

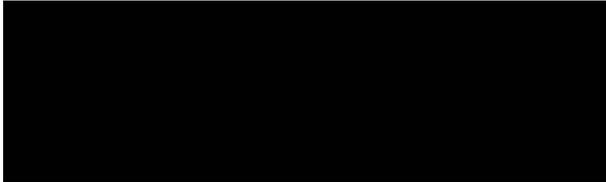
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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Services



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JUL 06 2009

FILE: WAC 08 233 51519 Office: CALIFORNIA SERVICE CENTER Date:

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting 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 engaged in telecommunications and network applications and seeks to employ the beneficiary as a trainee in teleconference network technology for a period of eighteen 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 three grounds: (1) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; (2) the petitioner failed to establish that the proposed training is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training; and, (3) the petitioner failed to establish that it has sufficiently trained manpower to provide the training specified.

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

- (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 support letter, dated August 8, 2008, the petitioner explained the purpose of the training program as follows:

The purpose of the training program is to teach [the beneficiary] about our unique technology solutions and the U.S. teleconferencing industry in general, and to provide him with the knowledge and skills he will need in order to thrive at a more advanced level. We will provide him with detailed training in teleconference network technology as well as a comprehensive understanding of how our company functions. He will take part in our training program, which involves both classroom training and in the field training, all conducted and overseen by our staff and programmers. The training will be full-time for the duration of the training program, and as a trainee, [the beneficiary] will receive a maintenance allowance during the training program. This training is only available in the United States and specifically only available at our company, as he will be involved in our unique technology for teleconferencing.

The petitioner submitted a training program outline that indicated that the beneficiary will receive classroom instruction and in the field training with “senior technologists and staff.” The outline stated that the trainee will receive “immediate feedback from the senior technologists and may be shadowing or interviewing various specialists.” In addition, written evaluations will be completed at the end of each phase. The training consists of four phases: Company Operations (3 months); Business-to-Business Market and the Teleconferencing (5 months); Custom Solutions, Bandwidth Limitation and Needs of Teleconferencing (5 months); and, Optimizing Code and Traffic for Teleconferencing (5 months). The program outline lists approximately six hours of classroom time every day, and two hours per day of in-the-field training, visits and interviews with experts.

The petitioner also stated in the outline that the “trainee’s acquired knowledge and understanding of our methods and their strict conformance to American practices and standards will better help to assist companies in Romania,” and “promote our particular understanding of the teleconferencing industry with potential overseas partners and give us new opportunities to extend partnerships in world markets.”

On September 2, 2008, the director requested additional information. In part, the director requested additional information regarding the availability of this type of training in the beneficiary’s home country, further evidence about the training program, and further evidence to

establish that the training program will assist the beneficiary in obtaining a job in his home country.

In the response letter, dated September 11, 2008, counsel for the petitioner explained that the training is not available in the beneficiary's home country and stated the following:

The proposed training program provides specialized instruction about teleconferencing network technology. As noted in the training plan (Exhibit "A-2" of the original petition), creating the largest teleconferencing networks (web, audio, and video) with the most advanced technology is the Petitioner's highly specialized business. The company's vast expertise covering a variety of domains such as Telecommunications, Data Communications, Industrial Automation and Data Integration can only be taught by a company such as the Petitioner, in the United States, where networks for these types of technological innovations are available.

On appeal, the petitioner also addressed the concern that the beneficiary is already qualified in the field by stating that the beneficiary "already has expertise but as noted in the petition, this training is not specialized and provides only the minimum basis for beginning the advanced training which is being offered by the Petitioner."

The director found that the petitioner failed to establish that the proposed training is unavailable in Romania, the beneficiary's home 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.

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 the petitioner itself offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; 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.

As stated above, counsel for the petitioner contends that the training program is not available in Romania because there is no training comparable to the one offered by the petitioner and Romania "does not have a sufficient network infrastructure to provide broadband-based teleconferencing at the level that the Petitioner can provide." The petitioner also submitted several articles explaining the situation of the information technology in Romania. Since the majority of the petitioner's training program consists of teleconferencing which is not as advanced in Romania, and to train the beneficiary on the petitioner's own business practice, the training is sufficiently unique that such knowledge could not be obtained in Romania. The director's discussion of this issue is, therefore withdrawn.

The director also found that the beneficiary 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 a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The director noted that the beneficiary had been in J-1 status with the petitioner as a telecommunications intern. On appeal, counsel for the petitioner said that an intern is very different from a trainee as the trainee “receives a detailed training plan with explicit conceptual and skill acquisition goals.” The director also noted several years of experience with information technology outlined in the beneficiary’s resume.

The petitioner’s explanation of the difference between an intern position and a trainee position is vague and does not provide much explanation as to how these two positions differ. In addition, the beneficiary possesses six years of professional work experience in the information technology industry. While participating in the proposed training program may provide the beneficiary with the necessary skills to enhance his career abroad, the purpose of the H-3 nonimmigrant classification is not to enhance the career prospects of highly qualified professionals. A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masauyama*, 11 I&N Dec. 157 (Reg. Comm. 1965); *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965); *Matter of Koyama*, 11 I&N Dec. 424 (Reg. Comm. 1965). The question is whether the beneficiary already possesses substantial training and expertise in the field, not whether he possesses training and expertise regarding the petitioner’s company or whether he can enhance his career prospects by obtaining further specialization in a field in which he already possesses substantial training and experience.

The beneficiary completed several courses in the field of study, has worked in the same field for over six years, and held a position as a telecommunications intern with the petitioner. The record establishes that he has substantial training and expertise in the field. Accordingly, the AAO finds that approval of the petitioner’s proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(C).

The director also denied the petition because the petitioner failed to provide evidence to establish that the petitioner can employ a full time trainer, and simultaneously operate a training program and a business. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition where the petitioner has failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified.

As noted above, the petitioner submitted a training program outline that indicated that the beneficiary will receive classroom instruction and in the field training with “senior technologists and staff.” The outline stated that the trainee will receive “immediate feedback from the senior technologists and may be shadowing or interviewing various specialists.” In addition, written evaluations will be completed at the end of each phase. The Form I-129 stated that the petitioner employs 59 employees. On appeal, counsel for the petitioner stated that “the Petitioner not only has staff willing to provide training but they have staff with Ph.Ds and with actual experience as teachers and academics.” The petitioner provided sufficient evidence to overcome the director’s

decision on this issue. The petitioner also provided a floor plan of its offices which indicate that it has sufficient work space for the training program.

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

Much of the information submitted by the petitioner is vague in nature and leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. The program is an eighteen month training program, but the petitioner's outline of the program provides a few paragraphs for each phase of the training program. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis.

A breakdown of how the classroom training, written and oral presentation, and practical training components of the proposed training is not provided for any of the parts. In addition, the petitioner provided a short list of the reading materials it will utilize; however, it does not explain how the materials will be incorporated into the program. The petitioner did not provide a curriculum outline that it will follow. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, but the description provided is inadequate. Again, the petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. It has failed to establish that its proposed training program does not deal in generalities. It has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

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.