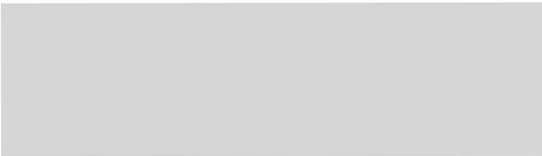




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 28 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 
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:

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,

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 The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

I. BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a 500-employee marketing company¹ established in [REDACTED]. In order to place the beneficiary in what the petitioner designates as a "Trainee" position for a period of 24 months, the petitioner seeks to classify her as a nonimmigrant 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 this petition, concluding that the evidence of record does not establish: (1) that similar training is unavailable in the beneficiary's own country; (2) that the beneficiary does not already possess substantial training and expertise in the proposed field of training; and (3) that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training.

The record of proceeding before us 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, as expanded by the petitioner's submissions on appeal, we find that the evidence of record as now constituted overcomes the director's determination that the petitioner did not establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training. Consequently, we withdraw this ground as a basis for denying this petition. However, as will be discussed below, the evidence of record does not overcome the director's remaining two grounds for denying the petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

II. STANDARD OF PROOF

In the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

¹ The petitioner describes itself on appeal as a "single-level direct sales group."

* * *

The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id. at 375-76.

Again, we conduct our review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. In doing so, we apply the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon our review of the present matter pursuant to that standard, however, we find that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Upon our review of the entire record of proceeding, and with close attention and due regard to all of the evidence, separately and in the aggregate, submitted in support of this petition, we find that the evidence of record does not establish that the petitioner's claim to satisfying the H-3 program requirements is "more likely than not" or "probably" true.

III. 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:

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 regulations directly addressing the H-3 alien-trainee program appear at 8 C.F.R. § 214.2(h)(7). The definitional provision, which is contained at 8 C.F.R. § 214.2(h)(7)(i), states the following:

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.

The particular rules governing petitions for H-3 trainees are divided into two major parts. They are:

- "Evidence required for petition involving alien trainee" - at 8 C.F.R. §§ 214.2(h)(7)(ii)(A) ("Conditions") and (h)(7)(ii)(B) ("Description of training program"); and
- "Restrictions on training programs for alien trainee" - at 8 C.F.R. § 214.2(h)(7)(iii).

Subparagraph (A) of the section on required evidence, which is contained at 8 C.F.R. § 214.2(h)(7)(ii), states the *conditions* as follows:

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.

Subparagraph (B) of 8 C.F.R. § 214.2(h)(7)(ii), specifies aspects of the training program that must be described in the record. It states the following:

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 [(a)] why such training cannot be obtained in the alien's country and [(b)] 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.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii), *Restrictions on training program for alien trainee*, provides a list of characteristics that would preclude an H-3 training plan from being approved as a valid basis for an H-3 trainee petition. The regulation reads as follows:

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.

IV. THE PETITIONER AND ITS PROPOSED TRAINING PROGRAM

In its July 22, 2014 letter of support,² the petitioner described itself as "a single-level direct sales group that builds its work force through advertising via newspapers, direct marketing, word-of-mouth, posted advertisements, letters[,] and various media on the internet." The petitioner explained that it is "the sales arm of [REDACTED]; an [REDACTED] New York based cutlery manufacturer." It provided a detailed history of its operations dating to 1947, and noted that it has been operating in Canada since 1990.

The petitioner claimed on the Form I-129 that it has experienced "considerable retention problems with its employees and wants to know why." In its July 22, 2014 letter, the petitioner explained that it has two goals for the training program: (1) to provide itself with the "keys to success to ensure increased trainee retention"; and (2) to provide the beneficiary "with the tools to operate a successful marketing training operation in her country of residence."³

² The petitioner claimed in this letter that the beneficiary's "trip to the United States to complete the Petitioner's training program will be the Beneficiary's first visit to the United States." However, the evidence of record indicates that the beneficiary earned a bachelor's degree from [REDACTED] in [REDACTED] California in 2013 and that she was employed in [REDACTED] California as an assistant industrial production manager for nearly a year following her graduation. 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). This inconsistency diminishes the probative value of the petitioner's assertions made in support of the petition.

