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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

b4

[redacted]

FILE: WAC 08 010 52132 Office: CALIFORNIA SERVICE CENTER Date: SEP 0 2 2008

IN RE: Petitioner:
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. 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 frozen yogurt franchisor and store that seeks to employ the beneficiary as a trainee for a period of 18 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 notice of intent to deny the petition; (3) the petitioner's response to the director's notice; (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 it has the physical plant and sufficiently trained manpower to provide the proposed training; (2) that the petitioner had failed to demonstrate that similar training is unavailable in the Philippines, the beneficiary's home country; and (3) that the petitioner had failed to establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

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 October 1, 2007 letter in support of the petition, the petitioner stated the following:

> [The petitioner] was formed in the year 2004. From the moment we opened the doors of the first [location] in February 2006 it's been a success. During the Fullerton, CA store's first year, more than 30,000 customers sampled our product each month. By the end of the first year of operation, more than 360,000 cups of yogurt were self-served. As successful as we've been, this is just a preview of greater successes yet to come.

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

> The ultimate goal is that the trainee will be fully prepared to become . . . qualified and competent to manage operations with minimal supervision. The trainee will be able to achieve the following:
>
> 1. Assist in our business expansion in her home country.
> 2. Introduce and promote [the petitioner] in her home country to both business associates and the general market.
> 3. Supervise, recruit, and train employees to staff the upcoming branch office in her home country.
> 4. Make recommendations to Headquarter[s] to improve company operations.

The petitioner explained that the proposed training program would last 18 months and would consist of eight topic areas: (1) Orientation and Organization; (2) Products; (3) Personnel Administration; (4) Safety and Security; (5) Inventory Management; (6) Equipment and Maintenance Management; (7) Facilities Management; and (8) Review and Evaluation.

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 in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO disagrees.

The petitioner has supplemented the record on appeal to include documentary evidence regarding the petitioner's actual number of employees, which was not available to the director at the time she made her decision. The petitioner has also submitted documentary evidence establishing the petitioner's affiliation with a sister company, whose personnel it can also access to cover the trainers' normal responsibilities when they are providing training to the beneficiary. The AAO finds the petitioner's submissions reasonable, and finds that it has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, the beneficiary's home country. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) requires a demonstration that the proposed training is not available in the alien's own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

In its October 1, 2007 letter of support, the petitioner stated the following:

> The training program is being offered due to our plan for global expansion. The frozen yogurt industry is going strong and we expect growth to continue. . . .
>
> [The petitioner's] method and business model is not yet available in the Philippines. It is therefore necessary for [the beneficiary] to receive training here in our office. In addition, the training program will include information about our company's specific policies and private information. Because of this, the information is not available elsewhere and requires [the beneficiary to] receive the training here.

In its January 27, 2008 response to the director's request for additional evidence, the petitioner stated the following:

> The Philippines has been selected as a point for expansion due to the low cost of investment and how lucrative business will be due to lack of competition. Our research indicates that currently there is only one well established frozen yogurt business in the Philippines. . . .
>
> International expansion requires that we first operationalize a branch office in the Philippines which will take charge of all the duties that our office in California handles but for the foreign market. The proposed training is offered in anticipation of this important move.
>
> Our training program is specific *proprietary training*; it deals with the specific operations of [the petitioner]. . . .
>
> Our franchise training is company specific proprietary training designed to verse the trainee in all aspects of the operation of [the petitioner's] Philippine branch and expanding the franchise . . . As the training is company specific proprietary training no other institution or organization is capable of providing the training, and given that [the petitioner] is not yet present in the alien's home country, the Philippines, **the training is not available in the alien's home country** [emphasis in original].

In its May 13, 2008 letter submitted on appeal, the petitioner states the following:

> **The training that** [the petitioner] **is offering is not available in the Philippines. The program emphasizes company specific proprietary training that only** [the petitioner] **can provide** [emphasis in original].

The question to be addressed when attempting to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*) is not whether the petitioner offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

In the present case, however, the reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Moreover, the petitioner in this particular case has submitted evidence to demonstrate that its business practices are sufficiently unique that such knowledge could not be obtained at another facility. The AAO finds that, in this particular case, the petitioner has established that the proposed training is not available in the Philippines, and finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*). The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to adequately describe the career abroad for which the training would prepare the beneficiary. 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 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.

With regard to the beneficiary's career abroad, the petitioner stated the following in its October 1, 2007 letter of support:

> Following our training program, [the beneficiary] will be equipped and knowledgeable with skills in the areas of operations and franchising of our brand and products. She will be able to apply aptitudes and abilities to our upcoming branch in a management position that we are offering her in the Philippines. Furthermore, she will be able to use this knowledge in any career outside the United States, if she chooses not to become employed with our company. Education in the U.S. is amongst the highest ranked throughout the world.

In his October 4, 2007 letter of support, counsel stated the following:

> The Petitioner has invited the Beneficiary for the sole purposes of receiving instruction and training in the areas such as inventory, equipment, and facilities management for starting an overseas branch [sic].

In its January 27, 2008 response to the director's request for additional evidence, the petitioner stated the following:

> [W]e maintain that **the purpose of the training program is to prepare the beneficiary for employment in the Philippines** [emphasis in original].

> Once the petitioner [sic] is fully trained in the operations and franchising of [the petitioner] in the U.S. she will return to the Philippines and apply her newly gained knowledge at our forthcoming branch in the Philippines.

