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FILE: WAC 08 050 50819 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 a textile, fabric finishing, and dyeing company that seeks to continue to employ the beneficiary as a trainee in fabric flame retardant treatment for a period of ten months. The petitioner, therefore, endeavors to extend the beneficiary's classification 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 ground that the petitioner had failed to demonstrate that the beneficiary would not engage in productive employment. The director noted that the petitioner submitted several pay stubs that indicated the beneficiary had worked overtime in each pay period. 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.

As a preliminary matter, the AAO notes that the Form I-129 requested an extension of the H-3 classification on behalf of the beneficiary until October 9, 2008. The beneficiary has been present in the United States in H-3 classification for the petitioner since December 2006. Thus, the petitioner is requesting a total period of two years and ten months in H-3 classification for the beneficiary. However, pursuant to 8 C.F.R. § 214.2(h)(15)(ii)(D), an extension of stay may be authorized for the length of the training program for a total period of stay as an H-3 trainee not to exceed two years. Since the beneficiary has already been present in the United States in H-3 classification for two years, the petitioner may not request an extension of its H-3 classification on behalf of the beneficiary.

In an attachment of the Form I-129, the petitioner stated that the training will provide the beneficiary with the “knowledge of Fabric Flame Retardant Treatment and general business operations in the U.S. market.” The petitioner also stated that the beneficiary will perform incidental productive employment that is “less than 5% of the training time.” The petitioner stated that the “beneficiary will research and set up a branch office for the company and lead a new team to expand our business and patent license.”

In a letter of support, dated November 16, 2007, the petitioner explained the reason for continuing the training program on behalf of the beneficiary as follows:

[The beneficiary] has been under our company’s training since December 2006. The current training she is undergoing is focused on durable flame resistant cellulosic and cellulosic blends. [The beneficiary] has proven her abilities to be trained in this field and she has done well in the current training program. We are proposing for [the beneficiary] to receive further training on Performance Finishes for Cellulosic and Cellulosic Blend Flame Retardant Fabrics. The purpose of the additional training is to provide the trainee with essential knowledge in improving the safety characteristics of apparel, bedding, protective clothing, tent cloth, carpets, home furnishings, aircraft and automobile interior fabrics and industrial fabrics which may be woven, knitted, tufted and nonwoven.

The petitioner also explained that the training will last 40 weeks and the trainee will “undergo academic instruction and practical training eight hours per day, five days per week.

The petitioner submitted a one-page outline of the training program which is broken down into the following phases: Principles of Performance Finishes for Flame Retardant Fabrics, Laboratory Recipe Formulation; Anti-Microbial Finishes; Anti-Static Finishes; Moisture Management Finishes; Quality Control Testing Procedures; and, Run Actual Production Batches.

The petitioner also submitted a packet of worksheets, articles, and reading materials which appear to be the materials the beneficiary will utilize during the training program.

The petitioner submitted a letter, dated October 15, 2007, that stated that the beneficiary “almost completed her training for children’s sleepwear,” and it needs to extend the training to teach her the technology of flame resistant fabrics. In addition, the beneficiary will be responsible for “developing new dyeing procedures for the flame resistant process.”

On February 28, 2008, the director sent to the petitioner a request for additional information. The director requested more details about the training program such as information about the trainers, the materials that will be used in the classroom training, and how the petitioner will evaluate the beneficiary’s performance. The director also requested copies of the lesson plans and course materials for the training already provided to the beneficiary, and information and evidence regarding the petitioner’s business expansion plan abroad.

In response to the director’s request, counsel for the petitioner explained that it filed a “patent for a new fire resistant process for cotton,” and the beneficiary is “being trained in this patent process to license this technology in the Philippines where beneficiary will be the representative for the petitioner.” Counsel further stated that the “project is dependent upon getting the patent granted and will not move forward until the patent is issued.” The petitioner also submitted copies of the beneficiary’s earning statements, and most of the statements were not dated.

The petitioner failed to submit documentation about the training program previously provided to the beneficiary, a more detailed description of the training program the beneficiary would continue to participate in, and information regarding the petitioner’s expansion plans abroad. Although the director requested further clarification of the training program, the petitioner submitted the same training program outline and did not further clarify the concerns of the director. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence. 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).

In the director’s decision, the director noted that in reviewing the beneficiary’s earning statements for the time she participated in the training program for the petitioner, she worked overtime in all the statements submitted. The director concluded that the overtime indicated that the beneficiary had participated in productive employment for the petitioner while in H-3 classification.

On appeal, counsel for the petitioner states that the “reason why sometimes Beneficiary had to participate in training for more than 40 hours a week is because that the chemical dyeing process the Beneficiary has to evaluate and observe takes a long time to complete.” Counsel further states that the “trainee has to observe each process test cycles, evaluate and write a report concerning the effectiveness of the batch trial back to the trainers”, and a “typical test batch cycle is 10 hours.”

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 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 copies of the beneficiary's earning statements for the previous year when she was working for the petitioner in H-3 classification. As stated above, the director noted that the beneficiary worked overtime in all the earning statements submitted by the petitioner, and thus the beneficiary was working in productive employment. On appeal, the petitioner explained that the beneficiary had to evaluate and observe the chemical dyeing process that lasts typically ten hours. Counsel's argument on appeal is not sufficient evidence to prove that the beneficiary did not perform productive employment. The training program consists of 40 hours per week and it is not clear why the beneficiary had to work overtime throughout her entire training program rather than observe the chemical process during the training hours. In addition, the petitioner failed to submit a breakdown of the classroom training and on-the-job training for this training program. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

In addition, the petitioner stated in a letter dated October 15, 2007, that the beneficiary will be responsible for "developing new dyeing procedures for the flame resistant process." Thus, the beneficiary will be participating in productive employment and will go beyond the scope of the training program.

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).

Beyond the decision of the director, the petitioner failed to demonstrate that it has an established training program and 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 ten-month training program but the petitioner's outline of the program consists of two pages. The petitioner's description of how the beneficiary would spend the time to cover each topic is explained in a few sentences. 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 beneficiary has already completed two years of training with the petitioner and the petitioner now seeks to extend the training program for an additional ten months. Although requested by the director, the petitioner never submitted sufficient evidence to explain how the new training program will differ from the training program already provided to the beneficiary. 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)).

Furthermore, in response to the director's request for evidence, the petitioner explained that the beneficiary will be trained on a new material patented by the petitioner; however, the "project is of course dependent on getting a patent and will not move forward until the patent is issued." The petitioner did not provide any documentation evidencing that the petitioner received the patent and thus the beneficiary would not be able to complete the proposed training. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Beyond the decision of the director, 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 petitioner stated that once the beneficiary completed the training program, the "beneficiary will research and set up a branch office for the company and lead a new team to expand our business and patent license." The petitioner did not provide evidence to demonstrate that there is a setting in which the beneficiary will be able to use her 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 she 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 the Philippines. 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.