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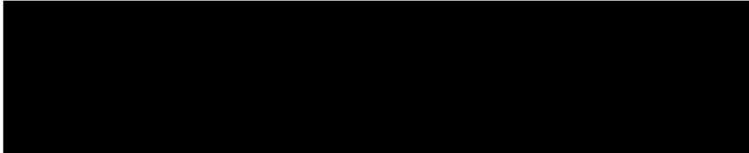


U.S. Citizenship
and Immigration
Services

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JUL 30 2007



FILE: SRC 06 122 53225 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
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:



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.

for *Michael T. Kelly*
Robert P. Wiemany, 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 a high-end, full-service health and beauty spa with an adjoining health café that seeks to employ the beneficiaries as spa services management trainees for a period of two years. The petitioner, therefore, endeavors to classify the beneficiaries as nonimmigrant worker trainees 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 Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of her determination that: (1) the petitioner had failed to demonstrate that the proposed training program is unavailable in the beneficiaries' home country; (2) the petitioner had failed to demonstrate that the proposed training program would benefit the beneficiaries in pursuing careers abroad; (3) the petitioner had failed to demonstrate that the beneficiaries would not engage in productive employment; (4) the petitioner had failed to demonstrate that its proposed training program does not deal in generalities; (5) the petitioner had failed to set forth the proportion of time that would be spent, respectively, in classroom instruction and in on-the-job training; (6) the petitioner had failed to demonstrate that its proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; and (7) the petitioner had failed to demonstrate that it has the physical plant to provide the proposed training program.

On appeal, counsel 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.

According to the training program syllabus submitted with the petitioner's March 8, 2006 letter of support, the proposed training program would last for a period of 24 months. At page 2, the "Overview" portion of the program syllabus states the following:

Our training program will enable the trainee to develop and refine the necessary skills to be a successful international, high-end Spa Services Manager. After introductory training, the trainee will be involved in the day-to-day management of [the petitioner's] spa services. Training will take place in the classroom, in private instruction with the company president [name withheld], in one-on-one training with other trained personnel, and in the [petitioner's] facility itself. All phases of the training will be formally evaluated at appropriate intervals. Specific objectives are for the trainee to learn and develop the essential skills in the day-to-day running of a high-end spa[.]

The petitioner stated that the referenced "essential skills" to would be imparted via its proposed training program are (1) complete understanding of the petitioner's spa services management model; (2) exposure to the petitioner's specialized health and beauty programs; (3) acquisition of valuable communication skills, such as creating customer rapport and presenting products and services to interest the customers; and (4) development of the ability to maintain and develop and international spa clientele.

As noted previously, the proposed training program would last for a period of 24 months, and be split into eight components. The beneficiaries would spend the first month in an orientation period. During this time they would receive basic training in and exposure to the basic aspects of the petitioner's approach to providing health and beauty treatments. This training would take place primarily in a classroom setting.

The second component of the proposed training would last for two months, and would consist of rotations through various spa departments, including facial care services, hand and body treatment services, anti-cellulite treatment services, massage therapy, waxing, nail care, hair care, makeup, and laser and botox treatments. The beneficiaries would also be exposed to the business development and management models for each department.

The third component of the proposed training program, entitled "Introductory TCM," would last three months. During this phase of the proposed training program, the beneficiaries would receive one-on-one introduction to the basics of traditional Chinese medicine (TCM). The petitioner's in-house TCM expert would teach this training. The beneficiaries would also receive an introduction to various methods of therapeutic Chinese massage during this period of time. The petitioner noted that the beneficiaries would not perform actual treatment services, but would rather participate as observers.

Entitled "Cultivating and developing client relationships," the fourth component of the petitioner's proposed training program would last for three months. According to the petitioner, this component "will focus on the importance of recognizing and analyzing clients' problems and objectives." The beneficiaries would keep weekly journals on clients and report their findings to the petitioner's president. They would then recommend treatment methods to clients.

In the fifth component of the proposed training program, which would last for three months, the beneficiaries would assist the petitioner's president in the day-to-day management of various departments of the petitioner's operations. They would be assigned entry-level, supervisory responsibility over a

division of the operations and introduced to simple management skills, and given opportunities to make business decisions.