The petitioner also included a September 17, 2007 letter to the beneficiary with its response to the director's request for additional evidence. In this letter, the petitioner offered the beneficiary a position abroad at the conclusion of the training program.

In its May 13, 2008 letter, the petitioner stated the following:

> [B]y utilizing our profits and wide network of vendors and clients, [the petitioner] intends to establish a branch office in the Philippines as its next business venture. The function of the Philippine branch will be to take charge of all the duties that our corporate office in California handles, but for the foreign market . . . **Please see enclosed business application as evidence of our plans to establish a Philippine branch office** [emphasis in original].
>
> Moreover, we have consistently stated that [the beneficiary] will be employed as a Regional Manager at our Philippine branch office after successful completion of our training program. . . .
>
> While awaiting completion of our Philippine branch office, [the beneficiary] will be employed as a company representative abroad. . .

In his May 19, 2008 letter, counsel states the following:

> [T]he petitioner is offering training program to train a regional manager for its upcoming Philippine office.

The AAO agrees with the director. As noted above, the AAO has found the petitioner in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*). Again, the question to be addressed when attempting to satisfy these two criteria is not whether the petitioner offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

However, in the present case, and as noted above, the entire reason for creation of the training program 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 (the knowledge that cannot be obtained in the Philippines) 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 (again, if the knowledge can be used at employment other than for the petitioner, it is therefore not wholly specific to the petitioner's business, and therefore can be obtained in the Philippines).

The petitioner has failed to establish that there is in fact exists a career abroad in which the beneficiary can utilize the training to be imparted via the proposed training program. As the purpose of the proposed training program is to train the beneficiary on the petitioner's unique business practices, the only setting in which the beneficiary would be able to utilize her newfound knowledge would be for the petitioner.

As the petitioner has not yet established its "upcoming branch" in the Philippines, there exists no setting in which she would be able to utilize her newfound knowledge. 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 her skills would be for the petitioner in the Philippines,[1] the petitioner must document that, at the time the petition was filed, it actually had 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 at the time the petition was filed, 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. The September 17, 2007 letter from the petitioner offering the beneficiary employment in the Philippines upon completion of the training program is not persuasive in this regard. Nor is the "business application" submitted by the petitioner on appeal persuasive. This document does not indicate that any action has been taken in the Philippines towards establishing the branch petitioner's branch office. Nor does it indicate that the document has been filed with the proper authorities. 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*).

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[1] The AAO notes the petitioner's assertion in its letter of support that completion of the proposed training program will "in any career outside the United States." In making this assertion, counsel is in essence asserting that the skills to be imparted by the proposed training program go beyond those that are specific to the petitioner's company. If the skills can be utilized in "any career outside the United States," or even in a related career, then those skills are clearly not specific to the petitioner's method of conducting business. If the AAO were to accept this argument, which it does not, the AAO would be compelled to enter a finding that the petitioner had failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and (*5*). The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) 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*) 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. If the petitioner is to assert that the skills and knowledge that the beneficiary would learn during the proposed training program are not specific to the petitioner, and could therefore be used at other companies, the AAO questions why the beneficiary cannot obtain such skills in the Philippines. The petitioner has noted the existence of at least one other frozen yogurt franchise in the Philippines: BTIC Frozen Yogurt (http://www.bticfrozenyogurt.com (accessed August 6, 2008)). The AAO also notes the existence of I Love Berries (*see* http://www.mb.com.ph/issues/2008/05/22/20080522125243_print.html (accessed August 6, 2008)) and The White Hat (*see* http://www.thewhitehat.com.ph (accessed August 6, 2008)), which both appear to be frozen yogurt franchises in the Philippines. The record fails to demonstrate that, if the proposed training is not specific to the petitioner, that similar training cannot be obtained in the Philippines, the beneficiary's home country.

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 an additional reason.

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. The information contained in the record of proceeding 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. The petitioner is not required to account for every minute of the beneficiary's time, but the description contained in the record is deficient.

For example, during the first session of the training program, entitled "Orientation and Organization," the beneficiary will spend four weeks on "Training Orientation"; "[The Petitioner's] Mission"; "Franchise/Company History"; and "Company Structure." Such generalized descriptions fail to explain what the beneficiary would actually be doing during this time.

The petitioner's description of the rest of its proposed training program suffers similar deficiencies. For example, the petitioner's description of how the beneficiary is to spend a four-week period of time is limited to the following: "Frozen Yogurt"; "Beverage"; and "The [Petitioner's] Experience." This does not explain what the beneficiary would actually be doing. In a similar vein, the petitioner's description of how the beneficiary is to spend a 12-week period of time is limited to "Company Policies"; "Positions"; and "Employee Training." The petitioner's description of how the beneficiary is to spend another 12-week period of time is limited to "Emergency and Preventive Procedures"; "Security Systems"; "Safety Rules"; "Injuries"; and "First Aid and Medical Care." The petitioner's description of how the beneficiary is to spend another 12-week period of time is limited to "Smallware Product Specs"; "Ordering and Receiving Procedures"; "Inventory Control"; and "Physical Inventory Procedures." The petitioner's description of how the beneficiary is to spend another 12-week period of time is limited to "Facilities Management"; and the petitioner's description of how the beneficiary is to spend a four-week period of time is limited to "Review and Evaluation." Again, such limited descriptions, presented in summary form, do little to educate the AAO about what the beneficiary would actually be doing while participating in the petitioner's proposed training program.

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 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.

For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). The petitioner has failed to demonstrate that the proposed training program that 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). 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.