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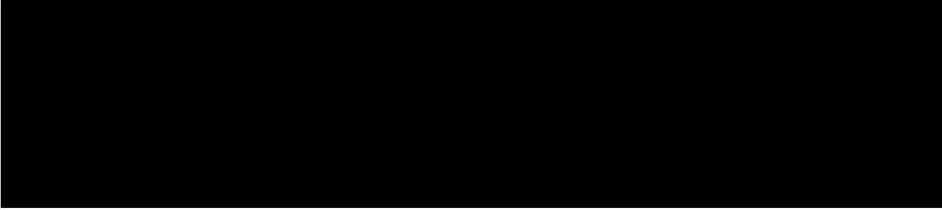
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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

DL



FILE: WAC 07 176 51514 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 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 electrical and lighting supplies wholesaler with five employees that seeks to employ the beneficiary as a trainee for a period of twenty 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 first Form I-290B and supporting documentation, submitted as a motion to reopen or reconsider; (6) the director's dismissal of the motion; and (7) the petitioner's second Form I-290B and supporting documentation, submitted as an appeal. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of her determination 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.

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.

In its May 17, 2007 letter of support, the petitioner stated the following:

We provide wholesale electrical and lighting supplies to both public and to other companies. We offer the utmost in personal service along with the lowest electrical and lighting prices.

* * *

Our services and products include: Industrial Lights, Dimmers, Tracklights, Ventilation Fans, Switches/Outlets, LightBulbs, Motion/Security, Time Switches, Surge Protection, Exit and Emergency Signs, and Circuit Breakers.

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 to fill in key positions in [the petitioner], and its branches/affiliates abroad [sic]. The training was specifically designed to provide [the] trainee with extensive direct exposure to the lighting industry. . . .

* * *

Ultimately, the knowledge gained will be valuable as the trainee joins the branches abroad.

* * *

Petitioner reiterates its purpose in conducting this training program, specifically to employ alien-trainees abroad in its bid to maximize our worldwide marketing, distribution production[,] and service management capabilities [at] our future affiliate office in Manila, Philippines.

In the program outline submitted at the time the petition was filed, the petitioner explained that its proposed training program would consist of five phases: (1) Company and Industry Orientation; (2) Lighting Innovation and Marketing Industry; (3) Product Orientation; (4) Zero Waste System; and (5) Final Evaluation and Assessment.

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 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.

In its letter of support, the petitioner stated the following with regard to supervision:

This is a 100% instructor led program. . . .

Due to the significant roles that trainees will play to the company operations, the President himself intends to supervise the whole training program. Since, he is the driving force in this business and he knows exactly what is needed to succeed, he wants to keep close tabs on all trainees from beginning to end. . . .

Each session and/or module will be facilitated by trainers that specializes [sic] in that particular area.

At the time the petition was filed, the petitioner also submitted an organizational chart. A second organizational chart, as well as a floor plan of the petitioner's building, were submitted in response to the director's June 6, 2007 request for additional evidence, in which she had requested the names, job titles, and job duties of all employees in the petitioner's training division.

In her September 14, 2007 denial, the director stated the following:

In the training program summary it is stated that this is a 100% instructor led program, however no instructor has been identified in the submitted evidence. The training program summary further states the whole program was created and conceptualized by the President and he himself will supervise the whole training program. The statements tend to suggest that the President will be the individual conducting the training. Counsel for the petitioner states ". . .this training program is their initial sponsored training program to be conducted on their premises and by the company President himself." Since the petitioner has only 5 employees, according to part 5, Item 12 of Form I-129 and the organization[al] chart, and no instructors on its staff, it seems that it would be difficult to maintain the petitioner's business in that the President is the instructor.

In reference to Exhibit "J", the petitioner submitted a floor plan that consisted of the President's office, a consultancy room, a lounge, and a reception/counter area to conduct sales. Exhibit "K" was photographs of the floor plan. However, it is noted that the photographs are inconsistent with the floor plan . . . There is no evidence that demonstrates the petitioner has any type [of] facility in which training is conducted.

