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

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MAY 01 2009

FILE: EAC 08 104 51278 Office: VERMONT 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, a restaurant, seeks to employ the beneficiary as a trainee to “train to specialize in Asian cuisine,” for a period of sixteen 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 failed to establish that the proposed training program deals in generalities with no fixed schedule, objectives, or means of evaluation; and, (2) that the petitioner failed to establish that the proposed training is unavailable in the beneficiary’s home country.

On the Form I-1290B, counsel for the petitioner states the following:

Appellant contends that: (A) the nature and extent of the training program proposed by it is not properly characterized by the examining officer. The program is not intended to be a continuation of a previous J-1 visa program any more than a master’s degree in history is a continuation of a bachelor’s degree in the same field (i.e., different courses, different qualifications, different result); (B) the examining officer’s conclusion of law under 8 C.F.R. § 214.2(h)(7) is incorrect.

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 letter of support, dated February 27, 2008, the petitioner explained that it wishes to change the beneficiary's status from J-1 to H-3 status in order to "participate in an entirely new training program that emphasizes cooking rather than the management of a restaurant." On the Form I-129, the petitioner stated that the training "will enable the trainee to obtain a much higher level job in first-class establishments." The petitioner also stated that it would like to employ the beneficiary abroad but has "no present plans to open a new restaurant in Sri Lanka. However, the petitioner will keep in contact with the trainee and "seek his advice and assistance when ordering herbs and spices and when considering new dishes with an Asian emphasis."

The petitioner also submitted the beneficiary's resume that indicates that the beneficiary took courses in "professional cookery and restaurant and bar service" at the Sri Lanka Institute of Tourism and Hotel Management. In addition, the beneficiary has been working as a chef at several different restaurants since 1997.

In the program description submitted by the petitioner, it states that the "training generally starts with basic sanitation and workplace safety and continues with instruction on food handling, preparation, and cooking procedures." The training program also states that the student will "spend most of their time in kitchens learning to prepare meals by practicing cooking skills." The training consists of six modules: Culinary Fundamentals and Sauces and Soups (3 months); Core Cooking Methods – Dry Heat, Moist Heat, Grains and Vegetables, and Breakfast, Brunch and Lunch (4 months); Advanced Culinary Applications, Cuisine of France, Italy and Asia (3 months); Pastry Essentials (3 months); and, Modern Masters, Market Basket Cooking, Hors d'oeuvres, Charcuterie and contemporary buffets (3 months); and, Introduction to baking techniques (3 months).

On April 23, 2008, the director requested additional information. Specifically, the director noted that the petitioner requested a change of status for the beneficiary from J-1 status to H-3 status.

The director stated that he was “not convinced that the contextual difference in the programs are substantially different enough to warrant the requested change of status.”

In response, the petitioner stated that “the J-1 Visa Program was much more of an introductory nature and focused on management and administration of a restaurant.” The petitioner also stated that the “H-3 Visa Program focuses on the art of cookery from how to sauté a pork loin to how to prepare petits fours.”

The AAO agrees with the director 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 failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. The AAO agrees. 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 a sixteen month training program, but the petitioner’s outline of the program consists of seven pages. For example, module two will last four months but the petitioner’s description of how the beneficiary would spend this period of time is a few paragraphs. 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).

The AAO finds, beyond the decision of the director, that the petitioner also failed to establish that the proposed training is unavailable in Sri Lanka, 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. In other words, 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.

In a letter dated May 23, 2008, counsel for the petitioner stated that "the H-3 Visa Program focuses entirely on food preparation from sauces and soups to pastries. It is my understanding that he could not obtain these skills in Sri Lanka." Counsel for the petitioner also stated that the training will "greatly assist [the beneficiary] to find employment in a first-class establishment in his home country." The petitioner did not submit any corroborating evidence to support the claim that the trainee cannot find training in "high-end" restaurants in Sri Lanka. The petitioner did not prove that Sri Lanka does not have restaurants or training programs that consist of culinary education. 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)).

Beyond the decision of the director, the petitioner failed to establish that the beneficiary does not already possess substantial knowledge and skills 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 reviewing the beneficiary's resume, he completed courses in "Professional Cookery and Restaurant and Bar services" at Sri Lanka Institute of Tourism and Hotel Management. In addition, the beneficiary has worked as a chef since 1997, over 11 years, and has worked in several high-end restaurants. Furthermore, the beneficiary has worked as a chef de partie for the petitioner since August 2006. 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, and has worked in the same field for over eleven years. 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).

Beyond the director's decision, the petitioner did not establish that the beneficiary would not engage in productive employment. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires the petitioner to establish that the beneficiary would 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 the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a petition in which the beneficiary would perform productive employment beyond that which is incidental and necessary to the training. As noted in the petitioner's program outline, the majority of the training will occur in the kitchen with hands-on training. The petitioner's program does not appear to contain any classroom time and instead only consists of hands-on training. Given that the beneficiary would spend the majority of his time in hands-on training, and that there appears to be no classroom component before engaging in such hands-on learning, the AAO finds that the weight of the evidence in this proceeding fails to establish that the beneficiary would not engage in productive employment.

Accordingly, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(2), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

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.