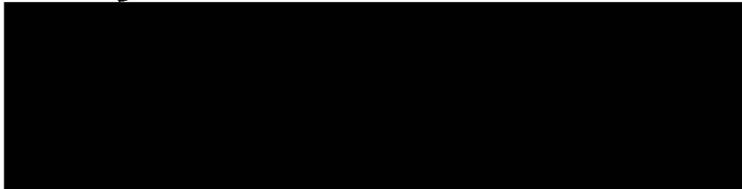




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FILE: WAC 07 213 54251 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is restaurant management company that operates six Denny's restaurant franchises. It seeks to employ the beneficiary as a trainee for a period of eighteen months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on seven grounds: (1) that the petitioner had failed to demonstrate that the proposed training is not available in the Philippines, the beneficiary's home country; (2) that the petitioner had failed to adequately describe the type of training and supervision to be given, and the structure of the training program; (3) that the petitioner had failed to set forth the proportion of time that will be devoted to productive employment; (4) that the petitioner had failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; (5) that the petitioner had failed to indicate the source of remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training; (6) that the petitioner had failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition; and (7) that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary.

On appeal, the petitioner contends that the director erred in denying the petition.

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)(7) states, in pertinent part, the following:

- (ii) Evidence required for petition involving alien trainee—
 - (A) Conditions. The petitioner is required to demonstrate that:
 - (1) The proposed training is not available in the alien's own country;
 - (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

- (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
 - (4) The training will benefit the beneficiary in pursuing a career outside the United States.
 - (B) Description of training program. Each petition for a trainee must include a statement which:
 - (1) Describes the type of training and supervision to be given, and the structure of the training program;
 - (2) Sets forth the proportion of time that will be devoted to productive employment;
 - (3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;
 - (4) Describes the career abroad for which the training will prepare the alien;
 - (5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and
 - (6) Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.
- (iii) Restrictions on training program for alien trainee. A training program may not be approved which:
 - (A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;
 - (B) Is incompatible with the nature of the petitioner's business or enterprise;
 - (C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;
 - (D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
 - (E) Will result in productive employment beyond that which is incidental and necessary to the training;

- (F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;
- (G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or
- (H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

In its June 20, 2007 letter of support, the petitioner stated the following:

[I]n 2004, [the petitioner] became a full-grown franchisee of Denny's restaurant. With just barely two years of existence, [the] Petitioner's gross income has grown to a total of \$3,000,000.00 and is expected to rise as we open our business into international trade.

With regard to why it is offering the training program, the petitioner stated the following:

[The reason for the proposed training program is] to develop highly qualified individuals for key positions of responsibility specifically intended for [the petitioner's] existing and future branches and affiliates. This has been developed to provide the trainee with maximum direct exposure to the marketing, accounting, administrative[,] and operational responsibilities of managing a company through assignments to the different departments or units of our business. It also offers an educational component that complements and enhances the experience acquired while on training. This unique training opportunity allows participants to gain practical experience in management.

* * *

This training was developed to give our future *Franchise Operations Manager* the opportunity to learn the management and operations of Denny's Restaurant [emphasis in original]. This is a valuable opportunity for him/her because it will teach specific franchise marketing and sales strategies. This will also allow participants to gain practical experience in operations. Ultimately the knowledge gained will be used in the capacity of a managerial appointment, specifically in Operations, once assigned to our future branch office abroad. He/She shall establish a global network between our U.S. company and the future affiliate branch abroad.

The petitioner explained that the beneficiary would participate in the proposed training program forty hours per week. It would consist of four modules: (1) Orientation; (2) Restaurant Operations; (3) Franchising; and (4) Logistics (Supply Chain Management).

Upon review, the AAO agrees with the director's finding that the petitioner's proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

The director found that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, the beneficiary's home country. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(I) requires the petitioner to demonstrate that the proposed training is not available in the alien's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires a statement from the

petitioner indicating the reasons why the proposed training cannot be obtained in the alien's home country and why it is necessary for the alien to be trained in the United States.

