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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 0 6 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,

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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for further action consistent with this decision.

I. BACKGROUND

The petitioner, which describes itself as a manufacturer of sports lighting, filed this petition to classify the beneficiary as an H-3 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). According to the petition, the beneficiary would be assigned to a "Sales Engineer Trainee" position, whose scope would be limited to participation in the H-3 training program described in the record. The petitioner asserts that the training program will take 24 months to complete, and that after the training the beneficiary will return to Rwanda where he presently works for the petitioner.

The director denied the petition, concluding that the petitioner failed to establish that similar training is unavailable in the beneficiary's own country.

We have reviewed the totality of evidence in the record of proceeding, as expanded by the petitioner's submissions on appeal. We find that counsel's contention on appeal that the evidence of record does not support the basis of the director's decision is correct. Accordingly, the director's decision will be withdrawn. However, we also find that the record of proceeding as presently constituted does not satisfy all of the requirements for approval of an H-3 Trainee petition. Therefore, we will also remand the petition for further adjudication and entry of a new decision.

The record of proceeding contains: (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.

II. THE 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, at 8 C.F.R. § 214.2(h)(7)(i), states:

> *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 found in two parts of 8 C.F.R. § 214.2(h)(7). They are:

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

<u>8 C.F.R. § 214.2(h)(7)(ii)(A): conditions for petition approval</u>

Subparagraph (A) of the section on required evidence at 8 C.F.R. § 214.2(h)(7)(ii), specifies *four conditions* for approval of an H-3 Trainee petition:

> *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.

<u>8 C.F.R. § 214.2(h)(7)(ii)(B): description of training program</u>

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

Description of training program. Each petition for a trainee must include a statement which:

(1) Describes [(a)] the type of training and supervision to be given, and [(b)] 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, [(a)] in classroom instruction and [(b)] 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 [(a)] the source of any remuneration received by the trainee and [(b)] any benefit which will accrue to the petitioner for providing the training.

8 C.F.R. § 214.2(h)(7)(iii): restrictions on training program

The regulation at 8 C.F.R. § 214.2(h)(7)(iii), *Restrictions on training program for alien trainee,* provides a list of *eight* deficiencies, any one of which will 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.

III. THE PROPOSED TRAINING PROGRAM

In the letter dated March 21, 2014, the petitioner described the objective of its proposed training program as follows:

> A primary goal of [the petitioner]'s Sales Engineer Training Program is to provide each Sales Engineer Trainee with advanced training and exposure to the unique technical and sales concepts associated with the Company's sports lighting and service processes. The program has been designed to give each participant the necessary knowledge and experience to perform the functions of a professional sales engineering position in our company-in this case, the role of [the petitioner's] Sales Development Coordinator [in] Rwanda. The training also aims to achieve the following goals and objectives: provide training in the technical aspects of quality, energy efficient sports lighting applications; provide training in the use of [petitioner] engineering related computer programs (i.e. Aim, Engineering Program, Vantage); provide instruction regarding value-added sales processes for sports lighting; provide instruction in sales processes used to effectively sell sports lighting projects; provide instruction in the use of [the petitioner] corporate sales and computer systems (i.e. Scoreboard, FirstClass); provide instruction in the after-sale service processes that support the value-added selling process; and develop and foster working relationships with U.S.-based design, sales and service unit personnel through on-the-job learning activities. [The petitioner] firmly believes that this training program in the United States helps our company achieve goals set forth by the Sales Engineer unit on an international scale, and that the training program is critical to the success of any Project Manager, Sales Engineer or Sales Development Coordinator hired by our company.

IV. DIRECTOR'S DECISION

As indicated above, the "condition" provision at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) requires the petitioner to establish that the proposed training is not available in the beneficiary's own country, and the "restriction on training program" provision at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requires the petitioner to submit a statement to indicate 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 only basis that the director specified for denying the petition was her finding that the petitioner failed to establish that similar training is unavailable in the beneficiary's own country. Upon review of the record of proceeding as expanded by the petitioner's submissions on appeal, we find that the petitioner has overcome that basis for denial. Accordingly, we hereby withdraw the director's decision to deny the petition.

However, the AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In conducting that review we found aspects of the evidentiary record before us that were not addressed in director's decision but that raise issues that may preclude approval of the petition. Accordingly, the petition will be remanded to the director for further adjudication and issuance of a new decision based upon full consideration of the merits of the petition.

The director, of course, retains full authority and discretion in adjudicating the petition pursuant to this remand, subject only to our determination here that the petitioner has satisfied *both* the "condition" provision at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) requiring the petitioner to establish that the proposed training is not available in the beneficiary's own country, *and also* the "restriction on training program" provision at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requiring the petitioner to submit a statement to indicate the reasons why such training cannot be obtained in the alien's own country.

