

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



4

JUL 06 2009

FILE: EAC 08 091 51045 Office: VERMONT SERVICE CENTER Date:
[redacted] (relates)

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

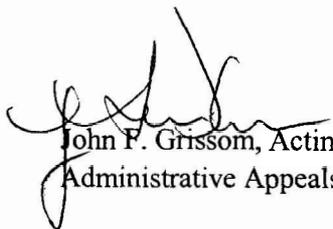
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

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 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 an after school provider of model airplane education that seeks to employ the beneficiary as trainee for a period of one year and eight 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 evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial letter; and, (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the following grounds: (1) that the petitioner had failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and, (2) that the petitioner had 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. On appeal, counsel 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 letter of support, the petitioner stated that it is a "model airplane academy" that is "committed to education in the classroom as well as informal after school clubs, home schooling, Scouts, activities, workshops." The petitioner explained that upon completion of the training program, the beneficiary "will

work in our affiliated company Chickbom, LLC, Herzelia, Israel as a District Manager,” and the beneficiary will be “responsible to establish educational programs in school and after school activities following our US programs.” The petitioner further explained that the training will involve “approximately 60% instruction and 40% on-the-job training.”

The petitioner submitted an outline of the training program which is broken down into the following twelve phases: Introduction to After School Program Management (2 weeks); Learning the Aviation Curriculum (2 months); Safety (1 week); Child Management (1 month); Sales (2 months); Finance (1 month); Computer Programs (1 month); Instructor Position (4 months); Human Resources (1 month); Operation Management (2 months and 3 weeks); Marketing (2 weeks); and, Practice Training (4 months).

In response to the director’s request for a more detailed outline of the training program, the petitioner submitted virtually the same training program with some additional information. However, in reviewing the two outlines, the second training program is not consistent with the first training program submitted by the petitioner. The amount of time allotted for each phase differs in the second outline. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original training program outline.

On appeal, the petitioner submitted several additional documents in support of the petition. One document was the company’s business plan, and under 1.1. Objectives, it states that one of the petitioner’s objectives is to “expand [the petitioner’s] franchises internationally by 2012. On appeal, the petitioner also submitted a list of partnerships working with the petitioner.

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 demonstrate that it has an established training program, and that the petitioner had failed to submit evidence that the training program does not deal with 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 where the petitioner submits a training program that deals in generalities with no fixed schedule, objectives, or means of evaluation.

The petitioner has not established that its training program does not deal in generalities. 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 a one-year and eight month training program but the petitioner’s outline of the program lists twelve phases and provides a few paragraphs of explanation for each phase. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis. Nor has the petitioner explained how the different phases would be divided among the portions of the training

program devoted to classroom training, written and oral presentation, and practical training. 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. 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).

In addition, the petitioner did not provide an explanation of how the beneficiary will be evaluated throughout the training program. It is not clear on what the beneficiary will be tested, as the training program outline only provides a general explanation of topics to be discussed but does not provide a syllabus that will be followed, information on how the material will be taught, information on the assignments that will be assigned to the beneficiary or materials that the beneficiary will use in order to learn the topics to be discussed.

The training program lists one phase of the program as an instructor position for four months where the beneficiary “will assume the role of a teacher so that he or she can advise and supervise all of [the petitioner’s] instructors.” The petitioner will also spend four months in practical training where the beneficiary will “manage an after-school program operation from beginning to completion.” Thus, the beneficiary will spend eight months of on-the-job training and without any classroom instruction. Thus, the petitioner 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, and 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)(ii)(A)(ii)(2) requires a demonstration 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 regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(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. Since the beneficiary will spend eight months as an instructor for the program, the beneficiary will be placed in the normal operation of the business.

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.

In his denial, the director stated the following:

The letter submitted states that the beneficiary “worked as an Arts and Crafts teacher which has nothing to do with aviation.” You have stated that this program is for very young children from kindergarten up, to learn how to make helicopters, rubber-band propellers, gliders, bi-planes, rockets, flying wings, paper airplanes, etc. It would appear that the beneficiary’s experience working with children as an Arts and Crafts teacher would be more useful than education in aviation. This program does not appear to delve into any indepth aviation training that might take some duration of time to learn.

In the petitioner's response to the director's request for evidence, the petitioner stated that "while [the petitioners'] teachers may be experience in the classroom, our curriculum guide is designed for teachers who may have little or no experience in the areas of aviation or space. The training program provides aerospace vocabulary and an array of aviation and space activities which are mastered by the teachers to enrich locally-designed programs." The AAO concludes that the petitioner did not provide sufficient evidence to establish that the skills required of the teachers hired by the petitioner greatly from the skills obtained from teaching arts and crafts or any other educational program.

Beyond the decision of the director, the AAO finds that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad. The regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States. As noted above, the reason for creation of the training program is to train the beneficiary so that he will "work in our affiliated company Chickbom, LLC, Herzelia, Israel as a District Manager," and he will "establish educational programs in schools and after school activities following our US programs." The petitioner did not provide evidence to demonstrate that there is a setting in which the beneficiary will be able to use his newfound knowledge. The beneficiary's newfound knowledge will be specific to the petitioner, and thus, an operation run by the petitioner would be the only setting in which he would be able to use the knowledge. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence, beyond the assertions of record, to demonstrate that it is in the process of setting up operations, or that it is currently operating, in Israel. The petitioner did not provide any documentation that it is affiliated to Chickbom, LLC, in Israel. The petitioner submitted a list of partnerships but the Israeli company is not on that list. Furthermore, the petitioner's business plan indicated that the petitioner will not expand internationally until 2012. 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)). The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4). Therefore, the petition may not be approved at this time.

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 AAO finds that the petition was properly denied and, for the reasons set forth in the preceding discussion, will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.