In his motion to reopen or reconsider, counsel stated the following with regard to physical plant:

[T]he Service failed to notice the submitted training room of the Petitioner-Appellant where the classroom instruction will be conducted. This was separately and independently submitted and attached from the set of the Service's purportedly inconsistent photographs mentioned in the Notice of Decision. The unintentional exclusion of photographs of the other areas of the training facility, such as the staff's office/cubicle, lounge[,] and President's office does not mean the absence of such areas, BUT more on the fact that these areas are reserved exclusively for the permanent employees' use and the President's use. . . .

With regard to sufficiently trained manpower, counsel stated the following:

Any business that is legally conducting its affairs regardless of their location, will always be manned by the President as the head supervisor of all its operations. . . .

Therefore, this inherent wisdom, unwavering concern and constant support on the part of the President in overseeing or principally managing the entirety or over-all affairs, including the conduct of any training program inside the company, is beyond anyone's doubt and reproach. As they say, it comes by being the President.

Nevertheless, assuming arguendo that the President cannot solely or entirely facilitate the whole training program, it is but logical and sensible to delegate or re-delegate the same responsibility to the next person in line who knows the sensitive and confidential information about the company or organization. . . .

* * *

Petitioner-Appellant respectfully attaches a copy of the next-in-line, full time and permanent Trainer. . . .

Concomitantly, Petitioner-Appellant respectfully resubmits and re-attaches the clearer copy of its Organizational Chart and Floor Plan to support its above allegations. . . .

Counsel submitted a third version of the petitioner's organizational chart, and a second version of its floor plan.

The director found counsel's assertions unconvincing, and dismissed the motion on December 4, 2007.

In his January 25, 2008 appellate brief, counsel states the following with regard to physical plant:

[F]or all intents and purposes, it is very clear that the petitioner-appellant has evidence to prove that it possesses physical space where a classroom or academic type of training can be conducted.

* * *

A room may be small or unpainted, or even ugly by ocular standards, but if it will serve the purpose for which it is designated, by all means, that room should be considered to be substantial. In the case at bar, we respectfully submit that the training room and the on-the-job training areas depicted in the photographs submitted in evidence constitute the physical plant space that will serve the purpose of the training.

With regard to sufficiently trained manpower, counsel states the following:

[T]he president is not alone in conducting the training and will be assisted by the Director of Operations (Accounting, HR and Marketing). . . .

We respectfully invite your attention to the actual terms used in paragraph (G) as “sufficiently trained manpower.” The sufficiency requirement refers to and describes the trained manpower. The law does not refer to a quantity of trainers [sic], but to the quality of training of the trainor [sic].

When the Immigration Officer on the case concluded that “the petitioner has not established that it has enough sufficiently trained manpower to provide the training specified,” there was a substitution of a personal standard over the clear provisions of the law. This is legally impermissible.

The AAO disagrees with counsel’s analysis. In analyzing this matter, the AAO will first address the evolving nature of the petitioner’s organizational chart. The first organizational chart listed the company’s president and five other employees: one bookkeeper, and four “sales staff.” The second organizational chart also listed the company’s president and five other employees. However, in this version of the organizational chart the petitioner’s staff had changed. While there had originally been four “sales staff,” there was now only one such employee. The petitioner named four new positions: (1) “finance/accounting”; (2) “operations”; (3) “sales & marketing”; and (4) “trainees.” The third organizational chart, submitted on appeal, contains further changes. The third organizational chart lists the petitioner’s president and six positions: (1) “accounting and marketing/trainor [sic]”; (2) the trainee; (3) an unidentified vacant position; and (4) three “counter sales staff.” The evolving nature of the petitioner’s organizational chart detracts from its credibility. 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 AAO finds that these changes do not clarify the record or submit additional details to fill in missing information. Rather, they constitute an attempt at a material alteration to the record 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). 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. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Nor does the AAO find credible the counsel’s assertions regarding [REDACTED], who counsel states is the petitioner’s “director of operations” (and who the petitioner refers to as its “accounting and marketing/trainor [sic]”) and will assist the petitioner’s president in conducting the training. First, the AAO notes that this particular position did not appear until the third iteration of the petitioner’s organization chart. Further, it appears that the petitioner has attempted to merge three positions named in the second iteration of its organizational chart—“finance/accounting,” “operations,” and “sales/marketing” into this position, referred to as “director of operations” by counsel and “accounting and marketing/trainor [sic]” by the petitioner. 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*. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. *See Matter of Michelin Tire Corp.* 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*.

