U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21920423

Date: SEP. 19, 2022

Appeal of California Service Center Decision

Form I-129, Petition for Nonimmigrant Worker (H-3)

The Petitioner seeks to temporarily accept the Beneficiary as an "apprentice/trainee" under the H-3 nonimmigrant trainee program. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(iii), 8 U.S.C. § 1101(a)(15)(H)(iii). The H-3 program allows an individual or organization in the United States to invite certain foreign nationals to receive job-related training that is not available in their home country, for work that will ultimately be performed outside of the United States.

The Director of the California Service Center denied the petition, concluding that the Petitioner had not demonstrated that (1) the proposed training program met the regulatory requirements; (2) the proposed training was unavailable in the Beneficiary's home country; (3) any productive employment engaged in by the Beneficiary would only be incidental and necessary to the training; and (4) the training will benefit the Beneficiary in pursuing a career outside of the United States.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

Section 101(a)(15)(H)(iii) of the Act describes an H-3 nonimmigrant as a foreign national ". . . who is coming temporarily to the United States as a trainee . . . in a training program that is not designed primarily to provide productive employment. . . ."

The regulations define the H-3 nonimmigrant at 8 C.F.R. § 214.2(h)(7)(i) as follows:

> *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, at 8 C.F.R. § 214.2(h)(7). They are:

- "Evidence required for petition involving alien trainee" - at 8 C.F.R. § 214.2(h)(7)(ii)(A) ("Conditions") and (B) ("Description of training program"). The conditions subparagraph specifies four training attributes that the petitioner must demonstrate with regard to the proposed training program; the training-program description provisions specify six items of information that the petitioner must provide about the proposed training.

- "Restrictions on training programs for alien trainee" - at 8 C.F.R. § 214.2(h)(7)(iii). This section identifies six types of training programs that cannot be approved as a basis for an H-3 trainee petition.

Subparagraph (A) of the section on required evidence, 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 [foreign national]'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) at 8 C.F.R. § 214.2(h)(7)(ii), specifies 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 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 [foreign national]'s country and [(b)] why it is necessary for the [foreign national] 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 [foreign national] trainee,* provides a list of characteristics that 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 [foreign national] 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 [foreign nationals] 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. BACKGROUND

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner identified itself as a U.S. government contractor engaged in the wholesale of fuel and other commodities. It claimed that in

addition to being a supplier, it strategically pursued opportunities to fulfill the petroleum fuel needs for the U.S. Department of Defense and the Department of Logistics Agency (DLA). The Petitioner claimed that it intends to employ the Beneficiary as an H-3 trainee for a period of 24 months as a "U.S. government contractor/supplier trainee," and indicated that the Beneficiary would "receive training to learn and have the skill-set to become a supplier of products/services to the U.S. government." The Petitioner claimed that once his training was completed, the Beneficiary would work abroad for the Petitioner's Nigerian affiliate as a sourcing manager focusing on DLA fuel procurement and contracts in Africa, Europe, the Middle East, and Asia.

III. ANALYSIS

In denying the petition, the Director determined that the Petitioner had not sufficiently described the proposed training program as required under 8 C.F.R. § 214.2(h)(7)(ii)(B), concluding that the proposed training program did not meet the regulatory requirements because it dealt in generalities. The Director also determined that the Petitioner had not demonstrated that the training met three of the four training attributes outlined under 8 C.F.R. §214.2(h)(7)(ii)(A), because the record did not demonstrate that the proposed training was unavailable in the Beneficiary's home country, any productive employment engaged in by the Beneficiary would only be incidental and necessary to the training, and the training will benefit the Beneficiary in pursuing a career outside of the United States.

On appeal, the Petitioner asserts that the Director's decision was erroneous. The Petitioner argues that it submitted extensive evidence in support of eligibility, and asserts that the documentation submitted sufficiently outlines the nature of the proposed training. The Petitioner also disputes the Director's finding that it did not demonstrate that the training will benefit the Beneficiary in pursuing a career abroad, or identify such a career abroad. Upon review of the record in its entirety, we conclude that the Petitioner has not established eligibility for the requested benefit.

A. Nature of the Proposed Training Program

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) requires the Petitioner to submit a statement describing "the type of training and supervision to be given, and the structure of the training program," and 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation."