The AAO finds the petitioner's representations that the proposed training program that would impart skills specific to its method of conducting business reasonable and supported by the record. Accordingly, the AAO finds that the petitioner has overcome the concerns of the director in this regard, and it withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to adequately describe the type of training and supervision to be given, and the structure of the training program. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(1) requires the petitioner to describe the type of training and supervision to be given, and the structure of the training program.

Much of the information submitted by the petitioner is vague in nature and leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. For example, the second module of the proposed training program, entitled "Restaurant Operations," would last 28 weeks and consist of four courses: (1) menu planning, design, pricing, and evaluation; (2) managing food and beverage production; (3) restaurant human resources and labor cost controls standard; and (4) accounting and financial management.

The training manual submitted by the petitioner, however, does not explain what the beneficiary will actually be doing during this time. Rather, it consists of reading material that the AAO presumes the beneficiary will be reading during this time. It is unclear where this material fits into the classroom portion of the training program (it clearly is not part of the productive employment portion). For example, it is unclear whether the beneficiary will read this material during the classroom portion of the training, or whether he will be expected to have read it before arriving to class. Given that this portion of the manual is only 38 pages long, it is unclear how the petitioner will stretch this material to cover at least 19.5 hours per week of classroom instruction for 28 weeks.

Nor does the Hourly Employee Handbook, which the AAO presumes is distributed to all employees, and not just H-3 trainees, satisfy this criterion. Nor do the training materials submitted with the petitioner's October 24, 2007 response to the director's request for additional evidence, satisfy this criterion, as they do not address the beneficiary's proposed day-to-day activities.

The AAO finds this description deficient. Again, the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program. However, this description is inadequate. The petitioner has failed to provide a meaningful description of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(1).

The director also found that the petitioner had failed to set forth the proportion of time to be devoted to productive employment; that the petitioner had failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; and that the petitioner had failed to indicate the source of remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training, as required by 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2), (3), and (6). The AAO disagrees. The petitioner provided this information in its June 20, 2007 letter of support. Accordingly, the AAO finds that the petitioner has overcome the concerns of the director in this regard, and it withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition in which the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified.

The petitioner stated the following in its letter of support:

The Management Trainee shall be under the overall supervision of the President of Denny's Restaurant. At the beginning and end of each phase, the President and other instructors shall meet with the Trainee to discuss and review the Chronological Order of the Training Program, goals and objectives of the program [sic]. In addition, the Trainee shall meet with the President at least once during the particular rotation to provide feedback on the effectiveness of the rotation and how it relates to the overall training program.

In her August 29, 2007 request for additional evidence, the director requested additional evidence in this regard. In its October 24, 2007 response to the directors' request, the petitioner stated, in pertinent part, the following:

Denny's has hired a full time instructor who will provide both classroom and on the job training. His resume is enclosed herewith for your reference and recordation.

The petitioner submitted a copy of its president's resume. In her December 6, 2007 denial, the director stated the following:

The petitioner, in response to USCIS's request for additional evidence, claims that "Denny's has hired a full time instructor who will provide both classroom and on the job training." However, the claimed instructor, [REDACTED], has been working as a general manager for the petitioner since 2001. The record is insufficient to establish that the petitioner has sufficiently trained manpower to provide the 18-month training program specified.

In its January 8, 2008 appellate brief, the petitioner offers the following rebuttal:

[T]he service contends that the company does not have the sufficient trained manpower to provide the training. As previously tendered, the company provided a resume for our full time instructor who has been our restaurant manager since 2001, who will better give the instructions than him? Since he himself has been trained and honed by the same training program [sic].

The AAO finds the petitioner's explanation deficient. First, the AAO notes that the petitioner's description of the supervision has changed since the petition was filed. The petitioner's letter of support referenced "other instructors" in addition to its president. It now appears that the president will be the only trainer. The petitioner initially described the president's role in the training program as that of "overall" supervision, and that the president would meet with the beneficiary at "the beginning and end of each phase," as well as "at least once during the particular rotation." It now appears that the president will assume sole responsibility for the beneficiary's training.

