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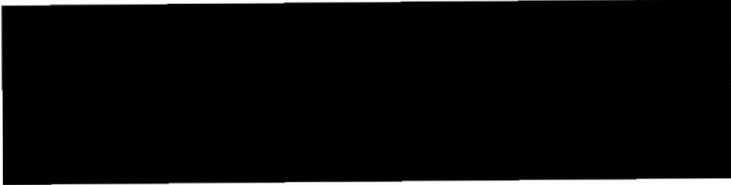
FILE: WAC 07 270 51741 Office: CALIFORNIA SERVICE CENTER Date: **AUG 15 2008**

IN RE: Petitioner:
Beneficiary:



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 an accounting and tax preparation firm with three employees that seeks to employ the beneficiary as management accountant trainee for a period of 24 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 five grounds: (1) that the petitioner had failed to describe the type of training and supervision to be given, and the structure of the training program; (2) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified; (3) that the petitioner had failed to set forth the proportion of time to 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; and (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.

On appeal, newly-retained 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.

In its letter in support of the petition, submitted at the time the petition was filed, the petitioner stated the following:

[The petitioner] is an accounting firm that offers a full range of financial and accounting services to its clients. The ongoing need for fully trained U.S. accountants with a thorough knowledge of U.S. accounting laws and practices, is fundamental to the very nature of my business.

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

The purpose of this program is to give the trainee extensive training in the field of Accountant [sic].

[T]he goal is to equip the trainee with the necessary expertise to fulfill the position of Accountant and prepare her to successfully lead the future international expansion of [the petitioner] from overseas as its Accountant for [the] future branch of the corporation and to also centralize accounting practices within the company. She will also be trained in all aspects of internal auditing for the company to ensure that we are in compliance with all applicable laws and regulations relating to accounting practices and procedures.

The training is detailed and comprehensive and involves direct academic and technical instruction and exposure to various key elements of our accounting practices for supervised practical training.

The petitioner described the proposed training program as follows:

Training will be provided in-house as well as by assignments with management, outside accounting services, bookkeepers and government tax agencies . . . The training will be conducted through direct academic instruction and supervised key practical training with hands-on exposure to the relationships with various support organizations.

The petitioner explained that during the period of training the beneficiary would take part in daily classroom instruction between 9:00 a.m. and 1:00 p.m., and between 2:00 p.m. and 6:00 p.m. she would take part in supervised training and observation.

On appeal, the petitioner explains that the proposed training program would consist of five phases. The first phase, entitled "Introduction to [the petitioner]," would last four months. The second phase, entitled "Current Business Model and Growth Measure," would last six months. The third phase, entitled "Internal Management Accounting and Auditing," would last four months. The fourth phase, entitled "Management of Personnel," would last four months. The fifth phase, entitled "Training in Business Development and Development of a Private Accounting Organization," would last six months.

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 set forth, with specificity, the type of training and supervision to be given, and the structure of the training program, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(1). The AAO disagrees.

The petitioner submits a more detailed description of the proposed training program on appeal which overcomes the concerns of the director in this regard. Accordingly, the AAO 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, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO agrees.

According to the Form I-129, the petitioner has three employees, and its organizational chart indicates four employees. In its letter of support, the petitioner stated the following:

During periods allocated to academic instruction and practical training, the Trainee's activities will at all times be coordinated and supervised by the following company personnel and his subordinates:

However, no further information was provided; no list of names followed.

On the organizational chart submitted in response to the director's request for additional evidence, the petitioner stated that its owner/proprietor would administer the training program, and on appeal, counsel also states that the owner/proprietor would conduct the training program.

However, it is unclear how the petitioner's proprietor/owner will be able to conduct four hours of classroom instruction followed by four hours of supervised training, every day, for a period of 24 months. It is unclear to the AAO how the petitioner's owner/proprietor will be able to attend to her other duties during this time. Moreover, it is unclear to the AAO how the business will be able to function without the owner/proprietor's services during this time, as she comprises fully half of the petitioner's staff of two accountants.

The AAO also notes inconsistencies in the record with respect to the training to be provided. In his February 5, 2008 response to the director's request for additional evidence, former counsel stated the following:

There will be several personnel who will be supervising the beneficiary and will be co-leading the training program (please refer to enclosed training materials detailing the personnel who will be providing training). There are many other staff that can see to the day-to-day operations of the company.

The names of those individuals who will be supervising and "co-leading" the beneficiary were not provided, 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 Obaigbena, 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). Moreover, the AAO notes that these statements conflict with the petitioner's statements, and newly-retained counsel's statements, that the petitioner's owner/proprietor would be the single person providing the training. 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 establish that it has the manpower to provide this training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition.

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 letter of support and supporting documentation. 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.

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)(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 the regulation at 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.

In his February 5, 2008 response to the director's request for additional evidence, former counsel stated the following:

The Petitioner currently does not have a presence in the Philippines . . . Their accounting team has expertise and experience that is not available anywhere other than in the U.S. headquarters . . . Their U.S. business and accounting practices and procedures are unique and highly successful and they wish to transfer this method of accounting practices to expand in the Philippines. The training is therefore only available within the U.S. It is imperative that the trainee obtain intimate knowledge of the company and its operations in the U.S. . . .

We would like to make it clear that due to the business specific nature of the required skills to be developed by the trainee, these cannot be developed through a university course of study.

The record establishes that 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 her newfound knowledge. Since her newfound knowledge will be specific to the petitioner, an operation run by the petitioner would be the only setting in which she would be able to use the knowledge.

The petitioner's intentions are not the issue; the issue is whether there existed, at the time the petition was filed, a career abroad in which the beneficiary would utilize the training she obtains through the proposed training program. Since the knowledge gained via participation in the training program would be specific to the petitioner, and an operation run by the petitioner would be the only setting in which she would be able to use the knowledge, and the petitioner did not have any business operations in the Philippines at the time the petition was filed, it has not demonstrated that such a position existed at the time the petition was filed. Nor has it demonstrated that such a position exists at the present time.

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). There is no evidence in the record of proceeding to indicate that the petitioner had any concrete plans for expansion into the Philippines at the time the petition was filed, beyond training the beneficiary.

The petitioner has failed to establish that its proposed training program will benefit the beneficiary in pursuing a career outside the United States. It has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(4) and 214.2(h)(7)(ii)(B)(4). 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. The petitioner proposes to employ the beneficiary as a management accountant trainee. The record establishes that the beneficiary earned a bachelor's degree in accountancy in 1994. She is a certified public accountant in the Philippines. She is also a certified internal auditor in the Philippines. A proposed training program must provide actual training to the beneficiary and not simply increase her proficiency or efficiency. *Matter of Masuyama*, 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 record establishes that the beneficiary has substantial training and expertise in the field of proposed training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of this petition. For this additional reason, the petition may not be approved.

Finally, the AAO notes that the instant petition was filed on September 18, 2007, after the beneficiary's previous nonimmigrant status had expired. Therefore, it does not appear as though the beneficiary was in valid nonimmigrant status at the time the petition was filed. However, the AAO will not address this issue, as matters surrounding the beneficiary's maintenance of valid nonimmigrant status are within the director's sole discretion and beyond the scope of the AAO's jurisdiction.

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.