³ The petitioner's July 22, 2014 statement that the training is intended to equip the beneficiary with the skills to operate a marketing training operation "in her country of residence" is noted. In that same letter, the petitioner stated that the beneficiary resides in India. However, the petitioner did not provide an Indian address for the beneficiary at page 3 of the Form I-129. The petitioner also stated at page 3 of the Form I-129 that if the petition is approved, the beneficiary wishes to obtain an H-1B visa in [REDACTED] Vietnam. It is therefore not clear whether the petitioner's claim is that the beneficiary intends to "operate a successful marketing operation" in India, her claimed country of residence, or in Vietnam, her country of citizenship. Given that all of the petitioner's evidence with regard to 8 C.F.R.

The petitioner stated that the beneficiary would spend sixty percent of her time in classroom training, fifteen percent of her time in practical training, ten percent of her time in "marketplace exposure," and fifteen percent of her time attending industry conferences and seminars.

The petitioner submitted a program outline when it filed the petition, and it supplemented that outline in its response to the director's RFE.

V. ANALYSIS

We shall now discuss why, based upon our complete review of this entire record of proceeding, we have determined that the appeal must be dismissed.

A. The Unavailability Issue

As a condition for approval of a H-3 petition for an alien trainee, 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 beneficiary's "own country"; and the provision at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons (1) why such training "cannot be obtained in the alien's country" and (2) "why it is necessary for the alien to be trained in the United States."

The petitioner stated the following in its July 22, 2014 letter:

The Petitioner's training program is not available in Vietnam because the business model employed by the Petitioner that is exemplified in the training program is specific, if not to the Petitioner alone, but certainly to the United States. Such a well-organized and seamless direct sales model is unique to the Petitioner. The training program which is designed to road map the trainee's progression from trainee to management is also unique to the Petitioner.

In its August 19, 2014 letter, the petitioner stated that its training program "is unique in the United States to our company."

As evidence that the training is unavailable in Vietnam, the petitioner submitted two letters. The first letter was from [REDACTED] who wrote in his capacity as an employee of [REDACTED] a company with offices in [REDACTED] and [REDACTED] Vietnam. The second letter came from [REDACTED] an instructor at [REDACTED] in Vietnam.

In his August 15, 2014 letter, Mr. [REDACTED] explained that [REDACTED] specializes in

§ 214.2(h)(7)(ii)(A)(1) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) relates to Vietnam rather than to India, we will assume that she intends to return to Vietnam to operate her marketing business.

developing direct communication services with a focus on four areas: (1) full media service; (2) content management; (3) exclusive media formats; and (4) entertainment and direct communication. After discussing the company's business activities, Mr. [REDACTED] stated the following:

[T]he education in Vietnam is mainly focusing on knowledge without applications or experiences. Students are taught in classroom with no hands on experience. They lack soft skills in: listening, team work, communication, problem solving, confidence, consulting, and work ethic.

(Quoted verbatim.)

Mr. [REDACTED] letter carries little evidentiary value, as he does not reference the petitioner, the petitioner's industry, or the petitioner's proposed training program. However, even if we set these issues aside the letter would still not satisfy the petitioner's burden, as Mr. [REDACTED] only addresses the Vietnamese education system. Mr. [REDACTED] does not indicate whether similar training would be available outside of the Vietnamese educational system,⁴ such as from private companies who operate in Vietnam.

In his August 13, 2014 letter, Professor [REDACTED] discusses Vietnam's economy under its previous state-managed model, and contrasts that model with the transition to capitalism:

On the other hand, the economy in capitalist market is different. Their productions are determined by the law of supply and demand, which is the nature of society. The government's main objection is to create conditions for people to participate equally in developing the market. All the business models, including productions, sales, as well as marketing plans are efficient.

As Viet Nam opens its doors to international trading corporation, fair competitions are encouraged between private organizations, unions, and state owned. However, the old model of management, under political influences since the 70s, have limited the development of entrepreneurship in Vietnam. The best way to gain experience in business is to work with experts. Hence, the university and its board had agree that hands on experiences from one of the most financial efficient in sales and marketing corporations in the US is necessary.

(Quoted verbatim.)

