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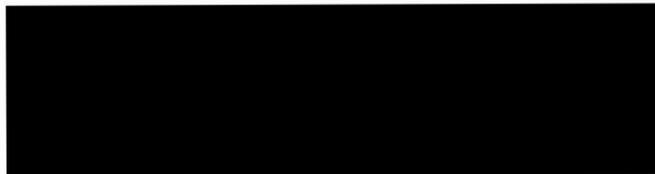
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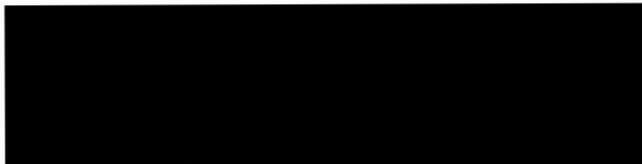


FILE: WAC 07 207 53511 Office: CALIFORNIA SERVICE CENTER Date: SEP 29 2008

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.

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 metal and hardware distributor 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 two grounds: (1) that the petitioner had failed to establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States; and (2) 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.

On appeal, the petitioner 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 June 25, 2007 letter in support of the petition, the petitioner stated the following:

[The petitioner] is one of the oldest metal companies in Los Angeles. . .

* * *

This unique training opportunity allows participants to gain practical experience in chemical waste treatment processing. Ultimately the knowledge gained will be used in the capacity of a Research Associate appointment, once assigned to our future affiliate/branch abroad. He/She shall establish a global network between our U.S. company and the future affiliate branch abroad.

In the training manual submitted at the time the petition was filed, the petitioner explained that the proposed training program would last 18 months and consist of five modules: (1) Orientation; (2) Environmental Compliance; (3) Pollution Prevention Procedures; (4) Workplace Safety; and (5) 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 adequately describe the career abroad for which the training will 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.

In its June 25, 2007 letter of support, the petitioner stated the following:

With the everyday transactions we engage into, we are able to utilize our profits to expand our services even further and are in the process of negotiating with agents to represent and promote our services worldwide. . . .

In the training manual submitted at the time the petition was filed, the petitioner stated the following:

[The proposed training program] shall make the Trainee an effective employee once a position in waste management is assumed at our future affiliate/s abroad.

In her October 11, 2007 request for additional evidence the director stated, in pertinent part, the following:

Explain further how the knowledge or skills acquired in the proposed training will benefit the beneficiary in pursuing a career outside the United States. Provide evidence of the facility/affiliate where the beneficiary will work upon completion of the program, to include photographs of business premises, inside and out, [and] evidence of business relationship.

In his December 30, 2007 response to the director's request for additional evidence, counsel stated the following:

All of the knowledge that the alien beneficiary will be provided in the training pertains to information that is peculiar and unique to the business of [the petitioner]. . . .

[T]here can be no other similar training program available in the Philippines, as we have yet to establish our presence in that new market territory. . . .

* * *

The Beneficiary, in fact, received an Offer of Employment with a Philippine affiliate company, the Tabel Enterprises in Bohol, Philippines. . .

The "Offer of Employment" referenced by counsel is a letter from Tabel Enterprises, located in the Philippines, dated November 15, 2007, which states the following:

We [would] just like you to know that when you decide to come back to the Philippines, we are very much interested to pursue your application with Tabel Enterprises. . .

The petitioner did not submit evidence of the petitioner's affiliation with Tabel Enterprises, as requested by the director.

In her April 16, 2008 denial, the director stated the following:

In the case at hand, the petitioner has not adequately described the career abroad for which this training program will prepare the alien. The petitioner states that the purpose of the training program is to develop highly qualified individuals for key positions of responsibility specifically intended for [the petitioner], its branches[,] and future affiliate/s abroad. However, although the petitioner states that they are in the process of negotiating with agents to represent and promote their services worldwide and are seeking to expand their operations outside the United States, the record contains no evidence such as pending contracts; business plans; lease agreements, etc., showing [that] an affiliate may come into existence in the near future. Nor is there any evidence of an agreement or contract between the petitioner and the beneficiary for future employment abroad. . . .

At this point, by their own admission, the petitioner indicates that their affiliate abroad is currently being researched. This is supported by the lack of evidence in the record pertaining to an existing or currently pending affiliate. Although, the record does now contain a job offer letter, dated November 15, 2007, that indicates an employment opportunity may be available with Tabel Enterprises, in the Philippines upon completion of the beneficiary's proposed training, the letter was authored and signed after the filing of the instant petition on June 29, 2007. USCIS cannot consider facts that have come into being only subsequent to the filing of a petition. . . .

[T]he petitioner has not established that there is currently a career abroad for which the beneficiary will utilize his learned knowledge upon completion of the petitioner's training program. Neither, does the petitioner indicate how or where the beneficiary will utilize his training [and] knowledge until the future affiliate becomes a reality. . . .

In its May 13, 2008 appellate brief, the petitioner offers the following rebuttal:

The Petitioner is a multi-million dollar earner and is therefore in the position to establish and can carry on their international marketing plans. The training program is the initial process in which the company is gauging its fruitfulness . . . Our business plans are dependent upon his completing the training since the training is comprised of our research, marketing plan[,] and logistics. . .

The AAO agrees with the director. The petitioner has failed to establish that there is in fact a career abroad in which the beneficiary can utilize the training to be imparted via the proposed training program. If “[a]ll of the knowledge that the alien beneficiary will be provided in the training pertains to information that is peculiar and unique to the business of [the petitioner],” then it is unclear how that training could be utilized by another employer. 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. As the petitioner has not yet commenced operations in the Philippines, there exists no setting in which he would be able to utilize his 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 his skills would be for the petitioner in the Philippines, 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, 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).

The director also found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO agrees.

In her denial, the director stated the following:

The minimal documentation provided by the petitioner in support of this criterion has failed to establish that they have sufficiently trained manpower to provide the proposed training. The petition shows that the petitioner currently has twenty-six employees. The record contains no evidence of an instructor list. Nor does the training manual provide the names of those individuals that are to be instructing each of the five different phases of the program.

On appeal, the petitioner offers the following in rebuttal:

No other company knows our policies and methods better than we do. . . .

The president is most the most [sic] qualified since he has established most of the protocols and procedures imbedded in our means of business.

We have 26 employees to whom the President may designate some of his duties. Furthermore, the fact that the President together with other Division Heads will intermittently conduct the training is sufficient to establish that they can perform their duties and conduct the training without any interference in their daily duties.

Again, the AAO agrees with the director. The petitioner has failed to establish that it has the personnel to provide the training specified in the petition. The petitioner has failed to provide the names and qualifications of the individuals who would provide the training. Nor has it explained how, if it does not employ full-time trainers, the individuals who will provide the training will perform their normal duties. It has failed to establish that it has sufficiently trained manpower to provide the training outlined in the petition. The petitioner 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. 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 training manual consists of reading material, but the petitioner does not relate this material to the course outline in any meaningful way. It is unclear how the petitioner would be able to stretch this reading material across 18 months. Objectives are provided, but lists of objectives are not substitutes for descriptions of how those objectives are to be accomplished; the petitioner has not explained what the beneficiary will actually be doing during this time. 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. Further, the petitioner has not clarified how long will be spent on each module of the training program, which is not indicative of a training program with a fixed schedule. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of this petition. 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. The AAO incorporates here its earlier discussion of the vague and generalized nature of the petitioner's description of what the beneficiary would actually be doing while participating in the proposed training program, as well as its earlier discussion of the deficiencies in the petitioner's description of the supervision that the beneficiary would receive. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(1). 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.