V. ADDITIONAL ISSUES

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

The training-program restriction at 8 C.F.R. § 214.2(h)(7)(iii)(C) prohibits approval of a training program which "[i]s on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training."

Some aspects of the record of proceeding raise the issue of whether the beneficiary already possesses substantial training and expertise in the field of training proposed in the training program.

The record of proceeding indicates that the beneficiary engaged in Curricular Practical Training ("CPT") with the petitioner while pursuing his bachelor's degree in Industrial Technology and Applied Mathematics in , Iowa. The Form I-20 indicates that the duration of employment was from March 14, 2011 to May 4, 2011, and again from May 16, 2011 to August 14, 2011. The petitioner's letter of reply to the RFE asserts that "while at [the petitioner] on CPT[,] [the beneficiary's] time was limited to that authorized under CPT and focused primarily on the engineering based on his program of study." However, the petitioner did not provide further information or documentary evidence regarding the beneficiary's employment during the CPT program.

Further, according to the petition, the beneficiary has been working as the petitioner's Sales Development Coordinator in Rwanda since July 2012 – and, as such, was the petitioner's only presence

in that country. Notably, this petition was filed on April 5, 2014; in other words, at the time of filing, the beneficiary had been employed with the petitioner for almost two years. In the support letter, the petitioner stated that the beneficiary "had minimal technical engineering training with [the petitioner]" during his CPT program and having worked in Rwanda, he "has an understanding of the types of products and projects that work in Central Africa." However, petitioner did not provide further information or documentary evidence regarding the beneficiary's training during CPT or the beneficiary's duties and responsibilities in Rwanda since July 2012.

The director specifically requested this information in the RFE on how the proposed training differs from the expertise that the beneficiary already possesses. In response, the petitioner stated that the beneficiary "has proven to be a valuable employee in Rwanda due to his understanding of the types of products and projects that work in Central Africa based on available infrastructure and perceived need; however, now he needs the opportunity to receive training in the entrepreneurial and sales skills." The petitioner further adds that the beneficiary "will receive specific training on [the petitioner's] policies and procedures required to support and to fully leverage our business opportunities in Africa." The petitioner asserts that it will provide "specialized engineering training relevant to the development and use of its products, including newly developed products and equipment," and that it "will be critical for [the beneficiary] to understand product modifications and options available for use in Africa given currently available and future infrastructure." The petitioner further claims that the beneficiary "does not have sufficient training and expertise in sales and marketing, new products/product development and engineering/technical, field services, project management, or coordination to be the business success we need him to be in Rwanda."

However, the petitioner did not provide any documentary evidence to substantiate its claims. As noted, the beneficiary has been working as the petitioner's Sales Development Coordinator for almost two years in Rwanda. Since the record of proceeding does not contain any substantive documentary evidence of the beneficiary's past employment and training with the petitioner, it is not clear what the beneficiary has been doing for the past two years. Further, without having "sufficient training and expertise in sales and marketing, new products/product development and engineering/technical, field services, project management, or coordination," the petitioner did not explain how the beneficiary "has proven to be a valuable employee in Rwanda."

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. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

This issue is itself an appropriate reason for remanding the petition for further adjudication.

B. The Training Will Benefit the Beneficiary in Pursuing a Career Outside the United States

The regulations at 214.2(h)(7)(ii)(A)(*4*) requires the petitioner to demonstrate that the training will benefit the beneficiary in pursuing a career outside the United States.

In its support letter, the petitioner claims that it "view[s] Africa as an emerging market with tremendous opportunities for our business; therefore, we are in the process of growing our footprint on the African continent." The petitioner further asserts the following:

> After completing the program, [the beneficiary] will return to [the petitioner] Rwanda to continue in the role of Sales Development Coordinator. In this role, [the beneficiary] will support existing customers and products in the Rwandan market; explore and collect information on the sales opportunities for our products in the Central and East African Market; develop relationships with key contacts in this geography; and develop and maintain strong communication in the territory and relationships with key contractors, specifiers, engineers, as well as with the internal sales team and customers. He will plan, coordinate and direct sales operations and project planning to provide support for customers and users; collect/manage client information to assist in the development of marketing plans and sales strategies; liaise with sales team, project team, and customers to keep information in Scoreboard current; ensure accurate and timely communication throughout the duration of the project; understand the company's pricing model, billing procedures, as well as assist in the preparation of our pricing tool for approval; negotiate prices and agreements with customers, including credit terms and collection; and regular reporting to sales team regarding current and future opportunities identified in Central and East African Markets. In all of these duties, [the beneficiary] will reply on the knowledge that he acquires through his training program. **He would be unable to effectively perform his duties at [the petitioner] Rwanda without this training.**
>
> (Emphasis in the original.)

