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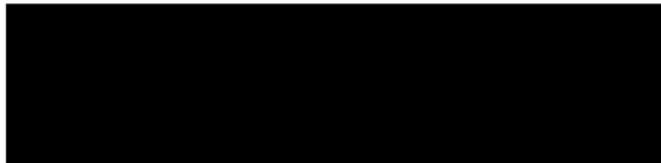


FILE: WAC 07 188 51885 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2008**

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:



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 a fish farming company that seeks to employ the beneficiary as an operations trainee for a period of 20 months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

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 eight grounds: (1) that the petitioner had failed to demonstrate how the proposed training will benefit the beneficiary in pursuing a career abroad; (2) that the petitioner had failed to demonstrate that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (3) that the petitioner had failed to set forth, with specificity, the type of training and supervision to be given, and the structure of the training program; (4) that the petitioner had failed to set forth the proportion of time to be devoted to productive employment; (5) 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; (6) 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; (7) that the petitioner had failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and (8) that the petitioner had failed to establish that the beneficiary would not be placed in a position which is in the normal operation of its business and in which citizens and resident workers are regularly employed.

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.

At the outset of its analysis, the AAO notes several inconsistencies and discrepancies in the record of proceeding. For example, the record contains conflicting information regarding the purpose of the proposed training program. In its May 14, 2007 letter, the petitioner stated that it plans to establish a fish and shrimp farming business in the Philippines, and that the beneficiary would fill the position of operations manager at that farm. However, in its May 25, 2007 letter, the petitioner stated that it provides the training program to individuals “who are interested in starting their own fish pond.” This inconsistency was not clarified.

Further, the AAO notes that on the Form I-129, the petitioner certified to Citizenship and Immigration Services (CIS) that it has six employees. However, in the tax returns submitted at the time the petition was filed, the petitioner informed the Internal Revenue Service that it had paid no monies in salaries or wages. Of the six Forms DE-6, California Quarterly Wage and Withholding Report, submitted in response to the director’s request for additional evidence, three report two employees, two report one employee, and one reports no employees.<sup>1</sup> This inconsistency was not clarified.

Finally, the petitioner certified on the Form I-129 and in subsequent correspondence that the beneficiary would be paid \$10 per hour during the proposed training program. However, the petitioner also submitted a November 7, 2005 letter in which it informed an individual who had inquired about training at the petitioner’s place of business that the fee for such training was \$3,500. It is unclear whether the beneficiary paid a fee in order to participate in the training program. This discrepancy has not been explained.

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.*

Having highlighted the inconsistencies and discrepancies contained in the record of proceeding, the AAO will undertake its analysis of this case.

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<sup>1</sup> Nor does the record indicate that any of these individuals were full-time workers. The Forms DE-6 indicate that the petitioner paid a total of \$2,000 in wages to two employees in the first quarter of 2006; a total of \$3,350 to two employees in the second quarter of 2006; a total of \$3,000 to one employee in the third quarter of 2006; a total of \$1,734 to two employees in the fourth quarter of 2006; a total of \$3,000 to one employee in the first quarter of 2007; and no wages paid to any employees in the second quarter of 2007.

In its May 14, 2007 letter, the petitioner described itself as a fish farming company engaged in aquaculture technology for large-scale, low-cost production of premium quality fresh fish and shrimp. The petitioner stated that the beneficiary would spend 75% of his time in classroom instruction, and 25% of his time in practical, on-the-job training.

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 will benefit the beneficiary in pursuing a career outside the United States. 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, 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 alien.

Although the discrepancy in the record regarding the petitioner's purpose in creating the proposed training program has been noted, the AAO will nonetheless analyze the assertions of counsel on appeal, which were submitted in rebuttal to the findings of the director in her denial.

