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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



**U.S. Citizenship
and Immigration
Services**

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date:

DEC 13 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 restaurant that seeks to employ the beneficiary as a chef trainee for a period of two years. 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 multiple grounds: (1) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) the petitioner failed to establish that the beneficiary would not engage in productive employment unless such employment is incidental and necessary to the training; (3) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; (4) the petitioner failed to establish that it possesses physical plant space and sufficiently trained manpower to provide the training specified; and (5) the petitioner failed to establish that the beneficiary does not already possess substantial knowledge and skills 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 explained the training program as follows:

The training program that is proposed involves some of [the petitioner's] equipment that is a result of collaboration between our chef and [redacted] a manufacturer of cooling systems, chillers, and temperature-control products. The "anti-griddle," a chilling surface used nightly at [the petitioner], is patent-pending. [redacted] has also provided [the petitioner] with high-speed emulsifiers. Our service ware was custom-designed by a sculptor, [redacted] Detail design studio. To date, [redacted] has created 25 original services pieced for [the petitioner's] use. A very small number of chefs practice a similar type of cuisine, often referred to as molecular gastronomy or hypermodern cooking, which is distinguished by the application of scientific principles to culinary practice. [The petitioner] in particular is distinguished by constant evolution, with more than 180 dishes added to the menu in just less than two years. Although other restaurants offer these types of cuisine, our chef offers a unique variation emphasizing aromatics. We only offer 12-and 24-course tasting menus. Due to the unique nature of our restaurant, equivalent training is not available abroad.

The petitioner also explained that the training program "involves formal classroom training and departmental rotation." The petitioner further stated that the trainees will spend 85% of the time on on-the-job training, 5% of the time in post-service debriefings, 5% of the time in self-study, and 5% of the time in evaluation. The petitioner submitted a two-page outline of the topics to be discussed each week for 2 years, and a brief explanation of techniques that will be utilized during the training.

In response to the director's request for evidence, counsel for the petitioner explained that the petitioner's restaurant "enjoys international acclaim as one of the foremost restaurants for the increasingly popular mode of cooking known as 'molecular gastronomy,' or 'hypermodern cooking.'" The petitioner submitted several articles of the accolades received by the petitioner's chef and the restaurant. Counsel contends that "due to the unique nature of [the petitioner] and the internationally acclaimed expertise of [redacted] equivalent training is simply not available."

In addition, counsel for the petitioner explained the benefits of the training program for the petitioner is that it "provides a key component to Petitioner's ability to staff its kitchen." Counsel further stated that "it is through such programs that up-and-coming chefs gain valuable hands-on experience, and how restaurants can keep their kitchens fully staffed."

On appeal, counsel for the petitioner provides further detail on the training staff and the schedule that the trainees will undergo each day. In addition, counsel provided more detail on the evaluation process of the trainees. The petitioner also submits a letter from the Chef and Co-Owner, Chef [REDACTED]. In the letter, the author explains how the training program differs from the experience the beneficiary previously obtained from other restaurants as follows:

Over ninety percent of the chefs that enter our Chef-in-Training program here at [the petitioner] have been to, and completed culinary school. Past that, they have staged at well-known restaurants and spent time in professional kitchens. That is just the beginning of their professional education and young chefs must follow that experience up with time spent in the best kitchens they can gain access to. The instruction from skilled chefs, as well as rigorous repetition that a Chef-in-Training performs at [the petitioner] is a crucial step in the cementing of their fundamental skills and development of new technique they have not been exposed to.

In addition, Chef [REDACTED] contends that the training provided by the petitioner is not available in Canada. [REDACTED] states that the petitioner has "proprietary techniques, custom-made food preparation pieces, custom serviceware and incredible access to rare ingredients."

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 failed to demonstrate that it has an established training program, and that the petitioner 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. The training outline 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 two-year training program but the petitioner's outline of the program consists of two pages. On appeal, counsel described in further detail the typical daily schedule of instructional training and on-the-job training. Although the petitioner provided a better understanding of the hours the trainee will train, it is not clear what topics, assignments, and rotations the trainee will need to do during the two-year program. The petitioner's two-page training outline is not sufficient to explain what the trainee will do for six hours of instruction and practice prior to the dinner

service, and seven hours of work each evening to prepare the dinner menu, from Wednesday to Sunday, for two years. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis. 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 director also found that 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 AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(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)(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.

