

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

DL

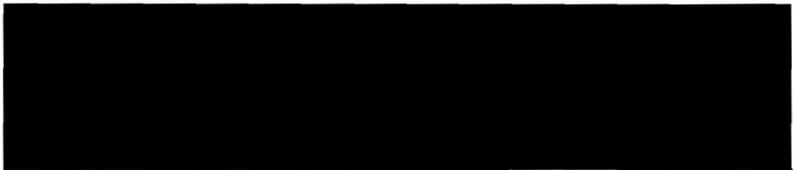


FILE: EAC 07 073 52256 Office: VERMONT SERVICE CENTER Date: MAR 17 2008

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 perfume distributor that seeks to employ the beneficiary as a trainee for a period of eighteen months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on three grounds: (1) 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; (2) that the petitioner had failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training; and (3) that the petitioner had failed to establish that the beneficiary would not be engaged in productive employment, unless such employment is incidental and necessary to the training.

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 the program syllabus that accompanied the Form I-129 at the time the petition was initially filed, the petitioner stated the following:

The purpose of this training program is to provide [the beneficiary] with a range of specific professional skills relating to the specialized marketing and sales techniques utilized by the fragrance and cosmetics sales and distribution industry[,] specifically the provision of name brand beauty products and perfumes. She will study all aspects of the industry, including our extensive product lines, such as Gucci, YSL, Hermes[,] and many more. The training program emphasizes the specialized business practices common in the industry and stresses the sales and marketing functions unique to the U.S. market.

The program is to further the trainee's career by offering "hands-on" experience in marketing and operations, as well as product line recognition. The ultimate purpose of the training program is to train the individual to qualify for a management position and eventual assignment and placement in that capacity at an overseas location, at this time Mexico, of [the petitioner].

The company imports fragrance and cosmetic products from France, Italy[,] and Germany[,] and distributes them to Duty Free shops in the Caribbean and Mexico. . . .

The petitioner stated that the beneficiary would acquire "in-depth theoretical and practical knowledge" regarding the sales and marketing of fragrance and beauty products. The training would be conducted through both direct instruction and supervised practical training. The beneficiary would spend four hours per day receiving direct instruction, and four hours per day in supervised practical training. The beneficiary would spend ten percent of the time allotted to supervised practical training (i.e., five percent of the entire training program) performing incidental productive employment.

According to the petitioner, the proposed training program would be divided into five components. The first component of the proposed training plan, entitled "Introduction," would last two months. During this time, the beneficiary would be familiarized with the petitioner's corporate approach to sales; its marketing and distribution operations; its management; its corporate structure; its client profiles; its computer systems; and its general corporate operating procedures. Via four daily hours of direct instruction, the beneficiary would receive instruction on the petitioner's organizational structure; its best-selling products; its distribution channels; its shipping practices; its fragrance and cosmetics lines; its commercial transportation carriers; its corporate operating procedures; and documentation. In four daily hours of practical training, the beneficiary would learn about industry standards; international distribution networks; order tracking; manufacturers' presentations and product literature; client acquisition; internet searches; working with clients; and meeting short-term objectives.

The second component of the proposed training program, entitled "Introduction to Fragrance and Cosmetics Lines as well as Related Services," would last five months. During this time, the beneficiary would acquire an in-depth knowledge of all aspects of various product lines by studying both the products and their designers. Via four daily hours of direct instruction, the beneficiary would study six fragrance lines (Hugo Boss, Escada, Dolce & Gabbana, Valentino, Gucci, and Hermes) and one cosmetics line (YSL). In four daily hours of practical training, the beneficiary would learn to analyze vendors; negotiate with vendors; and analyze products.

The third component of the proposed training program, entitled "Overview of Sales and Marketing Techniques," would last three months. During this time, the beneficiary would learn sales techniques; learn about the petitioner's marketing efforts; attend marketing and advertising strategy sessions; attend industry trade shows and meetings; study market profiles for target audiences; and assess the effectiveness of various strategies. Via four daily hours of direct instruction, the beneficiary would learn about market research; brochure design; web page design and operation; referrals; satisfying customers; market studies; target groups; advertising costs; cost negotiation; and client solicitation. In four daily hours of practical training, the beneficiary would learn about strategy meetings; the recording of sales conditions; and client consultations.

The fourth component of the proposed training program, entitled "Overview of Field Governmental Regulatory Entities & Documentation Requirements," would last four months. During this time, the beneficiary would learn about regulatory compliance. Via four daily hours of direct instruction, the beneficiary would learn about asset documentation; legal issues; distribution channels; cost analysis; and researching and preparing bids. In four daily hours of practical training, the beneficiary would learn about strategy meetings; the recording of sales conditions; and client consultations.

