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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE **DEC 13 2013**

OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director (the director) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a seven-employee accounting firm established in 2004. In order to employ the beneficiary in what it designates as an accounting trainee position for a period of 24 months, the petitioner seeks to classify her as a nonimmigrant alien 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 director denied the petition, concluding that the evidence of record had failed to establish: (1) that the training program was not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (2) that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (3) 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 (4) that the beneficiary does not already possess substantial training and expertise in the proposed field of training.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has overcome the director's finding that the petitioner failed to establish that the proposed training program was not designed in order to recruit and train aliens for the ultimate staffing of domestic operations in the United States. Accordingly, the AAO withdraws that particular finding. However, the evidence of record does not overcome the director's remaining three grounds for denying the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds three additional aspects which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely, the failure of the evidence of record to establish: (1) that the proposed training is not available in the beneficiary's own country; (2) that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training; and (3) that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation.<sup>1</sup> For these additional three reasons, the petition must also be denied.

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these three additional grounds for denial.

**I. Law**

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)(1)(ii)(E) states, in pertinent part, the following:

An 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. . . .

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part, the following:

- (i) *Alien trainee.* The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. This category shall not apply to physicians, who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.

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- (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.

## II. The Proposed Training Program

In its October 15, 2012 letter of support, the petitioner described the objective of the proposed training program as follows:

The purpose of this training is to prepare [the beneficiary] for a position in our affiliate offices in Paris, France in order to assist our Paris affiliate office in advising French clients regarding the interface of the French and U.S. tax systems in coordination with our certified accountants in France[.]

The petitioner further described the proposed training program as follows:

[T]he trainee will work out of the accounting unit in our Miami office under close supervision of the accounting supervisors. The trainee will also be exposed to taxation and bookkeeping methods as well. Our tax and accounting units usually share the same clients and often work hand in hand. The Trainee will train with our accounting team on a portfolio of French and European clients and U.S. subsidiaries of French and European companies. This accounting team advises our multinational clients as to their bilateral tax situation and how to most effectively manage their tax matters, particularly between France and the United States.

In a program description attached to the letter of support, the petitioner explained that the training program would be split into two phases: (1) Classroom Instructional; and (2) Rotational Training. The petitioner explained further that the second phase would be further split into four parts. The petitioner, however, provided conflicting information regarding the actual structure of the training program. For example, the petitioner stated at the top of the second page of the training program description that the second phase of the training program would extend from the fourth month of the program to the twenty-fourth, a period of 20 months. However, the petitioner then proceeded to offer a 24-month description of the second phase. The total length of the two phases, therefore, is unclear. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Regardless of the actual length of the Classroom Instruction phase of the training program, the petitioner claimed that, during this second phase, the beneficiary would be trained on the following

principles:

- Individual business disciplines and their relationships to the global business environment;
- The creation and analysis of financial statements based upon generally accepted accounting principles (GAAP);
- Basic U.S. tax laws as applied to businesses and individuals;
- The attestation function and GAAP;
- Basic concepts of cost and managerial accounting, and their roles in business;
- Application of mathematical concepts and technology in order to interpret, understand, and communicate quantitative data;
- Application of conceptual framework, economic reasoning, and GAAP to accounting problems;
- Analysis and interpretation of economic and financial events for internal decision-making purposes;
- Methods of attesting to the fairness of financial representations and the adequacy of internal controls;
- Preparation of basic individual and business tax returns;
- Application of U.S. tax laws for tax planning purposes; and
- Effective production, interpretation, and analysis of written text, oral messages, and multimedia presentations used in business;

Regardless of the actual length of the Rotational Training phase of the training program, the petitioner claimed that this phase would be broken into four parts.<sup>2</sup> The petitioner described this Rotational

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<sup>2</sup> Again, the petitioner provided conflicting information regarding the length of this phase of the training program. After stating that the Rotational Training phase of the program would last from the fourth through the twenty-fourth months of the training program (a total period of twenty-one months), the petitioner then stated that it would begin during the first month. The petitioner also stated that each of the four phases of the Rotational Training phase of the program would last for six months, for a total of twenty-four months, which further conflicts with its statement that the entire Rotational Training phase would only last twenty months. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

phase of the training program as follows:

With knowledge taken from classroom instruction, the trainee will be assigned on a rotational basis between various departments [of the petitioner's business] including tax planning, tax preparation, financial planning, business planning, and counsel to French-U.S. tax structures.