In her January 22, 2008 denial, the director stated the following:

Although, the record contains a job offer certification letter, stating that the [petitioner] will employ beneficiary as a fish farm manager in the Philippines after completion of the training program and also stating that he will be compensated \$10.00 per hour while in training, the record does not establish that there currently is a fish farming business in the Philippines, for the beneficiary to manage . . . In support of the petitioner's claim, they have submitted four photographs of the overseas farm. However, the photographs bear no identifying logos, emblems or signs displayed on the building or surrounding areas indicating the location abroad. These photographs are not sufficient evidence of pending expansion abroad. At this time, the petitioner is only hoping to expand into the Philippine market; the record contains no evidence of a pending purchase or business transaction regarding a fish farm abroad.

On appeal, counsel states the following:

[The] Petitioner anticipates that the overseas business will be established in time for Beneficiary's return to the Philippines to commence employment.

While there is currently no existing fish pond business in the Philippines, Petitioner is in the process of establishing one. INA § 101(a)(15)(H)(iii) only requires that the training benefit Beneficiary in pursuing a career outside the U.S. It does not specifically require that the career being offered to Beneficiary be currently existing.

The AAO disagrees with counsel's analysis. 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). In this particular case, since the proposed training is specific to the petitioner, and the setting in which the beneficiary would utilize his skills would be for the petitioner in the Philippines, the petitioner must document that it actually has plans to

commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no documentary evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any documentary evidence, beyond its own assertions, to demonstrate that it is in the process of setting up operations in the Philippines. 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)). The petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(4) and 214.2(h)(7)(ii)(B)(4).

The director also found that the petitioner had failed to demonstrate that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes approval of a training program that is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

Given that it does not appear as though the petitioner employs any full-time workers, the record indicates that the beneficiary would in fact be staffing the petitioner's domestic operations during the requested period of employment. Further, it is unclear how the "Training Procedures" manual submitted in response to the petitioner's request for additional evidence differs from the training materials that the petitioner's U.S. employees would study. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes approval of this petition.

The director also found that the petitioner had failed to set forth, with specificity, 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.

Despite counsel's assertions to the contrary, the information contained in the record of proceeding remains 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 during the course of the training program. The record contains no meaningful schedule or other sort of breakdown that would indicate, specifically, how the beneficiary would be spending his time.

The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, but the description provided is inadequate. However, the description contained in the record of proceeding is deficient. The petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, while he participates in 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, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(2). The AAO agrees. Counsel states the following on appeal:

The Petition also mentioned that Beneficiary will not engage in productive employment unless incidental to the training program. This is basically because the sole purpose of the training is to provide preparation, instruction[,] and guidance to beneficiary to adequately equip him for an overall operations manager position abroad. As further

proof that Beneficiary will not engage in productive employment (unless incidental to training), it has been mentioned that Petitioner have [sic] more than enough people performing all the necessary work for the company, thus, Beneficiary's services will not be required to assist in the operations of the business.

The AAO finds counsel's rebuttal deficient, as the record does not support her assertions. Given that the petitioner does not appear to employ any full-time workers, the record indicates that the beneficiary would in fact be performing productive employment for the petitioner. The assertion that the beneficiary would not be performing productive employment for the petitioner, beyond that incidental and necessary to the training, is not supported by the record. Accordingly, the statements in the record regarding the proportion of time to be devoted to productive employment are not supported by the record, either. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(2).

The director also found 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, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(3). The AAO agrees.

On appeal, counsel reiterates the petitioner's earlier contention that the beneficiary would spend 75% of his time in classroom training. However, given that the petitioner has employed, at most, two part-time employees between January 2006 and June 2007, it is unclear to the AAO who would actually facilitate this classroom instruction. The record does not support a finding that the beneficiary would actually be spending 75% of his time receiving classroom instruction. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(3).

The director also found 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)(6). The AAO agrees.

As noted previously, the petitioner certified on the Form I-129 and in subsequent correspondence that the beneficiary would be paid \$10 per hour during the proposed training program. However, the petitioner also submitted a November 7, 2005 letter in which it informed an individual who had inquired about training at the petitioner's place of business that the fee for such training was \$3,500. It is unclear whether the beneficiary paid a fee in order to participate in the training program. If the beneficiary paid this fee, then he himself is the source of at least some of the remuneration he would receive, and not the petitioner. 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.* The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(6).