While more on point that the previous letter, Professor [REDACTED]; letter nonetheless still fails to carry the petitioner's burden of proof. While we will assume that Professor [REDACTED] is referring to the petitioner when he discusses "one of the most financial[ly] efficient in sales and marketing

⁴ The proposed training program in the United States is not offered as part of the educational system of the United States.

corporations in the US," we nonetheless take note of the fact that he does not mention the petitioner by name. More importantly, he does not mention the petitioner's training program, let alone discuss the training program, its contents, or the principles to be imparted in any substantive detail.

For all of these reasons, the letters from Mr. [REDACTED] and Professor [REDACTED] do not satisfy the petitioner's burden of proof with regard to the availability issue. Having made these initial findings, we will turn to the direct questions raised by 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5): (1) whether similar training is available in Vietnam; and (2) whether the training must take place in the United States.

We first find that the evidence of record does not demonstrate that the proposed training is not available in Vietnam. The deficiencies present in the letters from Mr. [REDACTED] and Dr. [REDACTED] – the petitioner's primary evidence with regard to this issue – were set forth previously and need not be repeated. Having discounted these letters, we are left only with the petitioner's assertions regarding the unavailability of similar training in Vietnam, which are not supported by any other evidence.

The petitioner has not explained why similar training could not be obtained from companies operating in Vietnam with a similar business model to that of the petitioner. As noted above, the petitioner stated the following in its July 22, 2014 letter:

[T]he business model employed by the Petitioner that is exemplified in the training program is specific, *if not to the Petitioner alone*, but certainly to the United States.

(Emphasis added.)

The petitioner therefore, indicated that its business model is not unique and emphasizes on appeal that it is "a single-level direct sales group." We have no reason to doubt that the petitioner is not the only single-level direct sales organization in the United States. We therefore agree with the first half of the petitioner's statement. The second half of this claim by the petitioner, i.e., that this business model is "certainly [specific] to the United States," is not substantiated. The petitioner's own website indicates that it operates in Canada, which undermines its claim that its business model is unique to the United States.⁵ Going on record without supporting documentary evidence is not

⁵ Furthermore, we note that several direct-sales companies appear to be conducting business in Vietnam. The website of the [REDACTED] in Vietnam indicates that the organization has an entire section devoted to direct sales known as the "[REDACTED]" The website indicates further that members of the [REDACTED] include several well-known direct-sales companies, including [REDACTED]. See [REDACTED] in Vietnam, [REDACTED] available at [REDACTED] committee-avdsc/ (last visited Mar. 20, 2015). Fairly recent news articles also point to the existence and rise of direct sales in Vietnam. See [REDACTED], Solutions, Industries, Retailing, Country Report, "Direct selling in Vietnam," available at [REDACTED] (last updated Jul. 2014) ("Direct selling is expected to grow by a constant value [compound annual growth rate] of 10% over the forecast period"); [REDACTED] "Direct Selling on the Rise in Vietnam, available at [REDACTED] (last updated Jun. 13,

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's statement regarding the difficulty in "proving a negative" is acknowledged. However, it is required by the regulation, and upon review of all of the evidence contained in the record, both separately and in the aggregate, we find that such evidence does not demonstrate that similar training is unavailable in Vietnam. *See Matter of Chawathe*, 25 I&N Dec. at 375-76.

We will turn next to the second direct question that must be addressed when attempting to satisfy the availability issue – whether the training must take place in the United States. 8 C.F.R. § 214.2(h)(7)(ii)(B)(5). We find that the evidence of record does not establish that the training must take place in the United States. Even if we were to accept that the training is specific to the petitioner (which, as discussed above, we do not), we note that the petitioner's website indicate it has operations in Canada. The petitioner's July 22, 2014 letter states that the petitioner entered that market in 1990. Thus, even if we accepted the claim that the skills to be gained via this training can only be learned from the petitioner, it is not clear why they could not be acquired in that country. The evidence of record, therefore, does not satisfy the second prong of 8 C.F.R. § 214.2(h)(7)(ii)(B)(5).

For all of these reasons, we find that the evidence of record satisfies neither 8 C.F.R. § 214.2(h)(7)(ii)(A)(1), which requires the petitioner to demonstrate that the proposed training is "not available" in the beneficiary's "own country" nor 8 C.F.R. § 214.2(h)(7)(ii)(B)(5), which requires the petitioner to submit a statement indicating the reasons (1) why such training "cannot be obtained in the alien's country" and (2) "why it is necessary for the alien to be trained in the United States." The appeal will therefore be dismissed and the petition denied for this reason.

