and airport fixed base operations through classroom instruction, direct observation and practical instruction.

Upon review, the petitioner has not submitted sufficient evidence to overcome the director's conclusion. The AAO does not dispute that Federal regulations mandate extensive training requirements for commercial pilots. As noted previously, the director did not question the substance of the petitioner's proposed training program. The sole basis of the director's denial was her determination that, absent a detailed description of the beneficiary's employment and training history, USCIS was unable to determine whether or not the beneficiary already possesses substantial training and expertise in the proposed field of training.

The director clearly placed the petitioner on notice that she required detailed descriptions of the beneficiary's employment and training history. Absent such information, she was unable to compare the beneficiary's previous employment and training received in M-1 status to the training he would receive in the proposed training program.

The letter from China Eastern Airlines provided no information regarding the length of time the beneficiary served as a flight cadet and no detailed description of the duties he performed or the type of training he received while employed by the airline in such capacity. The foreign employer refers to the beneficiary's need to complete his training in the United States, but conspicuously absent from its letter is any mention of the fact that the beneficiary was already enrolled in an airline/commercial pilot training program with a similar flight training school for a one-year period.

Furthermore, the record contains no evidence of the training the beneficiary received during his one year period as an M-1 vocational student with the International Airline Training Academy, although the director clearly requested evidence of such training. The vocational school should be able to provide a letter or records summarizing the exact type and amount of ground and in-flight training the beneficiary has completed and any licenses he has received to date. In light of the director's request for detailed evidence regarding the beneficiary's employment and training history, the foreign entity's and petitioner's assertions that the beneficiary has not completed the necessary training are insufficient. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, 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). Accordingly, the director properly denied the petition.

While the petitioner has submitted a partial copy of the beneficiary's flight records for 2008, it is unclear where, with whom, or in what capacity the beneficiary completed such training, or whether this record comprises the entirety of the beneficiary's relevant pilot training to date. The beneficiary's authorized period in M-1 status expired in December 2007, five months before this petition was filed. USCIS has no record of approving a Form I-539 application to extend the beneficiary's M-1 status.[1]

Finally, the AAO acknowledges the petitioner's claim that it is offering training ancillary to flight training that is "different and additional" to that traditionally offered by flight schools, including training in aircraft reciprocating engines, aircraft engine accessories, airframe inspection and maintenance, airport operations, aircraft management and sales, and airport fixed base operations. The petitioner indicates that it has designed a "special course" specifically for China Eastern Airlines pilot trainees and implies that the beneficiary's training will therefore be different from what he obtained while in M-1 status. Again, absent a detailed description of the training the beneficiary completed with the M-1 vocational institution, the petitioner's assertions are insufficient to establish that the beneficiary does not possess substantial training and expertise in the proposed field of training.

On appeal, the petitioner has elected not to provide such a detailed description of the beneficiary's previous training and experience. Without this information, the AAO is unable to distinguish the beneficiary's previous training from the training to be imparted through the proposed training program.

Accordingly, the record fails to demonstrate that the proposed training is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of the petition.

The second issue addressed by the director is whether the beneficiary would be coming to the United States to receive training provided primarily at or by an academic or vocational institution. The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E)(*1*), precludes such beneficiaries from obtaining H-3 classification.

As discussed above, the petitioner is a described as an "aviation fixed base operator and pilot school." The curriculum, as described at the time of filing, appears to be a traditional, FAA-approved, flight instruction curriculum involving ground instruction, flight simulator instruction, supervised flights, and solo flights designed to prepare an individual for a career as a commercial pilot.

In the NOID, the director stated the following:

> USCIS notes that the petitioner is considered a vocational school. The petitioner provides instruction in a school-like setting in preparation for a specific career, without providing a

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[1] USCIS records indicate that the beneficiary filed a Form I-539 requesting an extension of stay in his current status March 11, 2008. The application was denied on July 9, 2008.

> degree. Because the petitioner is a vocational institution, the beneficiary is not eligible for H-3 classification. . . . The petitioner should have filed a petition to classify the beneficiary as a vocational student in the M-1 category.

In response to the NOID, counsel for the petitioner asserted that "the type of expertise gained by the training program offered by the petitioner is not vocational in nature." Counsel asserted that the beneficiary already possesses pilot skills and will be exposed to "all different aspects of aviation, not just flight training, as it would be in a vocational program." Counsel indicated that the training program was designed to allow the trainee to gain experience in "many different job functions and responsibilities in the aviation sector." Counsel indicated that the beneficiary would not receive such training at a vocational school for pilots.

In its letter dated June 27, 2008, the petitioner noted that the beneficiary "will be learning the aviation industry, with immersion not only in piloting skills, but additional exposure to aircraft maintenance and repair, aircraft ground handling, and other aviation business operations." The petitioner's response to the NOID contained no other information or documentation regarding these aspects of its training program or the amount of time to be devoted to such topics.

The director denied the petition, concluding that petitioner should be considered a vocational school, and thus the beneficiary is not eligible for the requested H-3 classification pursuant to 8 C.F.R. § 214.2(h)(1)(ii)(E)(*1*).

