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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 181 52818 Office: CALIFORNIA SERVICE CENTER Date: **SEP 18 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 a wholesaler of cell phones and accessories 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, received at the service center on June 1, 2007; (2) the director's June 13, 2007 request for additional evidence; (3) the petitioner's August 16, 2007 response to the director's request for additional evidence; (4) the director's September 19, 2007 denial letter; (5) counsel's October 22, 2007 motion to reopen the petition; (6) the director's December 4, 2007 dismissal of counsel's motion; (7) counsel's December 13, 2007 follow-up letter; (8) counsel's February 7, 2008 motion to reopen the petition; (9) the director's February 29, 2008 dismissal of counsel's motion; and (10) the Form I-290B and supporting documentation, received at the service center on April 3, 2008. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on two grounds: (1) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the proposed training; and (2) that the petitioner had failed to demonstrate that similar training is unavailable in the Philippines, the beneficiary's home country.

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 4, 2007 letter of support, the petitioner stated the following:

[The] Petitioner carries and distributes a full line-up of Sprint and OEM handsets and accessories of all affiliated manufacturers . . . Depending on the kind of business our clients are engaged in, we offer them affordable handsets and accessories that best suit their needs. . .

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

The purpose of the training program is to develop highly qualified individuals to fill in key positions in [the petitioner's] branches and affiliates abroad. This is designed to provide the trainee with an extensive and direct exposure to the field of marketing and merchandise distribution.

The main goal of the training program is to educate the trainee in all areas of [the petitioner's] operations. . .

In the training outline, the petitioner explains that its proposed training program would be divided into five phases: (1) General Orientation and Industry Familiarization; (2) Operations and Procedures; (3) Marketing; (4) Merchandise Strategies; and (5) Evaluation/Performance 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 agrees.

As a preliminary matter, the AAO finds that the petitioner has overcome the concerns of the director regarding its physical plant. The AAO finds the information of record, including the evidence and explanations submitted on appeal, reasonable. Therefore, the AAO withdraws that portion of the director's decision. Having made that determination, the AAO turns next to a consideration of whether the petitioner has established that it has sufficiently trained personnel to provide the training specified in the petition.

The petitioner stated the following with regard to supervision in its letter of support:

Due to the significance of the Marketing and Merchandise Distribution Manager Trainee, the President is in-charge of full supervision. Although, each session and/or program will be facilitated by an individual expert in a particular field, participants are required to report directly to the President at each session.

In his August 16, 2007 response to the director's request for additional evidence, counsel stated the following:

Petitioner has a regular training facility and a pool of sufficiently trained and qualified manpower to provide the training. Apart from the Chief Executive Officer, key trainers include, among others, [REDACTED] Chief Operating Officer; Executive Vice President of Sales; [REDACTED] Director of Strategy and Planning and [REDACTED], Vice President of Retail.

In her September 19, 2007 denial, the director stated the following:

Although the petitioner contends that it possesses the physical premise and sufficient manpower to provide the proposed training, the evidence of record does not support that contention. The petitioner states that in addition to the Chief Executive Officer, its "...key trainers include, among others, [REDACTED] Chief Operating Officer; [REDACTED], Executive Vice President of Sales; [REDACTED], Director of Strategy and Planning and [REDACTED], Vice President of Retail." The petitioner's organizational chart does not indicate that the petitioner has a training division which will provide the training nor does the record reflect that training duties are a part of the regular assigned duties for the above named individuals. In addition, the petitioner has not explained how the above named individuals will still be able to perform their professional duties while providing the proposed training . . . The record is insufficient to establish that the petitioner possesses physical plant space and sufficiently trained manpower to provide the training specified.

In his October 22, 2007 motion, counsel states the following:

As to the observation that petitioner failed to explain how the training officers could still perform their corporate duties while training the beneficiary, we submit that [the] petitioner is certain that no untoward disruption of duties both in the corporate duties of the training officers as well as in their training duties will possible [sic] occur . . . the trainee is an independent learner requiring minimum direct supervision.

The AAO finds counsel's rebuttal deficient. Counsel's assertions that the petitioner has sufficient manpower to conduct the training, after being placed on notice of the director's concerns via the denial letter, are insufficient. 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 Obaighbena*, 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).

The petitioner has still failed to establish that the individuals who will be providing the training will be able to attend to their regular duties. According to the schedule provided at the time the petition was filed, the beneficiary would spend fifty percent of his time in classroom instruction. In a company that is relatively small, such as the petitioner, it is reasonable to question who would attend to the trainers' regular job duties during their absence from their normal positions.