However, the petitioner did not provide substantive information regarding (1) its operations in Rwanda, and (2) its expansion plans in Africa, even though the petitioner claims that the training is tailored for the beneficiary's role in those endeavors. Further, as currently constituted, the record of proceeding does not contain documentary sufficient to (1) substantiate the actual nature and extent of the petitioner's claimed employment of the beneficiary in Rwanda; (2) substantiate the extent to which the beneficiary has been productively employed and paid in Rwanda for the period claimed in the petition, and (3) to substantiate that the proposed training is required for definite, non-speculative employment by the petitioner in Rwanda that would require the approximately two-years training program that the petitioner claims that the beneficiary must have to successfully function in his position in Rwanda. As noted, 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. 165 (citing

Matter of Treasure Craft of California, 14 I&N Dec. 190). Therefore, the petitioner did not establish that the training will benefit the beneficiary in pursuing a career outside the United States.

As this issue also appears to preclude approval of the petition at this time, it provides another basis for remanding the petition for further adjudication.

C. Issues Regarding Productive Employment of the Beneficiary and the Beneficiary's Role within Normal Operation of the Petitioner's Business

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*2*) requires the petitioner to demonstrate that "[t]he 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." Further, the regulation 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) states 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) states that a training program which "[w]ill result in productive employment beyond that which is incidental and necessary to the training" may not be approved. Moreover, the provision at 8 C.F.R. § 214.2(h)(7)(iii)(E) prohibits approval of a training program designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

The petitioner stated in its support letter that the beneficiary's "training will consist of approximately 50% classroom-style education and the remaining 50% will consist of hands-on-training." The petitioner asserted that the beneficiary "**will not be engaging in productive employment in the United States, and any hands-on-tasks will be solely incidental to training**" [emphasis in the original]. In response to the RFE, the petitioner asserts the "number of specific hours that will be spent in the classroom v. on-the-job training cannot easily be quantified due to factors such as real-life business projects that arise, and the trainee's ability and speed to grasp the covered aspects."

However, it is noted that under 8 C.F.R. § 214.2(h)(7)(ii)(B)(2), each petition must include a statement which "sets forth the proportion of time that will be devoted to productive employment." Without providing information on how much of on-job-training program is productive employment, the petitioner failed to establish that the beneficiary will not be placed in a position which is in the normal operation of the business, and that the beneficiary will not engaged in productive employment beyond incidental and necessary to the training.

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

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

Upon review, we do not find the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A), as it is not clear what the beneficiary would actually be doing in the proposed training program.

As noted, the beneficiary has been employed with the petitioner in the CPT program and also in Rwanda for over two years. Further, the beneficiary received a bachelor's degree majoring in Industrial Technology and Applied Mathematics, and minoring in Applied Computer Science and Physics. The petitioner claims that the beneficiary will receive "specific training on [the petitioner] policies and procedures required to support and to fully leverage [its] business opportunities in Africa" and "specialized engineering training relevant to the development and use of its products, including newly developed products and equipment." However, the training schedule indicates that the beneficiary is receiving training in general electrical, engineering, sales, marketing, and computer software programs. For example, weeks 5-10 consists of objectives such as "Lighting Theory Basics" and "Introduction to Lighting Design," and weeks 11-12 consists of topics such as "Understanding of Basic Electrical Theory-Circuitry," "Understanding of Basic [the petitioner] Product Options." Further, weeks 49-52 covers topics such as "Understanding the process for entering a project into Scoreboard," and "Become knowledgeable in the art of Pricing a project." However, the topics mentioned above appear to be basic concepts that the beneficiary should already be familiar with based on his academic background and also his work experience with the petitioner, which raises question on what the beneficiary would actually be doing during this training period.

While the petitioner is certainly not required to provide an exhaustive accounting 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 program does not fall within the zone of programs whose approval is precluded by the 8 C.F.R. § 214.2(h)(7)(iii)(A) proscription against approval of a programs that "[d]eal[] in generalities with no fixed schedule, objectives, or means of evaluation."

VI. CONCLUSION AND ORDER

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.

As stated above, the petition is remanded to the director for the issuance of a new decision, to be based upon adjudication of the merits of the petition as determined by applying the H-3 Trainee regulations to the totality of the evidence in the record of proceeding. The director may, of course, at the director's sole discretion, request any additional evidence that he or she may deem necessary to adjudicate the petition.

ORDER: The director's decision dated July 17, 2014 is withdrawn. The matter is remanded to the California Service Center for continued adjudication of the petition and entry of a new decision, which the director shall certify to the AAO for review if it is adverse to the petitioner.