The sixth component of the proposed training program would consist of a three-month apprenticeship. During this time, the beneficiaries would be given full responsibility to manage a division of the petitioner's operations. They would be required to deal with clients on a day-to-day basis, solve problems, and handle complaints over services received. They would receive weekly assignments such as client journals and creating proposals to develop possible new services and treatments. They would also be introduced to simple advertising skills and given the opportunity to suggest ways in which to expand the petitioner's clientele. The petitioner's president and other managers would provide one-on-one training during this time.

The seventh component of the proposed training program would last for three months, and would involve rotation through another division of the petitioner's operations. The petitioner's president would evaluate the beneficiaries' performance on a weekly basis.

The eighth, and final, component of the proposed training program, entitled "Practical Application of Knowledge and Skills," would last for a period of six months. During this six-month period, the beneficiaries would utilize the knowledge and skills they have learned to take on a part-time day-to-day running of one of the petitioner's departments. They would also oversee at least one other department within the spa. According to the petitioner, "[t]he ultimate goal for this phase is for this individual to be able to multi-manage spa departments with equal effectiveness."

At page 4 of the program syllabus, the petitioner provided a "schedule of time that will be spent in classroom instructions and in on-the-job training." This schedule broke down each day (save Wednesday and Sunday) into three periods: (1) one-on-one; (2) lunch; and (3) observation. At the conclusion of the schedule, the petitioner stated the following: "Please note that the above schedule is subject to some variations allowed for time in observation of business activities."

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 not established that the training was not available in the beneficiaries' home countries. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien's own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

In its March 8, 2006 letter of support, the petitioner stated the following:

The proposed training, including a series on European and Traditional Chinese services, is not available in the Philippines. This is because [the petitioner] only maintains a presence in the U.S. and many of our services are unique and proprietary and not offered by other spas.

In her April 4, 2006 response to the director's request for additional evidence, counsel stated the following:

[The petitioner] offers a training program that is entirely unavailable in The Philippines . . . Indeed [the petitioner's] training program was specifically designed and developed by the founder [name withheld]. The unique and proprietary services and business model of [the petitioner] are only available through [the petitioner]. [It] has no presence in the Philippines, so subsequently Training of this nature and of this caliber or of even an [sic] close similarity is not available in The Philippines . . .

In her April 25, 2006 appellate brief, counsel states the following:

Clearly, in the layout of this program, proprietary does not mean that the training cannot be used in other similar businesses. It does not mean that the training must only be used at [the petitioner]. Rather, it means it was created by [the petitioner] and that the knowledge and skills gained are unique to this particular training. And this valuable and transferable training is not available in the beneficiaries' home country [emphasis in original].

However, the question to be addressed when attempting to satisfy this criterion is not whether the petitioner offers this training in the aliens' home country. The question is whether the training is available anywhere in that country. The petitioner has submitted no evidence establishing that the training offered in this program is not available in the Philippines. The record contains no evidence, other than the assertions of counsel and the petitioner, that the type of training offered in the proposed training program is unavailable in the beneficiaries' home country. However, 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)). 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 Obaighena*, 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).

Nor has the petitioner explained how, or which portions of, its business practices are different from those the beneficiaries would learn in the Philippines. Finally, the AAO notes that the fact that a training program offered by a United States employer is better than a similar program in a foreign country does not establish eligibility under this regulation.

Accordingly, the petitioner has not satisfied the criteria at 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5).

The director found that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to submit a statement which describes the career abroad for which the training will prepare the alien. The AAO disagrees, and finds reasonable the assertion that there is a market in the Philippines for the type of training that the beneficiaries would receive in the proposed training program. As such, the AAO withdraws this portion of the director's denial.

The director also found that the petitioner had failed to demonstrate that the beneficiaries would not engage in productive employment beyond that necessary and incidental to the training program. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires a demonstration that the beneficiaries will not engage in productive employment unless such employment is incidental and necessary to the training.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program which will result in productive employment beyond that which is incidental and necessary to the training. The AAO agrees with the director.