The fifth component of the proposed training program, entitled "Management and Business Administration," would last five months. During this time, the beneficiary would learn about management techniques; administrative procedures; human resources operations; corporate operating procedures; management meetings; production goals and quotas; employee motivation; bonuses; and recordkeeping. Via four daily hours of direct instruction, the beneficiary would learn about international contracts; foreign currency transactions; international business law; taxes and duties; international letters of credit; management philosophy; long-range growth; negotiations with vendors and suppliers; staff training; market valuation; the setting of goals and quotas; human resources issues; computers; and regulatory compliance. In four daily hours of practical training, the beneficiary would learn about the review of personnel; employee motivation; workload tracking and documentation; pricing; ordering; the negotiation of international transactions; the determination of taxes to be paid; the evaluation of employees; and payroll.

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 program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. The AAO agrees. 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.

Although the director requested additional details regarding the proposed training program in his February 1, 2007 request for additional evidence, counsel's April 25, 2007 response failed to provide any meaningful additional details. A close examination of the description provided in counsel's response reveals that, other than providing the names of the individuals who will provide the training, the description was largely a verbatim repetition of the information provided at the time of filing.

Moreover, 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, and as noted by the director, during the second component of the proposed training program the beneficiary is to spend four hours per day, for five months, learning about six fragrance lines (Hugo Boss, Escada, Dolce

& Gabana, Valentino, Gucci, and Hermes) and one cosmetics line (YSL). This is in addition to receiving an introduction to these lines in the first component of the training program. The petitioner has provided little indication as to what the beneficiary would actually be doing during this five-month period of time during which she would be learning about these products for four hours per day. On appeal, counsel contends that this list of fragrances is not exhaustive, and that each fragrance and cosmetic line has unique methods of distribution, pricing, advertising, and display. However, counsel does not provide additional details as to what the beneficiary would actually be doing during this time. She does not explain how the beneficiary would be learning about these methods of distribution, pricing, advertising, and display, in a classroom setting for twenty hours per week, for five months. Again, it is unclear to the AAO what the beneficiary would actually be doing during this time, as the petitioner has failed to explain how the petitioner intends to fill such a large period of time (four hours per day, for five months). Simply stating that the beneficiary will “learn about” these lines of fragrances and cosmetics or that she will learn their “unique methods of distribution, pricing, advertising, and display” is an insufficient description, given the period of time that the petitioner has dedicated to this component of the training program.

The petitioner’s description of the rest of its proposed training program suffers similar deficiencies. 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 most of the proposed training program. It has failed to establish that its proposed training program does not deal in generalities. Nor does the record indicate how the beneficiary would be evaluated.

The petitioner has failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director also found that the petitioner had failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training. The AAO disagrees. 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.

On appeal, counsel submits an additional explanation regarding the beneficiary’s education and work experience. She does not appear to have a background in the petitioner’s specific industry. The AAO therefore finds that the beneficiary does not possess substantial training and expertise in the proposed field of training, and it withdraws that portion of the director’s decision stating the contrary.

The director also found that that the petitioner had failed to establish that the beneficiary would not be engaged in productive employment, unless such employment is incidental and necessary to the training. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(3) requires a demonstration that the beneficiary 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 record establishes that the beneficiary would spend four hours per day in supervised practical training. However, supervised practical training is not necessarily synonymous with productive employment. Here, the petitioner has specifically stated that ten percent of the time allotted to supervised practical training would be spent on incidental, productive employment. The petitioner has provided the names of the individuals who will supervise the beneficiary during her periods of supervised training, and

the AAO finds the assertion that no more than ten percent of this time would involve productive employment reasonable. The record does not indicate that the beneficiary will engage in productive employment beyond what is necessary and incidental for the training. The AAO therefore finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(ii)(3) and 214.2(h)(7)(iii)(E), and withdraws that portion of the director's decision finding the contrary.

Accordingly, 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 an additional reason. 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.

As noted above, the stated reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Having made such an assertion, the petitioner must 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

The petitioner has asserted that the beneficiary will assist it in establishing operations in Mexico. 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 only setting in which the beneficiary would utilize his skills would be for the petitioner in Mexico, the petitioner must document that it actually has plans to commence operations in Mexico upon completion of the training. The record, however, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence, beyond the assertions of record, to demonstrate that it is in the process of setting up operations in Mexico. 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 not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4). For this additional reason, 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.