The petitioner stated that, in addition to applying the principles learned during the Classroom Instructional phase of the training program, the beneficiary would also gain exposure to the following during Part One of the Rotational Training phase of the training program:

- Bookkeeping and accounting methods governed by the GAAP;
- Translation from U.S. accounting principals to European accounting principles, and vice versa; and
- U.S. tax principles.

The petitioner stated that, in addition to applying the principles learned during the Classroom Instructional phase of the training program, the beneficiary would also gain exposure to the following during Part Two of the Rotational Training phase of the training program:

- Classification of expenses (by nature in France, by function in the U.S.);
- Revenue recognition; and
- Inventory valuation.

The petitioner stated that, in addition to applying the principles learned during the Classroom Instructional phase of the training program, the beneficiary would also gain exposure to the following during Part Three of the Rotational Training phase of the training program:

- Retirement funds and pension plans;
- Depreciation of immaterial assets; and
- Leases.

The petitioner stated that, in addition to applying the principles learned during the Classroom Instructional phase of the training program, the beneficiary would also gain exposure to the following during Part Four of the Rotational Training phase of the training program:

- Deferred taxation;

- Linking with tax returns (very narrow in France, very loose in the U.S.); and
- Formats.

Finally the company described two objectives of the training program:

- a. By the end of her stay, the trainee should be completely familiar with what is involved in preparing a company's financial statements as well as how to prepare both U.S. corporate and individual tax returns. She will also be familiar with how to set up and incorporate a company in the U.S. The trainee will acquire knowledge and skills not available to her in her home country of France.
- b. The company would like to benefit from the skills and new ideas of the trainee, as well as to expose its American employees and clients to a foreigner's view point and work ethic. The company can benefit from the trainee's experience with French accounting and taxation. . . .

### **III. Training Program Designed to Recruit and Train Aliens for Ultimate Staffing of Domestic Operations in the United States**

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) forbids approval of a petition where the evidence of record fails to establish that the training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. In reaching his conclusion that 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes approval of this petition, the director identified "the vague information provided in the training program."

As will be discussed in further detail below, the AAO agrees with the director that the evidence of record fails to describe the proposed training program in sufficient detail. However, the AAO nonetheless disagrees with the director's findings with regard to 8 C.F.R. § 214.2(h)(7)(iii)(F).

The record does not indicate that the petitioner designed this training program in order to train aliens so that it may ultimately employ them in the United States. The petitioner has set forth its objective in providing the training to the beneficiary, which is "to prepare [the beneficiary] for a position in our affiliate offices in Paris, France in order to assist our Paris affiliate office." The record also contains a letter from that affiliate office stating its intent to hire the beneficiary upon her return to France. While not sufficient to establish every element of the petitioner's claim, the evidence of record nonetheless satisfies 8 C.F.R. § 214.2(h)(7)(iii)(F) in that it establishes the training program was not designed to recruit and train aliens for the ultimate staffing of the petitioner's domestic operations in the United States. Therefore, this portion of the director's decision is hereby withdrawn.

### **IV. Sufficiently Trained Manpower to Provide the Training Specified in the Petition**

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) forbids approval of a petition where the evidence of record fails to establish that the petitioner has sufficiently trained manpower to provide the training specified in the petition.

In its October 15, 2012 letter of support, the petitioner provided the names of five individuals who would conduct the training. According to the petitioner, two individuals – [REDACTED] and [REDACTED] – would conduct the classroom instructional phase of the training program, and three individuals – [REDACTED] – would conduct the rotational, on-the-job training phase. However, in the document entitled “H-3 Training Program” attached to that letter, the petitioner identified only [REDACTED] as “supervisors and instructors.” Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. This lack of clarity was intensified with the petitioner’s response to the director’s RFE. Although the petitioner maintained its earlier assertion regarding the roles of [REDACTED] it stated that two individuals – [REDACTED] – would conduct the rotational, on-the-job training phase. *See id.* On appeal, counsel contends that [REDACTED] would coordinate all of the beneficiary’s training, and refers to him as the petitioner’s Head of Training, and identifies [REDACTED] as training supervisors. Counsel makes no reference to [REDACTED]. *See id.*

The petitioner has changed its description of who would provide the training with each submission to USCIS. For this reason alone, the AAO finds that the evidence of record has failed to establish that the petitioner has sufficiently trained manpower to provide the training specified in the petition. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

The evidence of record also fails to establish that the petitioner has sufficiently trained manpower to provide the training specified in the petition for an additional reason: its lack of explanation as to how the trainers will be able to attend to their normal job duties while simultaneously training the beneficiary. The petitioner stated on the Form I-129 and in its October 15, 2012 letter of support that it has seven employees. In his decision denying the petition, the director noted the petitioner’s staff of seven, and stated the following:

Based upon the limited staffing of your company it cannot be determined that your company has the physical plant<sup>3</sup> and sufficiently trained manpower to provide [the training specified in the petition] to the beneficiary.