The AAO turns next to counsel's assertion on appeal that the director interpreted the regulation incorrectly. The AAO disagrees. Even if the AAO accepts counsel's contention, and in essence removes the phrase "sufficiently trained," the regulation still requires the petitioner to demonstrate that it has the manpower to provide the training specified. The AAO agrees with the director's analysis in this regard. It is unclear to the AAO how, in a 5-employee organization, if one of those employees will assume responsibility for training the beneficiary over a 20-month period, the petitioner will be able to function without 20% of its workforce for that period of time. The AAO does not accept counsel's assertions regarding the role [REDACTED] is to play in the training. In reaching its decision to reject counsel's assertions regarding the role of [REDACTED], the AAO considers the evolving nature of the petitioner's organizational chart, which detracts from its credibility, as well as its failure to provide her name until the time of the appeal, despite the director's specific request for the names of the petitioner's training personnel in her request for additional evidence.

The petitioner has failed to demonstrate that it has sufficiently trained personnel to provide the training specified in the petition.

Nor does the AAO find that the petitioner possesses the physical plant to provide the training specified in the petition. Again, the evolving nature of the petitioner's floor plan detracts from its credibility in this regard. 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).

Specifically, the AAO notes that there are two floor plans contained in the record of proceeding. The first floor plan names, from left to right, the president's office, a "consultancy" room, what appears to be a lounge area, and a reception area with counters. There are two bathrooms and a vanity area in front of the reception area. The second floor plan differs from the first. Although counsel downplays the differences, the AAO notes these discrepancies. As noted previously, the rear of the office previously contained four rooms. There are now six: (1) "receiving"; (2) "shipping"; (3) "training room"; (4) "conference room"; (5) "accounting"; and (6) a "lunch room." Again, 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). Given the petitioner's inconsistencies describing its physical plant, the record does not establish that the petitioner possesses the physical plant to conduct the proposed training program. Again, the evolving nature of the petitioner's floor plan detracts from its credibility.

The petitioner has failed to establish that it has the physical plant or 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).

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.

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 first module of the proposed training program, entitled “Company & Industry Orientation,” would consist of two sessions, and last a total of seven months. The petitioner’s description of this portion of the training program consists of two pages of goals, objectives, and topics to be covered, and six pages of reading material. 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 training program outline is only eight pages long, it is unclear how the petitioner will stretch this material to cover seven months of instruction. Such a vague, generalized description does not explain what the beneficiary would actually be doing on a day-to-day basis. 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.

The petitioner’s description of much of the rest of its proposed training program suffers similar deficiencies. For example, the third module of the proposed training program, entitled “Product Orientation,” would last three months. The petitioner’s description of how the beneficiary is to spend this period of time consists of one sentence, followed by a 22-page listing of products sold by the petitioner. The petitioner does not specifically describe the daily training program. Again, it is unclear how the petitioner will stretch this material to cover three months of instruction. The petitioner has failed to explain what the beneficiary would actually be doing on a day-to-day basis.

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, the description contained in the record is inadequate. The petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiaries 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. 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)(2)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

The AAO has found 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. It therefore finds the petitioner in compliance with 8 C.F.R. § 214.2(h)(7)(ii)(A)(1), which 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), which 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.

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.¹

¹ The AAO notes the letters from [REDACTED] and [REDACTED] which, according to counsel, contain offers of employment. The AAO disagrees. Neither letter offers the beneficiary a position. Rather, each

There is no evidence in the record of proceeding to indicate that the petitioner had any concrete plans for expansion abroad 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, or 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)(2)(A)(4). 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.

letter invites the beneficiary to submit an application for employment. Nor does either letter indicate that it was issued on the basis of the beneficiary's expected completion of the petitioner's training program.