The petitioner's explanation is deficient for two reasons. First, the AAO finds that the petitioner has not merely clarified the record on appeal or filled in missing information. Rather, the AAO finds that the petitioner has attempted to make a material alteration to the proposed training program as set forth initially. However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits the visa classification sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Second, beyond the petitioner's attempt to materially alter its training program on appeal, the AAO finds the petitioner's latest explanation unsupported by the record. The petitioner has failed to explain how, if the beneficiary will be principally trained by Mr. [REDACTED] or a period of 18 months, Mr. [REDACTED]'s normal workload will be performed during that time. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The petitioner has failed to establish that it has sufficiently trained manpower to provide the training described in the petition. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(G).

Finally, the AAO turns to the director's finding that the petitioner has failed to adequately describe the career abroad for which the training will prepare the beneficiary. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

As noted previously, the petitioner stated in its letter of support that the reason for the proposed training program is "to develop highly qualified individuals for key positions of responsibility specifically intended for [the petitioner] its existing and future branches and affiliates."

In its response to the director's request for additional evidence, the petitioner stated the following:

[W]e wish to capitalize on the restaurant market in the Philippines and by training [the beneficiary] here he stands to gain on hand training in our methodologies, policies, sales strategies, specific franchise marketing, operations[,] and American Standards which we intend to implement in our future affiliate branch in the Philippines.

On appeal, the petitioner states the following:

Since Denny's is yet to open a franchise in the Philippines and therefore the training presently is non-existent in the beneficiary's home country [sic].

The AAO disagrees with the petitioner's analysis. As noted above, the reason for creation of the training program at issue here is to train the beneficiary on the petitioner's own business practices. Having made such a demonstration, however, the petitioner is compelled to further demonstrate that there is a setting in which the beneficiary will be able to use his newfound knowledge. Since his newfound knowledge will

be specific to the petitioner, an operation run by the petitioner would be the only setting in which he would be able to use the knowledge.

There is no evidence in the record of proceeding to indicate that the petitioner had any concrete plans for such expansion at the time the petition was filed. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record contains no evidence of pending contracts, business plans, facility photographs to document the petitioner's expansion plans. The record contains no documentary evidence of the petitioner's expansion plans, beyond training the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established that the proposed training would prepare the beneficiary in pursuing a career abroad. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(4).

Pursuant to the above discussion, the AAO agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa.

Beyond the decision of the director, the AAO finds that the petition may not be approved for two additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a petition that deals in generalities with no fixed schedule, objectives, or means of evaluation.

The AAO incorporates here its previous discussion regarding the vague, generalized nature of the petitioner's description of its proposed training program which leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. While the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, the description provided by the petitioner is inadequate. The petitioner has failed to provide a meaningful description of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program.

Nor is the means of evaluation clear. The "Performance Appraisal" submitted by the petitioner at the time the petition was filed does not appear tailored to the proposed training program in any meaningful way. Rather, it appears to be a general employee review form used by the petitioner to evaluate all of its employees. The written exercises submitted by the petitioner in response to the director's request for additional evidence suffer the same deficiency: they appear to be used for all of the petitioner's employees, not just its H-3 trainees. It is unclear how the beneficiary's evaluation would differ from that of the petitioner's hourly staff.

The AAO finds that the petitioner has failed to establish that it has an established training program that does not deal in generalities with no fixed schedule, objectives, or means of evaluation. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires a demonstration that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed.

The petitioner has failed to explain how the proposed training program differs from the training it offers its American management staff. It states on appeal that the individual who would train the beneficiary “has been trained and honed by the same program.” Moreover, in its letter of support, it specifically stated that one of the reasons for creation of the training program is to develop staff for its existing restaurants. The petitioner has failed to establish that the training program would not place the beneficiary into a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(2). For this additional reason, the petition may not be approved.

For all of these reasons, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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