Moreover, while the petitioner has provided a list of names, it has not established that they possess the qualifications to provide the training. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* at 165.

Finally, counsel's assertion that the beneficiary will require little supervision is not supported by the record. If the beneficiary is to spend at least fifty percent of his time in classroom instruction, someone must provide the instruction. If the beneficiary is to be simply reading to himself during this time, then there is no reason why he cannot do it in the Philippines. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(G).

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 May 4, 2007 letter of support, the petitioner stated the following:

Since the training program shall specifically deal with petitioner's business procedures in marketing and distribution of its merchandise and services, all of which are intrinsically connected with the nature of [the petitioner's] business, there is no equivalent training outside the United States.

In his August 16, 2007 response to the director's request for additional evidence, counsel stated the following:

Considering that the training program specifically deals with complex issues, principles[,] and procedures that are intrinsically connected with marketing, worldwide distribution[,] and value-quality service operations unique to [the petitioner], the training may not be conducted elsewhere.

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.

Pursuant to the above discussion, the AAO agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa.

Beyond the decision of the director, the AAO finds that the petition may not be approved for four additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(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 May 4, 2007 letter of support:

Upon completion of the multi-course curriculum, the trainee will be equipped with the knowledge needed to succeed and be competent as [the] [M]arketing and Merchandise Distribution Manager for our affiliate abroad. . . .

Ultimately, the knowledge gained will be valuable as the trainee joins [the] petitioner's branches and affiliates outside the United States.

As discussed previously, 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.

In the present case, as noted previously, the basis of the AAO's determination that the proposed training is unavailable in the beneficiary's home country is its focus on the petitioner's specific business practices, as discussed by the petitioner.

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 (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 his newfound knowledge would be for the petitioner.

However, the record does not indicate that the petitioner has any business operations in the Philippines. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm.

1978). In this particular case, since the proposed training is specific to the petitioner, and the setting in which the beneficiary would utilize his skills would be for the petitioner in the Philippines,¹ the petitioner must document that, at the time the petition was foiled, 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. 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.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(1) requires the petitioner to describe the type of training and supervision to be given, and the structure of the training program. In its letter of support, the petitioner stated that the beneficiary would spend 50 percent of his time in academic training; 40 percent of his time in practical and/or on-the-job training; and ten percent of his time in observation. However, it also stated that the beneficiary would spend 70 percent of his time in practical training and observation,

¹ The AAO notes counsel's assertion in his August 16, 2007 response to the director's request for additional evidence that, "upon the completion of his training in the United States, [the beneficiary] would have gained a valuable and unparalleled experience in the industry which he can use to further his professional career in the Philippines." 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 a career that is not with the petitioner, 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. According to the petitioner's own evidence, over 22 million people in the Philippines use cell phones. It is unclear how those individuals were able to obtain those phones if Filipino cell phone wholesalers are unable to train their employees in marketing and distribution. The letter submitted by Professor ██████████ in which she states that she has never conducted, performed, or designed a training program focusing on wireless communication technology is insufficient. First, the AAO notes that the training program is not designed to teach technical aspects of wireless technology; it is to train the beneficiary on marketing and merchandising. Second, the AAO questions Ms. ██████████ qualifications to opine on this matter, as her educational background appears to be in industrial psychology and special education, not marketing and merchandising. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Further, the AAO notes the existence of several marketing programs at Filipino universities. The record fails to demonstrate that, if the proposed training is not specific to the petitioner, similar training cannot be obtained in the Philippines, the beneficiary's home country.

and thirty percent of his time in the petitioner's laboratory and/or training facility. These percentages are in conflict. Further, as noted previously, counsel stated in his motion that the beneficiary will receive "minimum direct supervision," which is inconsistent with the earlier statement that the beneficiary would spend 50 percent of his time in academic instruction. 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 adequately describe the supervision that the beneficiary would receive while participating in the proposed training program. For this additional reason, the petition may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires the petitioner to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. As noted previously, the record is unclear as to the amount of time that the beneficiary will spend in classroom instruction. The petitioner first asserts that the beneficiary will spend 50 percent of his time in classroom instruction. However, it then states that the beneficiary will spend 70 percent of his time in practical training and observation, and 30 percent of his time at the petitioner's laboratory and training facility, and on motion counsel asserts that the beneficiary will receive "minimum direct supervision." The petitioner has not clarified the record with regard to the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. For this additional reason, the petition may not be approved.

Finally, the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires the petitioner to establish that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. As the record is unclear as to how much time the beneficiary will actually spend in the classroom, and counsel asserts that he will in fact receive "minimum direct supervision," the record does not establish that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training. 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.