The director found that the petitioner had failed to establish that the proposed training program does not deal in generalities, with no fixed schedule, objectives, or means of evaluation, as required by 8 C.F.R. § 214.2(h)(7)(iii)(A). The AAO agrees.

The AAO incorporates here its previous discussion regarding the petitioner's vague and generalized description of its training program. 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 petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. It has failed to establish that its proposed training program does not deal in generalities. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

Finally, the director found that the petitioner had failed to establish that the beneficiary would not be placed in a position which is in the normal operation of its business and in which citizens and resident workers are regularly employed, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(2). The AAO agrees.

The AAO incorporates here its previous discussion regarding the petitioner's apparent lack of full-time employees. Given that it does not appear as though the petitioner employs any full-time workers, the record indicates that the beneficiary would in fact be placed in a position which is in the normal operation of its business and in which citizens and resident workers are regularly employed, as it does not appear as though there would be anyone else to perform the duties of such positions. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

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 four additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires the petitioner to demonstrate that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. As noted previously, given that it does not appear as though the petitioner employs any full-time workers, the record indicates that the beneficiary would in fact be performing productive work for the petitioner. The assertion that the beneficiary would not be performing productive employment for the petitioner, beyond that incidental and necessary to the training, is not supported by the record. Accordingly, the statements in the record regarding the proportion of time to be devoted to productive employment are not supported by the record, either. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3). For this additional reason, the petition may not be approved.

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. As noted previously, the record fails to establish that the petitioner has any full-time employees. It has not demonstrated that it has the manpower to provide the beneficiary with 32 hours of classroom instruction per week for a period of 20 months. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition. For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. In its May 14, 2007 letter, the petitioner stated the following:

[The beneficiary] is an ideal candidate for our company's Training Program on account of his professional aptitude. His lack of experience and exposure to fish and shrimp farming, however, necessitates that he undergo our formal training program.

The record, however, does not support the petitioner's assertion. The record indicates that the beneficiary entered the United States in B-1 status on March 15, 2007. The Department of State annotated the beneficiary's visa with the following information:

ATTEND TRAINING PROGRAM FOR AQUACULTURE TECHNOLOGIES

PLANS TWO WEEK STAY

By the time this petition was filed, the beneficiary would have already completed the training program for which the B-1 visa was issued. The petitioner has failed to explain how that training program differs from the one at issue in this petition.

The record establishes that the beneficiary earned a bachelor's degree in electrical engineering in 1979. The petitioner has failed to provide any evidence regarding the beneficiary's career between 1979 and June 6, 2007, the date the petition was filed. The record, therefore, is unclear as to whether the beneficiary participated in the aquaculture training program to further his knowledge in that field, or whether he had no background in the field and was pursuing an entirely new career. The petitioner has not met its burden in establishing that the beneficiary does not have substantial training and expertise in the field. A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masauyama*, 11 I&N Dec. 157 (Reg. Comm. 1965); *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965); *Matter of Koyama*, 11 I&N Dec. 424 (Reg. Comm. 1965). The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(C). For this additional reason, the petition may not be approved.

Finally, the AAO turns again to the petitioner's November 7, 2005 letter, which was addressed earlier in this decision. As noted previously, in that letter the petitioner informed an individual who had inquired about training at the petitioner's place of business that the fee for such training was \$3,500. In that the petitioner provides training for a fee, it appears as though it may be a vocational institution. If the petitioner is a vocational institution, the beneficiary is not eligible for H-3 classification. The regulations state that "[a]n H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, *or training provided primarily at or by an academic or vocational institution.*" 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) (emphasis added). There is insufficient evidence in the record to determine whether the petitioner is, in fact, a vocational institution, and the director did not raise this issue. However, as this petition is not approvable, remand to the director for resolution of this issue would serve no purpose.

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.