The Petitioner initially stated that the Beneficiary's training would consist of an eight-week program that met eight hours per day from Monday through Friday. According to the Petitioner, each day of training would be divided into four hours of classroom training and four hours of on-the-job training.

The Petitioner claimed that the Beneficiary had no prior training or experience with global process sourcing, and indicated that his training would consist of the following learning modules:

1. Registration and qualification requirement
2. Solicitation/bidding process
3. Sourcing and pricing
4. Relationship building and negotiation strategies
5. Project management 101
6. Contract execution and closing

The Director issued a request for evidence (RFE), noting that the Petitioner's initial description of the training was too general. Specifically, the Director noted that the description of the proposed training provided neither a meaningful account of the Beneficiary's day-to-day activities during the entire training period nor an adequate description of the complete training program and schedule. The Director requested that the Petitioner provide additional evidence such as copies of lesson plans and training materials for this training program or previous training programs; copies of the Petitioner's standard trainee performance appraisal guidelines and sample appraisals from former students/trainees; a detailed account of the training program describing the classroom training, practical exercises, and on-the-job training; and pamphlets, brochures, website excerpts, or other printed material outlining the nature of the training.

In response, the Petitioner submitted a copy of its syllabus/lesson plan, entitled "Doing business with and becoming a U.S. Government contractor/supplier," which indicated there would be two trainers leading the eight-week course. The syllabus indicated that the training would take place from 8 a.m. to 3 p.m., Monday to Friday, with classroom training being held from 8 a.m. to 11 a.m. and on-the-job training taking place from 12 p.m. to 3 p.m. It further indicated that the first five weeks of training would use the "SHOW AND DO" approach, where the trainer would supervise the trainee, but the last three weeks of training would afford the trainee "total independence to use his acquired knowledge and skills." The syllabus also provided a daily breakdown of the topics to be covered during each classroom and on-the-job session.

Regarding the method of instruction, the syllabus indicated that a method called "the Natural Approach" would be used "to provide comprehensible oral and written input," as well as Beneficiary-trainer interaction and real time practical activities during hands-on training. In addition, the syllabus indicated that "proprietary training material" by [redacted] the Petitioner's president and chief executive officer (CEO), would be used in addition to using past performance and past procurements as examples. The documentation further stated that a grade of 70% would be considered passing for the course, and that grades would be determined by homework, which accounted for 70% of the final grade, and one exam worth 30% of the final grade. The course objectives were also identified and included understanding the U.S. government, the North American Industry Classification System (NAICS) code and Product Service Code (PSC), global taxation, and factors that affect and govern pricing.

In denying the petition, the Director determined that the Petitioner's RFE response had not overcome the deficiencies noted in the training program's description, and further noted numerous unresolved discrepancies in the Petitioner's descriptions of the training program. Upon review, we agree with the

Director's finding that the Petitioner's description of the training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) or 8 C.F.R. § 214.2(h)(7)(iii)(A). While the regulations do not require a petitioner to account for every minute, or even every hour, of a beneficiary's time, the plain language of the regulations requires a petitioner to sufficiently describe a training program's structure, the type of training, and the supervision to be given, and to also establish that the program does not deal in generalities. The description, therefore, must be meaningful. However, the Petitioner's description does not adequately convey the essential aspects of the program.

The Petitioner intends to provide training to the Beneficiary through a combination of classroom instruction and on-the-job training. It indicated that the Beneficiary will become familiar with the U.S. government and its fiscal budget, as well as general issues pertaining to global taxation and procurement.

Regarding the classroom instruction phases of training, the Petitioner's syllabus listed the topics to be covered each day of the proposed training, yet no further information regarding these topics was submitted. While the Petitioner specified the number of instructional hours/weeks that would be associated with each particular topic, the manner in which instruction would be administered is unclear. The Petitioner did not articulate any details regarding the nature of the Beneficiary's classroom training beyond identifying the topics to be covered, and it did not supplement the record with lesson plans or documentation outlining the manner in which the instruction would be presented. Although the Petitioner submitted a copy of a PowerPoint presentation titled "Doing Business and Becoming a Supplier to the Government," and asserts on appeal that this document constitutes training material, the Petitioner did not identify any additional training materials to be used beyond stating that the course would use "proprietary training material" created by [redacted] The training overview lacked specific details regarding the manner in which the subject material would be presented or the manner in which the Beneficiary's work would be evaluated and appraised.