The AAO incorporates its previous discussion regarding the vague and generalized description of the training program contained in the record, particularly regarding the rotational assignment portions of the training. In addition, counsel for the petitioner explained in its response to the director's RFE, that the benefits of the training program for the petitioner is that it "provides a key component to Petitioner's ability to staff its kitchen." Counsel further stated that "it is through such programs that up-and-coming chefs gain valuable hands-on experience, and how restaurants can keep their kitchens fully staffed." In addition, the training program includes that the trainee work the night dinner service from Wednesday through Sunday. Counsel acknowledges that the petitioner utilizes the trainees as staff for the kitchen. Although the petitioner claims that hands-on experience is necessary for this type of training, it is not clear why the trainee needs six hours of hands-on experience during the day, in addition to working the entire evening to prepare the dinner service for the restaurant. It appears that the trainee will receive some training but he will also be part of the kitchen staff. Furthermore, without additional information regarding what the beneficiary will actually be doing while he is being rotated through several divisions of the petitioner's kitchen, the AAO concludes that he will in fact 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 he will engage in productive employment beyond that incidental and necessary to the training. The petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(2), 214.2(h)(7)(ii)(A)(3), or 214.2(h)(7)(iii)(E).

The director also noted that the petitioner failed to establish that the proposed training could not be obtained in Canada, the beneficiary's home country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires the petitioner to demonstrate that the proposed training

is not available in the alien's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires a statement from the petitioner indicating the reasons why the proposed training cannot be obtained in the alien's home country and why it is necessary for the alien to be trained in the United States.

The AAO notes that 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 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.

On appeal, counsel for the petitioner states that director failed to "take into consideration that the professional development of a chef relies not only on the practice of technique, but the development of a unique and individual viewpoint." Counsel further states that the "fame of a chef at the level of [REDACTED] is not based upon just his technique, but about his inspiration and how he creatively expresses that inspiration through the medium of food and the perspective of molecular gastronomy."

In addition, the petitioner submitted a letter from [REDACTED] that states that while Canada does in fact have molecular gastronomy restaurants, this training is not available in Canada because the petitioner is "constantly innovating to the point where we are not performing molecular gastronomy, but rather developing and exercising an entire approach and philosophy toward food that ties classical techniques and progressive techniques into an extremely robust dining experience for the guests."

Although Canada may have reputable restaurants that perform molecular gastronomy, the training that will be obtained by the beneficiary is very unique because the trainee will learn the petitioner's specific techniques and specialties created by [REDACTED] is a top chef in the world and has developed his particular style, technique and methods that can only be taught when working with him. In addition, as noted in the letter submitted by [REDACTED], the petitioner has "proprietary techniques, custom-made food preparation pieces, custom serveware and incredible access to rare ingredients." In the present case, however, the reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Moreover, the petitioner in this particular case has submitted sufficient evidence to demonstrate that its business practices are sufficiently unique that such knowledge could not be obtained at another restaurant. The AAO finds that, in this case, the petitioner has established that the proposed training is not available in Canada, and finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Accordingly, the AAO withdraws that portion of the director's decision stating the contrary.

The director found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The director noted that the petitioner failed to submit an organizational chart and floor plan as requested in the RFE. The AAO finds that the petitioner

has overcome the concerns of the director regarding its physical plant and sufficient manpower. The petitioner submitted a floor plan and an organizational chart which shows sufficient space and manpower to train the beneficiary. The AAO finds the information of record, including the evidence and explanations submitted on appeal, reasonable. Therefore, the AAO withdraws that portion of the director's decision.

The director found that 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 the director's denial decision, she noted that the beneficiary received a Cuisine Diploma from Le Cordon Bleu Ottawa Culinary Arts Institute and has several years of work experience in restaurants. Although it is true that the beneficiary has a degree and work experience in the culinary industry, the beneficiary can learn new techniques and methods by training with Chef [REDACTED]. As noted above, the training received from this prestigious chef would provide training that the beneficiary does not already possess. The AAO will withdraw the director's decision on this specific issue.

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.