PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

D5

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 03 112 52770 Office: VERMONT SERVICE CENTER Date: APR 0 0 2004

IN RE: Petitioner: [redacted]
Beneficiaries:

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care training, personnel, and service provider. It seeks classification of the beneficiaries as nurse trainees. The director determined that the training would be on behalf of beneficiaries who already possess substantial knowledge and expertise in the area of proposed training. The director also found that the petitioner had not established that the beneficiaries would not be placed in a position that is in the normal operation of the business, and would be engaged in productive employment beyond that which is incidental to the training. The director stated that the petitioner had not established that the training would assist the beneficiaries in working in the field in their home country. Finally, the director stated that the petitioner had not established that it had sufficiently trained staff to provide the proposed training.

On appeal, the petitioner submits a brief stating that the director erred in making these determinations. The petitioner states that the beneficiaries do not have any training or expertise in the specific area of the proposed training. The petitioner also states that the director erred in his calculations of the amount of time spent in on-the-job training and, therefore, the amount of time spent in the normal operation of business and productive employment. Additionally, the petitioner states that it has an adequate number of trained staff to provide the training.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

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

> (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;

(2) 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.

The record, as it is presently constituted, contains: a description of the 18-month training program; the beneficiaries' academic documents and resumes; a letter from the petitioner; and a letter from the Deputy Consul General of the Consulate General of the Philippines in New York stating that similar training is unavailable in the Philippines.

The first basis for the director's denial of the petition is that the training would be on behalf of beneficiaries who already possess substantial knowledge and expertise in the area of proposed training. The training is

specifically focused on geriatric nursing and critical care for the elderly. The beneficiaries have bachelor's degrees in nursing in their home country and have worked in the field for periods ranging from six years to 13 years. The petitioner submitted transcripts indicating the coursework the beneficiaries took in the process of obtaining their degrees and that provides clear information about their background. One of the beneficiaries took a five-credit course that likely included an element of geriatric training. Another beneficiary's practical experience specifically included the aged as a portion of the population served over a period of 600 hours of training. The petitioner's response to the director's request for evidence states that geriatric nursing is a field of specialization in nursing, and therefore, the beneficiaries need to study this "intensive and encompassing curriculum." The petitioner did not submit any evidence to support its assertion that this is a highly specialized field that would require separate training beyond that of a bachelor's degree in nursing. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The director also found that the 618 hours of productive employment, or 22 percent of the total training hours, were too many to be considered "incidental" to the training. On appeal, the petitioner states that the productive employment:

> [I]s intended to help the trainees defray daily expenses considering the cost of living in the US. These hours are actually part and parcel of the On-The-Job [sic] (OJT) training but were taken out of the 1,594 total for OJT because regulations require that we "set forth the proportion of time that will be devoted to productive employment."

The petitioner appears to be stating that all of the training is the same, only some of it is paid employment, and some is unpaid. Productive employment in the context of the H-3 classification is not meant to "defray daily expenses" of the cost of living, but to provide complementary training to the classroom instruction contemplated by this program. The total number of hours of OJT and productive employment equals 55 percent of the total training time, and the petitioner has not made it clear how this can be considered incidental to the training.

The director determined that the petitioner did not establish that the proposed training would "benefit the beneficiaries in obtaining a career outside the United States[,]" since they had all already been employed as nurses previously. The director also stated: "It is not apparent that there would be positions strictly involving gerontology overseas other than in a nursing home. . . . It is not evident that the additional training would better prepare the beneficiaries for a career overseas." The petitioner has not established that the training would assist the beneficiaries in finding employment given the dearth of facilities catering to the elderly in the beneficiaries' home country. In addition, the letter that the petitioner submitted from the Deputy Consul General of the Consulate General of the Philippines in New York states that the tradition of caring for the elderly in the Philippines is home-based care and indicated that, despite the growing number of elderly, there is no system for providing care to them. If this is true, then it raises the issue of where the beneficiaries would work to utilize the knowledge gained during the proposed training.

The director also stated that the petitioner had not established that it had sufficiently trained staff to provide the proposed training. On appeal, the petitioner states, "[W]e have competent Baccalaureate degreed nurses who have many years of experience working in Geriatric Centers and Critical Care for the Elderly Centers in the US, and for every batch of trainees, we designate a coordinator from among the teaching staff." In the director's request for evidence, he asked the petitioner to "establish how your company is able to train 8

individuals with a staff of 32 employees." The petitioner's response did not address this issue. There is no evidence in the record beyond the petitioner's statement regarding the trainers. Again, the petitioner cannot simply enter a statement into the record without supporting documentary evidence.

Beyond the decision of the director, the regulations forbid approving training that deals in generalities with no fixed schedule, objectives, or means of evaluation. There is no method of evaluation included in the training program.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.