B. Substantial Training and Expertise in the Proposed Field of Training

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes 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. We find that the evidence of record, including counsel's submissions on appeal, overcomes this ground for denial, and this portion of the director's decision is hereby withdrawn.

C. 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 that the evidence of record demonstrate that "[t]he beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training." As a corollary, 8 C.F.R. § 214.2(h)(7)(iii)(E) forbids

2013). While we do not consider this information in our adjudication of the instant appeal, we note that the petitioner did not submit any evidence to the contrary to support its assertions regarding the lack of direct sales in Vietnam.

approval of a training program which "[w]ill result in productive employment beyond that which is incidental and necessary to the training."

Although productive employment is not prohibited under the H-3 program, "only minimal productive employment is permitted." 55 Fed. Reg. 2606, 2618 (Jan. 26, 1990).⁶

The issue here is whether the beneficiary would engage in productive employment beyond that incidental and necessary to whatever would comprise the training component of the proposed H-3 program, so as to (1) meet the condition at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) (that is, that the beneficiary not be placed in productive employment beyond that incidental and necessary to the training) and (2) not fall within the restriction at 8 C.F.R. § 214.2(h)(7)(iii)(E) against productive employment beyond that incidental and necessary to the training.

As noted above, the petitioner claims that the beneficiary would spend sixty percent of her time in classroom training. The director first found that the evidence of record did not adequately support this claim. The director then noted several claims by the petitioner which, according to the director, indicated that the beneficiary would in fact spend a great deal of time in productive training. For example, the director noted the petitioner's claims that the beneficiary would receive "promotions" during her training and that the beneficiary would be an "assistant manager." The director also stated that many of the beneficiary's duties "would not be substantially different from the duties performed by regular company employees." As noted by the director, however, "[t]he H-3 classification cannot be used to staff U.S. operations."

On appeal, the petitioner contends that the "milestones are representative. They are not actual promotions." The petitions also claims that "[s]adly, USCIS has interpreted these 'real world' milestones as the reality."

Upon review, we agree with the director's decision to deny the petition on this ground. First, we find that the record of proceeding does not support the petitioner's claim that the milestones are only "representative." The petitioner's training program outline specifically states that the beneficiary would receive "assistant manager training" from May 11, 2015 through October 2, 2015, and that following a visit to the petitioner's marketing headquarters, she would be "[p]romote[d] to Sales Manager for the [REDACTED]." The training program outline does not state or otherwise indicate that this would be a "representative" promotion. Rather, considered with the totality of the evidence bearing upon the proposed training program and the beneficiary's roles in it, the milestones appear to indicate actual promotional advancement that is neither just symbolic or "representative" but that is meant in large part as a recognition of the beneficiary's productive employment.

⁶ The legacy Immigration and Naturalization Service (INS) was responding to a comment submitted in response to a proposed regulation. The commenter had "stated that the standard for productive labor should be modified so that it can be realistically involved with the training, and the best way to receive training is to do hands on work." In response, the legacy INS affirmed that "[w]hen a training program is characterized as hands-on training [(as is primarily the case in the instant petition)], it is difficult to establish that the training is not principally productive employment," and that "only minimal productive employment is permitted." *Id.*

Moreover, several of the bullet-pointed skills listed by the petitioner on appeal such as "build[ing] her own customer base from scratch," are indicative of productive employment by the beneficiary. The petitioner asserts that these skills "are within the context of the Petitioner's business model." We agree. However, the fact that they "are within the context of the Petitioner's business model" does not mean they do not exceed the allowable productive-employment threshold, which we find to be the case here.

The evidence of record does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) and 8 C.F.R. § 214.2(h)(7)(iii)(E). Accordingly, the appeal will be dismissed and the petition denied on this basis.

VI. CONCLUSION AND ORDER

On appeal, the evidence of record overcomes the director's finding that the evidence of record does not establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training. Accordingly, the director's adverse determination on that issue is withdrawn as a basis for denying the decision. However, the evidence of record does not overcome the director's remaining two grounds for denying this petition.⁷ Consequently, the appeal will be dismissed, and the petition will be denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *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.

⁷ Because each of these issues independently precludes approval of the petition, we will not address any of the additional deficiencies we have observed on appeal that also preclude approval of the petition.