Similar to the classroom training, the Petitioner briefly identified the topics to be covered in each of the on-the-job training sessions, and indicated that this portion of the training would focus on the trainer showing the Beneficiary how to perform various tasks. For example, one unit of on-the-job training indicates that "trainer show trainee how to search in detail NAICS code and how it applies to products and services." Another unit indicates that "trainer show trainee detailed qualification requirements to register as a government supplier." The remainder of the on-the-job training sections indicate that the trainer will "deep dive" into various topics such as the U.S. fiscal budget and global taxation, and will introduce the Beneficiary to various websites and their functions, such as the login procedure for www.login.gov and how to place bids on websites such as www.fedbid.gov and www.fbo.gov.

The Petitioner, however, did not explain or provide details regarding the type of instruction the Beneficiary would receive or his level of involvement with regard to the tasks associated with each unit of on-the-job training. This omission is critical, as some of the identified trainings are vaguely stated. For example, one on-the-job session simply stated that the "trainer show trainee on all the set aside requirements and its implication to solicitation." Absent further details or clarification, it is unclear exactly what the Beneficiary will do doing and learning during several of these sessions. Moreover, although the Petitioner identified [redacted] its president/CEO as the trainer for each unit

of training, the training overview did not explain the manner in which he would oversee or evaluate the Beneficiary's performance in each unit.

Upon review, we conclude that while the training topics identified by the Petitioner appear to be reasonably connected to the stated training-objectives, the stated training goals are vague and broadly stated. While the Petitioner has identified a schedule for the training (i.e., 8 a.m. to 11 a.m., and 12 p.m. to 3 p.m., five days per week), the Petitioner's statements about the proposed training program lack content that is sufficiently detailed and specific to establish that the Beneficiary's training would be governed by a fixed schedule, already determined by specific time periods designated for a specific training, and also characterized by objectives or means of evaluation. For example, while the Petitioner makes reference to one final exam and frequent homework assignments that will formulate the "grade" for this training course, no additional information regarding the exam or these assignments was submitted, and there is no similar means of evaluation identified for the on-the-job portion of the training.

Moreover, as discussed briefly above, the nature of the Beneficiary's supervision and means of evaluation are likewise unclear. The syllabus submitted in response to the RFE indicated that the Beneficiary will be supervised by two individuals: [redacted], the Petitioner's president/CEO, and [redacted], the Petitioner's sourcing manager and trainer.

Although [redacted] is listed as a trainer, the syllabus suggests that the Beneficiary will be under [redacted] direct supervision for all units of classroom instruction and on-the-job training. In addition to not explaining or clarifying the extent of [redacted] role in the training, the level of [redacted] involvement in the classroom and on-the-job portions of the training is confusing. Given that two instructors are identified, it is unclear why each instructor is not assigned to a designated portion of the training, such that we can ascertain who is responsible for the Beneficiary's training on a specific day or topic. It is unclear, therefore, how the Beneficiary's work will be evaluated as claimed by these two individuals.

Additionally, we note that at the time of filing, the Petitioner claimed to have two employees. According to corporate documentation submitted in support of the petition, it appears that the Petitioner's employees at that time were [redacted] and [redacted] its secretary and chief financial officer. Although [redacted] is listed on an organizational chart submitted in response to the RFE, he does not appear to have been employed by the Petitioner at the time of filing. It appears, therefore, that the syllabus/lesson plan, also submitted for the first time in response to the RFE, reflects a material change to the proposed supervision and evaluation of the Beneficiary as well as to the underlying training program itself as originally stated.[1] USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit sought at the time the petitioner files the petition. *See* 8 CFR 103.2(b)(1). A 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*

[1] As noted by the Director, the Petitioner significantly reduced its claim regarding the amount of training hours the Beneficiary will engage in. Initially, the Petitioner stated that the Beneficiary would receive 40 hours of instruction per week for eight weeks. In response to the RFE, the Petitioner provided an updated overview of the proposed training, indicating that it would provide the Beneficiary 30 hours of instruction per week for eight weeks, citing COVID-19 protocols. We further note that despite outlining an eight-week training program, the Petitioner sought approval for the Beneficiary's employment as a trainee on the Form I-129, Petition for a Nonimmigrant Worker, for a two-year period.

