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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: NOV 19 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 engaged in hardware sourcing, importing and distribution, and it seeks to employ the beneficiary as a trainee for a period of twelve 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.

On October 16, 2009, the director denied the petition on three grounds: (1) the petitioner failed to establish that the beneficiary would not receive training provided primarily at or by an academic or vocational institution; (2) the petitioner failed to establish that the beneficiary would not be engaged in productive employment beyond that which is incidental and necessary to the training; and (3) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. 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 a letter of support, dated August 26, 2009, the petitioner stated that the training program will “provide the trainee with the first-hand knowledge of the processing in the business of international sourcing, importing and distribution of industrial materials and products in the United States.” The petitioner also explained the purpose of the training program as follows:

Since 2006, [the beneficiary] has been retained at freelance by [the petitioner] to assist its personnel in China and Mongolia for business interpretation/translation, travel arrangements, and certain activities in preliminary sourcing/following up with factories. [The beneficiary’s] multilingual ability quickly made her a valuable necessity for [the petitioner] to improve sourcing business in Asia. However, we do have an obstacle [to] overcome in order to more effectively working [sic] with [the beneficiary] in China-Mongolia region because she needs more first-hand knowledge in metal hardware items’ production process, industrial usage, quality assurance issues, and business transactional issues (marketing, international/domestic shipping and receiving, packaging, invoicing, quality inspection, customer services, etc.). Therefore, we determined that further training for [the beneficiary] in these fields will be beneficial for her working as an affiliate in Mongolia and China in future to facilitate [the petitioner’s] sourcing and importing business, and we have set forth a training program for [the beneficiary] for this purpose.

The petitioner also submitted a training manual that is divided into the following three parts: (1) In-House Training (Concentrated in the initial 3 months from September – December 2009); (2) Industrial Seminar, Field Training & Trade Show (Spread out in a period from September 2009 to March 2010); and, (3) Classroom training at local colleges (after in-house training; concentrated in period from January – July 2010).

On September 9, 2009, the director requested for further evidence to establish eligibility for H-3 classification.

In a response letter, dated September 29, 2009, the petitioner explained that the beneficiary “will not be involved in any productive work and will not displace any U.S. worker because her training program is mostly the observation on daily business transaction, attending various trade shows and seminars, and attending short courses at local colleges on selected topic related to our business operation.”

The petitioner also contends that training at or by an academic institution is only prohibited if it is “all” of the training program. In addition, the petitioner stated that the classroom training “is only one of three parts of our entire program.” The petitioner also stated that since the training plan “does not require the beneficiary to spend all of her time (but rather, only part of it and less than 50% of entire time) in the college classes,” the training program complies with the regulations.

On appeal, the petitioner submitted a modified schedule of the training program that would start on January 24, 2010 and end on February 18, 2010. The modified training program is for one month as compared to the twelve-month program previously submitted, and it eliminates several of the parts of the training program as listed in the first training outline. As a preliminary matter, on appeal, a petitioner cannot offer a completely new training program from the one submitted with the initial petition. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services’ requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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). Since the petitioner cannot materially change the training program on appeal, the analysis in this decision will be based on the twelve-month training program as submitted with the initial petition.

Upon review, 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 establish that the beneficiary would not receive training provided at, or by, an academic or vocational institution. The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E)(I) states that “[a]n H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution (emphasis added)”

In the petitioner’s outline of the twelve-month training program, it stated that one of the three parts of the program will be classroom training at local colleges. The outline indicated that the classroom training will be “concentrated in a period from January – July 2010.” Courses will be taken at Concordia University, Maryville University, and the University of Missouri-Columbia for a total of 23 credits. In response to the RFE, the petitioner claims that the regulations only limit training provided at or by an academic institution if it will consist of the entire training program. However, as noted above, the regulations utilize the word “primarily” and not “all.” According to the training program, the beneficiary will have to take a full course load at academic institutions for over six months out of the twelve-month training program.

The director denied the petition on the basis that the petitioner had failed to establish that the beneficiary would not receive training at, or by, an academic institution. The petitioner was put on notice of this deficiency of the petition. On appeal, the petitioner did not discuss this issue

and instead provided a new training program that eliminated all courses at the local universities. 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). 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)).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

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)(3) 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)(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 response to the RFE, the petitioner stated that the beneficiary will not engage in productive employment; however, the petitioner did not provide sufficient evidence to substantiate this claim. In addition, on appeal, the petitioner did not submit any evidence regarding this issue. Instead, the petitioner provided a completely new training program outline. Again, 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. at 165. As such, the petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(3), or 214.2(h)(7)(iii)(E).

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 twelve-month training program that is divided into three parts. Although the petitioner submitted a training outline with topics to be discussed in each module, much of the training is general to all business operations and not specific to the petitioner's business activities. In addition, it appears that half of the program will consist of classroom instruction and the other half will be supervised/practical training; however, the petitioner did not explain sufficiently what the practical training will consist of for 50 percent 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. 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. Therefore, it has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

In addition, the petitioner did not provide a clear explanation of how the beneficiary will be evaluated throughout the training program. The training program outline, for example, does not provide the 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 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.