On appeal, the petitioner submits additional evidence in support of its assertion that the training to be imparted is "different and additional to that obtained in a vocational school," as well as evidence of the petitioner's ability to provide "training complementary to flight training." As noted above, the petitioner provides on appeal a description of the "additional areas of expertise" to be provided concurrently with flight instruction. The petitioner indicates that such additional areas would be taught utilizing textbooks, written examinations, direct observation of employees engaged in these practical tasks, and performance of different job tasks under direct supervision of the petitioner's employees or employees of the petitioner's affiliates. The petitioner did not indicate the amount of time the beneficiary would devote to these additional courses, and simply noted that the training would occur "concurrently with flight training."

Upon review, the petitioner's evidence is not persuasive. The petitioner's initial description of its training program and course syllabus consisted solely of ground school and flight training components that would typically be offered by any FAA-approved flight school, and the evidence confirms that the school offers a standard vocational pilot training curriculum to its students. It was not until after the director issued the NOID that the petitioner indicated that had designed a special program to include training complementary to its standard flight training curriculum. 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. 1998).

The petitioner made no effort to explain why it failed to mention the "complementary training" at the time the petition was filed. 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 petitioner has not submitted any objective evidence that it had a pre-existing plan to provide the complementary training in place as of the date the petition was filed. Such evidence may have included a contract, agreement or other evidence of correspondence whereby the Chinese airline requested, and the petitioner agreed to provide, the "complementary training" to the foreign pilot trainees. Absent such evidence, the AAO must base its determination on the training program as it existed at the time of filing.

The AAO concurs with the director's determination that that the proposed training is to be provided by a vocational institution and the regulations prohibit the beneficiary from participating in such a program as an H-3 nonimmigrant. The appropriate visa classification for a student or trainee attending a vocational institution is the M-1 nonimmigrant visa classification. *See generally*, section 101(a)(15)(M) of the Act, 8 U.S.C. § 1101(a)(15)(M); *see also* 8 C.F.R. § 214.3(a)(2)(ii).

Section 101(a)(15)(M)(i) of the Act, 8 U.S.C. § 1101(a)(15), defines an M-1 nonimmigrant student as:

> an alien having a residence in a foreign country which he has no intention of abandoning *who seeks to enter the United States temporarily and solely for the purpose of pursuing a full course of study at an established vocational or other recognized nonacademic institution* (other than in a language training program) in the United States particularly designated by him and approved by the Attorney General, after consultation with the Secretary of Education, which institution shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant nonacademic student and if any such institution fails to make reports promptly the approval shall be withdrawn . . .

(Emphasis added.)

The record shows that the beneficiary's primary purpose for entering the United States is to pursue a full course of study at an established vocational or other recognized nonacademic institution. Neither he nor the petitioner can seek to avoid the restrictions on nonimmigrant students by claiming that his training also qualifies him for some other nonimmigrant classification. Given that the petitioner currently appears to be a SEVIS approved school, and therefore the beneficiary would be eligible to attend the petitioning entity as an M-1 nonimmigrant, the fact that the petitioner has petitioned for the beneficiary under a separate nonimmigrant classification is further evidence of the petitioner's attempt to circumvent the restrictions on nonimmigrant students.

The plain language of section 101(a)(15)(M) of the Act makes it clear that Congress intended there to be strict controls on nonimmigrant students and the vocational or nonacademic institutions they attend. As a trainee attending a vocational institution, the M nonimmigrant classification and the related regulatory restrictions apply to his admission and stay in the United States. *See* 8 C.F.R. § 214.2(m). Additionally, the regulations provide a rigorous set of requirements that a vocational school must meet before they are permitted to admit nonimmigrant students. *See generally* 8 C.F.R. § 214.3. To admit a nonimmigrant vocational student in another nonimmigrant classification would frustrate this carefully designed regimen. Given the petitioner's

proposed training program, the director correctly held that, if he is to come to the United States as a nonimmigrant vocational student, he may do so only as an M-1 nonimmigrant.

Even assuming *arguendo* that the petitioner had established that it will provide the "complementary" training, it must still establish that the beneficiary's training will not be provided *primarily* at or by a vocational institution. Given that the "complementary" training component was not deemed significant enough to require any mention in the petitioner's initial evidence, it is reasonable to conclude that the beneficiary's primary training will be completed within the school's standard vocational curriculum for pilots, which falls under the prohibition at 8 C.F.R. § 214.2(h)(1)(ii)(E)(*1*). For this additional reason, the petitioner's argument that it is not a vocational school for purposes of this visa classification is not persuasive.

The regulations state that the H-3 classification applies to an alien who is coming temporarily to the United States as a trainee, "other than to receive graduate medical education or training, *or training provided primarily at or by an academic or vocational* institution." 8 C.F.R. § 214.2(h)(1)(ii)(E)(*1*) (emphasis added). For this additional reason, the petition may not be approved.

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.