The record clearly establishes that, particularly during the latter twelve months of the proposed training program, the beneficiaries would engage in a great deal of productive employment. In the thirteenth through the fifteenth months, the petitioner indicates that most of the beneficiaries' time would be spent on productive employment. While page 4 of the program syllabus indicates that roughly half of the beneficiaries' time would be spent in one-on-one instruction and the other half spent on observation, this contradicts page 3 of the program syllabus, which does not indicate a large degree of "observation." The statement that the beneficiaries "will be given full responsibility to manage a division" of the petitioner's operations is inconsistent with a finding that the beneficiaries would be spending half of their time in one-on-one training and the other half in observation. 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).

In a similar fashion, page 4 of the program syllabus also indicates that, during the sixteenth, seventeenth, and eighteenth months the beneficiaries would spend roughly half of their time in one-on-one instruction, with the other half spent on observation. However, page 3 of the program syllabus indicates that, while the president will provide close supervision, evaluation will be provided on a weekly basis only. *See id.*

Finally, the AAO notes the same inconsistencies regarding pages 3 and 4 of the program syllabus for the nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth months. The petitioner's description of this portion of the training program, which indicates a great degree of productive work, does not indicate that the beneficiaries would spend half of their time in one-on-one instruction, with the other half spent on observation. *See id.*

Again, it appears that the bulk of the proposed training program would involve productive employment, particularly in the latter twelve months of the program. The record does not establish that spending such a large percentage of the beneficiaries' time in productive employment is incidental to the training.

Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

The director also found that the petitioner had failed to demonstrate that its proposed training program does not deal in generalities. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a proposed training program that deals in generalities with no fixed schedule, objectives, or means of evaluation. The AAO agrees with the director.

At the outset of its analysis under this criterion, the AAO notes that the director afforded the petitioner the opportunity to supplement the record with a more detailed description of its proposed training program in her March 22, 2006 request for additional evidence. The petitioner, however, elected not to supplement the record in this regard. Rather, counsel asserted that the previous submission was adequate for approval (and repeats the same assertion on appeal).

The AAO notes that CIS is still left with little indication of what the beneficiaries will actually be doing on a day-to-day basis. While the petitioner is certainly not required to provide a daily itinerary for a two-year program, the petitioner has provided little information beyond a vague, generalized description. For

example, the petitioner provides four sentences regarding the three-month period (months seven through nine) in which the beneficiaries will cultivate and develop client relationships. Six sentences are provided for the six-month period (months nineteen through twenty-four) in which the beneficiaries will apply their new knowledge and skills.

Moreover, the AAO notes that some of the information is contradictory. As referenced earlier, page 4 of the training syllabus indicates that roughly half of the beneficiaries' time would be spent in one-on-one instruction and the other half spent on observation. However (and also as noted previously), spending this entire time in one-on-one instruction and in observation leaves no time for the application of skills that is purported to be of such importance during the latter twelve months of the program.

Nor is the schedule at page 4 of the training syllabus credible. The petitioner indicates that the one-on-one instruction (i.e., the classroom instruction) is to be provided by the petitioner's president. However, it is not credible that the petitioner's president can provide twenty-one hours per week of one-on-one instruction to four separate individuals. She would be spending 84 hours per week on one-on-one instruction, leaving little time to attend to other presumed responsibilities.

On appeal, counsel attempts to clarify this schedule, substituting the words "classroom instruction" for "one-on-one training," and "on-the-job training" for "observation." However, this does not eliminate the generalities. First, the AAO is left with no information regarding what types of instruction the beneficiaries would receive for twenty-one hours per week during the latter twelve months of the program, except that such instruction would be provided by the president.

Moreover, the AAO notes that there are several possible departmental rotations in its program. The program syllabus indicates that the beneficiaries will participate in at least two rotations. However, the AAO has no information regarding which beneficiaries would participate in which rotations. While the petitioner may not yet have this information, it is nonetheless indicative of a program that does not have a fixed schedule.