<sup>3</sup> To the extent the director indicated that the petitioner lacks the physical plant to provide the training specified in the petition, such comments are withdrawn, as the AAO finds the evidence of record to raise no such concerns.

On appeal, counsel argues as follows:

[Y]ou [(the director)] indicate that the Petitioner currently employs seven workers. In fact the Petitioner has 13 employees in its Miami office . . . Furthermore, the Petitioner has affiliate offices in New York, San Francisco, Los Angeles[,] and Atlanta which would add well over 20 additional employees to the Petitioner's group in the U.S.

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[Y]ou [(the director)] make multiple references to the Petitioner only having 7 employees . . . and then deduce that there are not ample resources to operate the Petitioner's training program. In fact, Petitioner has 13 employees[.]

These assertions are not persuasive for two reasons. First, counsel's assertions conflict with those made by the petitioner: again, the petitioner stated on the Form I-129 and in its October 15, 2012 letter of support that it has seven employees. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Without documentary evidence to support the claim,<sup>4</sup> 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). Therefore, counsel's assertions on appeal regarding the petitioner's size merit no weight.<sup>5</sup>

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<sup>4</sup> Counsel's submission of an organizational chart listing thirteen employees is acknowledged. However, this organizational chart represents a claim made by the petitioner than evidence to support that claim, and the record of proceeding lacks documentary evidence to establish or corroborate the new claim that the petitioner's staff nearly doubled in size between October 15, 2012, the date the petitioner signed the Form I-129 and accompanying letter of support, and March 21, 2013, the date of counsel's assertions. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

<sup>5</sup> With regard to counsel's claims regarding the petitioner's staffing levels of its New York, San Francisco, Los Angeles, and Atlanta offices, it must be noted further that, even if the petitioner were to submit evidence verifying the staff it employs in these offices, no mention of such personnel playing any role in the training of the beneficiary was made until the appeal. Again, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. at 176.

Moreover, and at a more foundational level, the evidence of record simply does not explain how the job responsibilities of the individuals who will provide the training will be performed while they are training the beneficiary. For examples, the petitioner stated on the Form I-129 and again in its letter of support that it has seven employees, and the evidence of record indicates that there will be at least four trainees taking part in the training program. The evidence of record does not demonstrate how these two individuals, whoever they may be, would perform their normal job duties if – as asserted – they will provide five hours of classroom instruction to the trainee (and presumably, the other trainees) on a daily basis for three months, and for three hours per day for the following 20 months.

As the evidence of record lacks an explanation as to how the trainers will perform their normal job duties while providing the training, it fails to establish that the petitioner has sufficiently trained manpower to provide the training specified in the petition. Approval of this petition is consequently forbidden by 8 C.F.R. § 214.2(h)(7)(iii)(G). Accordingly, the appeal will be dismissed and the petition denied on this basis.

**V. Placement into Position Within the Normal Operation of the Petitioner's Business**

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) forbids approval of a petition in which the evidence of record fails to establish 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.

In denying the petition on this ground, the director highlighted his earlier finding with regard to the petitioner's failure to demonstrate that it has sufficiently trained manpower to provide the training specified in the petition. Specifically, the director stated that "[i]t is not evident that your company has a staff of employees who would be devoted to providing training to the beneficiary."

In rebuttal to the director's observation that it did not have any employees devoted to providing the training, counsel contends on appeal that [REDACTED] would coordinate all of the beneficiary's training, and counsel refers to Mr. [REDACTED] as the petitioner's Head of Training. Again, however, that assertion conflicts with the evidence submitted by the petitioner prior to the appeal. [REDACTED] was not identified by the petitioner as playing any role in the training program in its initial submission, and in its RFE response only identified him as one of two individuals who would conduct the rotational, on-the-job training phase. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Counsel's assertion that [REDACTED] would coordinate all of the beneficiary's training, and his reference to that individual as the petitioner's Head of Training, will be accorded no weight.