Corp., 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

These conflicting statements regarding the means of evaluation for the Beneficiary, coupled with the inconsistencies regarding the changes to the amounts of time to be devoted to each aspect of the proposed training, raise questions regarding the true nature of the training program. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Finally, the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*2*) requires that the description of the training program "[s]ets forth the proportion of time that will be devoted to productive employment." The Petitioner did not specify the proportion of time the Beneficiary would devote to productive employment. Because the overview of the training program is so generalized, the extent of his productive employment cannot not be determined.

Given the inconsistencies in the record regarding the nature of the training plans, the coursework, and the means of evaluation of the Beneficiary's progress, we conclude that the training program deals in generalities with no fixed schedule, objectives, or means of evaluation. For the above stated reasons, we find that the evidence of record satisfies neither 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) nor 8 C.F.R. § 214.2(h)(7)(iii)(A) or (B).

B. Availability of the Proposed Training

The Director also determined that the Petitioner had not provided sufficient evidence to satisfy the condition at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*), which states that the H-3 petitioner "is required to demonstrate" that "[t]he proposed training is not available in the alien's own country."

The record includes an unsigned statement on the Petitioner's letterhead, indicating that "[t[here is nowhere in Nigeria the training program is being offered." It further states that "[w]e researched to see if any company is offering the training program in Nigeria, and NO COMPANY offers the training program in Nigeria. We reviewed and checked the U.S. Embassy and consulate in Nigeria to see if they offer the training program, but no such training exists." Finally, it states that "[w]e have also reached out to the Nigerian American Chamber of Commerce in Nigeria and also the American Business Council in Nigeria to see if they offer such training program in Nigeria, but they do not offer such training program."

This statement does not sufficiently demonstrate that the proposed training is not available in Nigeria, the Beneficiary's home country. The statement does not identify its author, does not adequately explain the basis of the author's knowledge, and does not specifically address the nature or availability of the training program. Further, the Petitioner's blanket statement that the proposed training is not available in Nigeria is not substantiated. The statement falls short of establishing that no public or private organizations in Nigeria offer similar training to that currently offered to the Beneficiary.

Absent additional evidence to support these assertions, we conclude that the Petitioner has not demonstrated that "[t]he proposed training is not available in the alien's own country," as specified at 8 C.F.R. § 214.2(h)(1)(ii)(E).

C. Productive Employment

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) requires that the Petitioner "demonstrate" that "[t]he beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training." The evidence of record has not satisfied this condition.

As noted above, the Petitioner did not specify the proportion of time the Beneficiary would devote to productive employment. Upon review of the Petitioner's statements, both in response to the RFE and again on appeal, it appears that the Beneficiary will engage in productive employment during the on-the-job portion of the training, particularly in the last three weeks of the training period. The syllabus indicates that during the three hours per day allotted for on-the-job training during that period, the Beneficiary "will be given total independence to use all the acquired knowledge and skills to bid, trade and execute contracts/delivery order while trainer evaluate their work."

To the extent that the Petitioner describes them, the activities said to comprise the Beneficiary's on-the-job training generally do not establish that they are not also productive employment. The Petitioner affirmatively stated throughout the record that it is a U.S. government contractor engaged in the procurement of fuel and petroleum contracts. Given that the Beneficiary will "bid, trade and execute contracts/delivery order," it appears that the Beneficiary's work will in fact benefit the Petitioner's operations, and thus is not limited to what is essential to the training program's goals. Although the Petitioner asserted in response to the RFE that the training program would not result in productive employment, it does not provide sufficient details to demonstrate, rather than just attest, that the Beneficiary "will not engage in productive in productive employment unless such employment is incidental and necessary to the training." The Petitioner had not satisfied the condition for approval at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*).

D. Career Abroad

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) requires that the evidence of record demonstrate that the training will benefit the Beneficiary in pursuing a career outside the United States; and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*4*) requires the Petitioner to describe the career abroad for which the training will prepare the Beneficiary. We find the evidence of record sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*4*), and the Director's contrary determination is hereby withdrawn.

IV. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered 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, 8 U.S.C. § 1361. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.