Also, the AAO finds that the petitioner's amendment of the classroom instruction from one-on-one training to classroom instruction constitutes a material alteration, rather than clarification, of the training program. Previously, the beneficiaries were to receive personal instruction from the petitioner's president for twenty-one hours per week. Now, that time is to be spent on general classroom instruction. 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). Moreover, the AAO notes that the meanings of "on-the-job training" and "observation" are not interchangeable, and finds further that this is another attempted material alteration to the petition.

For all of these reasons, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A). The AAO finds that the record fails to demonstrate the existence of a training program that does not deal in generalities.

The director also found that the petitioner had failed to set forth the proportion of time that would be spent, respectively, in classroom instruction and in on-the-job training. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires the submission of a statement which sets forth the proportion of time that would be spent, respectively, in classroom instruction and in on-the-job training. The AAO agrees with the director's finding.

As was the case under 8 C.F.R. § 214.2(h)(7)(iii)(A), the AAO notes that much of the information submitted by the petitioner in this regard is contradictory. As referenced previously, page 4 of the training syllabus indicates that roughly half of the beneficiaries' time would be spent in one-on-one instruction and the other half spent on observation. However (and also as noted previously), spending this entire time in one-on-one instruction and in observation leaves no time for the application of skills that is purported to be of such importance during the latter twelve months of the program.

Nor is the schedule at page 4 of the training syllabus credible, as the petitioner indicates that the one-on-one instruction (i.e., the classroom instruction) is to be provided by the petitioner's president. It is not credible that the petitioner's president would provide twenty-one hours per week of one-on-one instruction to four separate individuals. She would be spending 84 hours per week on one-on-one instruction, leaving little time to attend to other responsibilities.

Counsel attempts to clarify this schedule on appeal, substituting the words "classroom instruction" for "one-on-one training," and "on-the-job training" for "observation." However, this does not eliminate the generalities. Again, the AAO is left with no information regarding what types of instruction the beneficiaries would receive for twenty-one hours per week during the latter twelve months of the program, except that such instruction would be provided by the president. Moreover, the AAO noted previously that there are several possible departmental rotations in its program. The program syllabus indicates that the beneficiaries will participate in at least two rotations. However, the AAO has no information regarding which beneficiaries would participate in which rotations.

The AAO determined previously that the petitioner's amendment of the classroom instruction from one-on-one training to classroom instruction constituted a material alteration, rather than clarification, of the training program. Previously, the beneficiaries were to receive personal instruction from the petitioner's president for twenty-one hours per week. After the petitioner's amendment, that time is to be spent on general classroom instruction. Again, 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).

Accordingly, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(ii)(B)(3).

The director also found that, pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(F), the petitioner's proposed training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. The AAO finds no basis for such a determination, and withdraws that portion of the director's decision.

Finally, the director found that the pictures submitted by the petitioner contained no details regarding the size of the petitioner's buildings or any classroom locations. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition where the petitioner has failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified.

As detailed previously, the petitioner indicated at page 4 of the training syllabus that the beneficiaries' one-on-one instruction (i.e., the classroom instruction) is to be provided by the petitioner's president. It is not credible that the petitioner's president can provide twenty-one hours per week of one-on-one instruction to four individuals. She would be spending 84 hours per week on one-on-one instruction, leaving little time to attend to other responsibilities. The petitioner has not demonstrated that it has sufficiently trained manpower to provide the training specified.

Accordingly, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(G).

Counsel contends, in part, that the petition should be approved because of past approvals. However, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, if those petitions were approved based on the same unsupported assertions contained in the current record, their approvals were erroneous. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved those nonimmigrant petitions, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001). Further, prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Finally, counsel asserts, as she did in her response to the director's request for additional evidence, that the standard of proof for adjudicating this petition is the "preponderance of the evidence standard." For the reasons set forth in this decision, the AAO finds, as did the director, that the petitioner has failed to satisfy the regulatory criteria set forth previously.

For the reasons set forth in the preceding discussion, the AAO finds that the petitioner has failed to overcome the director's denial of the petition. Accordingly, the AAO will not disturb the director's denial of the petition.

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.

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