However, the petition would still be denied under 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) if these questions were not present, as the record indicates that the beneficiary would indeed be placed into a position which is in the normal operation of the petitioner's business, and in which citizens and resident workers are regularly employed. The record indicates that such would be the case during the

Rotational Training phase of the training program which, as noted above, would last for an undetermined period of time. The statements made by the petitioner when it filed the petition indicate that the beneficiary would receive limited direct supervision during this period of time. First, the petitioner repeatedly refers to this portion of the training as “on-the-job training,” indicates that the training during this portion of the training program would consist solely of the beneficiary “accompanying” the trainers, and states that such training would “only tak[e] limited time away” from the trainers’ normal duties. Moreover, in the training program outline it submitted when it filed this petition, and again on appeal, the petitioner stated the following:

**The use of “on-the-job”** training methods are preferable to a strictly theoretical approach for this training position, as in accounting and taxation, every situation is different, and there is always something new to learn. It is not always easy to apply what one learns in a book to the actual situation. This applies particularly in accounting and tax preparation. The trainee will be able to benefit from the knowledge of those around her[.]

It is conceded that practical day-to-day experience will increase proficiency in any line of endeavor. However, the statute involved here is one that contemplates the training of an individual rather than providing further experience by day-to-day application of skills. *Matter of Masuyama*, 11 I&N Dec. 157, 158 (Reg. Comm’r 1965). While it is conceded that practical experience will increase a person’s efficiency in any line of endeavor, the intent of the statute involved here is to train rather than to gain experience. *Matter of Koyama*, 11 I&N Dec. 424, 425 (Reg. Comm’r 1965).

The record indicates that the beneficiary would spend the overwhelming majority of her time in on-the-job training rather than in actual, structured classroom instruction. The record indicates further that the supervision she would receive during such on-the-job training would be minimal, given that such training would “only tak[e] limited time away” from the trainers’ normal duties. The record therefore indicates that the beneficiary would spend the majority of her time in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed. The petitioner has therefore failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(2). Accordingly, the appeal will be dismissed and the petition denied on this basis.

## VII. Substantial Training and Expertise in the Proposed Field of Training

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) forbids approval of an H-3 petition filed on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

A reliable evaluation contained in the record of proceeding equates the beneficiary’s undergraduate degree, which she earned from a French institution in 2008, to a bachelor’s degree in financial accounting awarded by an accredited institution of higher education in the United States. According to her resume, the beneficiary spent the next two years “[w]orking in a chartered-accountancy office in Paris[.]” The beneficiary then entered the United States as a J-1 exchange visitor, and began working for the petitioner pursuant to her J-1 status, in June 2011. The beneficiary’s Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status lists the

“Subject/Field Code” of her training as “Accounting.”

The director raised this issue in his RFE, and the petitioner provided the following response:

The beneficiary pursued a J-1 intern/training program with the petitioner, however this was a very general overview of the company’s operations and activities. The purpose of this 24 month H-3 training program is to provide the beneficiary with a much more in depth understanding and knowledge of the petitioner’s accounting services and the detailed manner in which it renders such services. . . .

Counsel makes similar assertions on appeal:

The Beneficiary’s previous J-1 experience with the Petitioner only provided a superficial overview of the accounting and tax principles, methodologies, and procedures that would be needed to effectively carry out the American desk position at [the petitioner’s French affiliate].

The AAO is not persuaded by these broad, and unsupported, statements. Given the beneficiary’s education, training, and employment in the accounting field, both in the United States and in France, such broad statements are not sufficient to distinguish the knowledge of accounting principles the beneficiary already possesses from those she would learn in the training program. The petitioner has not established that knowledge of accounting principles the beneficiary already possesses would differ substantially from the training proposed here. Again, it is conceded that practical day-to-day experience will increase proficiency in any line of endeavor. However, the statute involved here is one that contemplates the training of an individual rather than providing further experience through the day-to-day application of skills. *Matter of Masauyama*, 11 I&N Dec. 157 at 158. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(C). Accordingly, the appeal will be dismissed and the petition denied on this basis.

#### **VIII. Unavailability of Similar Training in the Beneficiary’s Own Country**

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) forbids approval of a petition in which the evidence of record fails to establish that similar training is unavailable in the beneficiary’s own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which 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. The beneficiary of the instant petition is a citizen of France.

In its October 15, 2012 letter of support, the petitioner stated the following:

We have implemented a tax training program to respond to a growing demand of clients in France for bilateral tax services. Such [t]raining is not available in France.

The petitioner’s foreign affiliate made a similar assertion in its letter, which was also dated October 15, 2012.

While the assertions of the petitioner and its overseas affiliate are acknowledged, the record contains no documentary evidence supporting either assertion. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5). Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

#### IX. Productive Employment Beyond That Incidental and Necessary to the Training

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires the evidence of record to demonstrate that “[t]he beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and as a corollary, 8 C.F.R. § 214.2(h)(7)(iii)(E) forbids approval of a training program which “[w]ill result in productive employment beyond that which is incidental and necessary to the training.”

The AAO has already found that the evidence of record indicates that the beneficiary would spend the majority of her time in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed. As noted above, the evidence of record indicates that the beneficiary would spend the overwhelming majority of her time in on-the-job training rather than in actual, structured classroom instruction. The record indicates further that the supervision she would receive during such on-the-job training would be minimal, given that such training would “only tak[e] limited time away” from the trainers’ normal duties. This portion of the “training,” therefore, appears more akin to productive employment.

Productive employment is not prohibited under the H-3 program. However, the issue here is whether the beneficiary will engage in productive employment beyond that incidental and necessary to the training, which is expressly prohibited by 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(3) and 214.2(h)(7)(iii)(E). A petitioner’s belief that a certain percentage of time in productive employment is *necessary*, as appears to be the case here, is not sufficient; the petitioner must also demonstrate that, in fact, that amount of productive employment would be necessary, and that it would also be only incidental. The two definitions of “incidental” in *Webster’s New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are “1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . .”

The record indicates that the beneficiary would spend the majority of her time in productive employment, and the AAO finds that it lacks evidence showing that devotion of such a high percentage of her time to such productive employment is either necessary or “incidental” under either definition described above.

The evidence of record therefore fails to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) and 8 C.F.R. § 214.2(h)(7)(iii)(E). Thus, even if it were determined that the petitioner had overcome each of the

director's grounds for denying this petition (which it has not), the petition could still not be approved.

**X. Generalities with No Fixed Schedule, Objectives, or Means of Evaluation**

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) forbids approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation."

Upon review, the AAO does not find the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A), as it does not make clear what the beneficiary would actually be doing while taking part in the petitioner's proposed training program. As a preliminary matter, the AAO again highlights the inconsistencies in the petitioner's various identifications of the individuals who would provide the training, as well as its inconsistencies with regard to the length of the various phases of the program. Such inconsistencies are not indicative of a program with a fixed schedule.

The AAO notes further that the petitioner's description of how the beneficiary would spend her time consists primarily of general concepts presented in bullet-pointed fashion. The record of proceeding lacks a substantively informative description, which extends beyond generalities, of what the beneficiary would actually be doing on a daily basis while participating in the training program.

While the petitioner is certainly not required to provide an exhaustive plan accounting for each minute of the beneficiary's time, in this case it has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing on a daily basis while participating in the training program. It has failed to demonstrate that the proposed training does not deal in generalities, as required by 8 C.F.R. § 214.2(h)(7)(iii)(A). Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

**XI. Prior H-3 Approvals Issued to the Petitioner**

In support of its claim that the petition should be approved, the petitioner states that USCIS has approved several H-3 petitions it has filed in the past. Copies of these allegedly approved petitions, however, were not included in the record. If a petitioner wishes to have unpublished service center or AAO decisions considered by USCIS in its adjudication of a petition, the petitioner is permitted to submit copies of such evidence that it either obtained itself and/or received in response to a Freedom of Information Act request filed in accordance with 6 C.F.R. § 5.

Again, the petitioner in this case failed to submit copies of these petitions and their respective approval notices. As the record of proceeding does not contain any evidence of the allegedly approved petitions, there were no underlying facts to be analyzed and, therefore, no prior, substantive determinations could have been made to determine what facts, if any, were analogous to those in this proceeding.

When any person makes an application for a “visa or any other document required for entry, or makes an application for admission [ . . . ] the burden of proof shall be upon such person to establish that he is eligible” for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. at 190. Furthermore, any suggestion that USCIS must review unpublished decisions and possibly request and review each case file relevant to those decisions, while being impractical and inefficient, would also be tantamount to a shift in the evidentiary burden in this proceeding from the petitioner to USCIS, which would be contrary to section 291 of the Act, 8 U.S.C. § 1361. Accordingly, neither the director nor the AAO was required to request and/or obtain a copy of the allegedly approved petitions cited by the petitioner.

Nevertheless, even if this evidence had been submitted and even if it had been determined that the facts in those cases were analogous to those in this proceeding, those decisions are not binding on USCIS. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO’s authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

## XII. Conclusion

The petitioner has overcome the director’s finding that it failed to establish that the proposed training program was not designed in order to recruit and train aliens for the ultimate staffing of domestic operations in the United States. However, the evidence of record does not overcome the director’s remaining three grounds for denying the petition. Consequently, the appeal will be dismissed and the petition will be denied. Additionally, and beyond the decision of the director, the AAO finds that the evidence of record also fails to establish: (1) that the proposed training is not available in the beneficiary’s own country; (2) that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training; and (3) that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. Each of these additional reasons precludes approval of the petition.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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