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FILE: WAC 07 183 53789 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 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.

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 cellular telephone distributor, wholesaler, importer, and exporter 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 request for additional evidence, dated August 30, 2007; (3) the petitioner's November 15, 2007 response to the director's request; (4) the director's first denial letter, dated January 22, 2008; (5) the petitioner's first Form I-290B and supporting documentation, received at the service center on February 27, 2008; (6) the director's second denial letter, dated March 14, 2008; and (7) the petitioner's second Form I-290B and supporting documentation, received at the service center on April 16, 2008. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on seven grounds: (1) that the petitioner had failed to describe the career abroad for which the proposed training will prepare the beneficiary; (2) that the petitioner had failed to set forth, with specificity, the type of training and supervision to be given, and the structure of the training program; (3) that the petitioner had failed to set forth the proportion of time to be devoted to productive employment; (4) that the petitioner had failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; (5) that the petitioner had failed to indicate the source of remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training; (6) 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; and (7) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the proposed 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 its May 18, 2007 letter of support, the petitioner stated the following:

[The petitioner] is located in Los Angeles[,] California [and] has been an industry leader since 1996 in the distribution of new and factory refurbished wireless handsets. Our product line consists of all major carriers utilizing Analog, TDMA, GSM and CDMA networks.

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

To develop highly qualified individual/s to fill in key positions at [the petitioner], its branches and affiliates abroad. This training was specifically designed to provide [the] trainee with extensive direct exposure to mass volume closeout distributorship.

The main goal of the program is to educate [the] trainee in all areas of [the petitioner's] business]. By the end of the 18-month period the trainee would have gained knowledge in marketing and merchandise distribution. This training will also give a specific focus on internet marketing operations which may include but is not limited to planning, developing, coordinating, analyzing[,] and maintaining business systems, functions[,] and activities.

* * *

Primary Objective: To prepare and equip [the] trainee for the future key position at our affiliate company in the Philippines [emphasis in original]. . . .

The petitioner explained that the proposed training program would last 18 months and consist of five phases: (1) the first phase, entitled "General Orientation & Industry Familiarization," would last two months; (2) the second phase, entitled "Operations & Procedures," would last five months; (3) the third phase, entitled "Marketing," would last seven months; (4) the fourth phase, entitled "Merchandise Strategies," would last two months; and (5) the fifth phase, entitled "Evaluation/Performance Evaluation," would last two months.

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 describe the career abroad for which the proposed 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.

As noted previously, the petitioner stated in its May 18, 2007 letter of support that the objective of the proposed training program is to train the beneficiary for a position with the petitioner's affiliate company in the Philippines.

In his November 15, 2007 response to the director's request for additional evidence, counsel stated the following:

The knowledge and skills that the beneficiary will acquire in the United States will equip the trainee with competence not only in effectively setting up the operation of [the] petitioner, but also in charting a marketing expansion scheme based on what will be learned in this training program. . . .

* * *

The petitioner designed this training program in order to train a suitable alien beneficiary who will be employed in its intended expansion and market acquisition in the Philippines. The plan is to find and train a person who is both willing and capable and then to set up a business in the Philippines, where the alien beneficiary shall be put to use. . . .

The record also contains two job offers for the beneficiary. In its May 17, 2007 letter, the petitioner offers the beneficiary the position of Marketing and Merchandise Distribution Manager in Manila. In its November 27, 2007 letter, Perfect Communications Enterprises offers the beneficiary the position of Marketing and Merchandise Distribution Manager in Manila. According to counsel's appellate brief, Perfect Communications Enterprises is an affiliate of the petitioner.

In her January 22, 2008 denial, the director stated the following:

These statements [by the petitioner] clearly show that there is no Philippine affiliate in existence at this time. This is further supported by the fact that the record contains no evidence of pending contracts, business plan or facility photographs of an existing or currently pending Philippine affiliate. Therefore, the petitioner has not established that there is currently a career abroad for which the beneficiary will utilize her learned knowledge upon completion of the petitioner's training program. Neither, does the petitioner indicate how or where the beneficiary will utilize her learned knowledge until the future affiliate becomes a reality. . . .

Counsel states the following in his appellate brief:

Petitioner respectfully reiterates that the herein Beneficiary will be most suitable to train as a Marketing and Merchandise Distribution Manager who will be employed in its intended expansion and market acquisition in the Philippines. The plan is to find the train [sic] a person who is both willing and capable and then to set up a business in the Philippines where she will be put to use. The Petitioner's earlier manifestation which pertains to setting up formally the office in the Philippines is anchored on the successful outcome of the training. . . .

However, the Petitioner's plans of future expansion does not only end on the lack of sufficient manpower to run the international operations and the absence of the physical business premises in the Philippines. With the Petitioner being in the business of

telecommunications and distribution and communication, it has established ties and affiliations to its varied clientele and international counterparts. . . .

* * *

[O]ne of the affiliates of the herein Petitioner in the Philippines thru, **Perfect Communications Enterprises in Bacolod City, Philippines** has issued an Offer of Employment for the Beneficiary for a **permanent career abroad** in the Philippines [emphasis in original].

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. 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.¹ The petitioner, however, has not established that there exists a setting in which the beneficiary 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 setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that it is currently operating in, or has actual plans to commence operations in, the Philippines upon completion of the training. Without such information, there is no evidence of a career abroad for the beneficiary. 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. The letters offering employment to the beneficiary are not persuasive in this regard, either: the letter from the petitioner is inadequate for the reasons just discussed, and the letter from Perfect Communication is inadequate because the petitioner has not submitted any evidence to verify its claim that it is "affiliated with" Perfect Communications. 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)(ii)(A)(4) or 214.2(h)(7)(ii)(B)(4).

¹ If the petitioner were to assert otherwise, and assert that such skills could be utilized in employment with another company, then it would be in essence asserting that the skills to be imparted by the proposed training program go beyond those that are specific to the its company. If such is the case, 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 director also found that the petitioner had failed to set forth, with specificity, the type of training and supervision to be given, and the structure of the training program. The AAO agrees. 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 director stated the following in her denial:

Although, the petitioner has provided a copy of their [sic] training program, the material is vague and deals in generalities. . . .

The AAO agrees. Despite counsel's assertions to the contrary, the information contained in the record of proceeding remains 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. While the petitioner provides a list of objectives to be learned, it is unclear what the beneficiary would actually be doing while in the classroom or while receiving on-the-job training. Lists of objectives are not substitutes for descriptions of how those objectives are to be accomplished. The petitioner has failed to submit sample daily lesson plans or other evidence that would clearly explain what the beneficiary will actually be doing while participating in the training program. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every hour, or even every single day, of the training program. However, it must explain how the beneficiary will actually be spending her time while participating in the training program; generalized objectives are insufficient.

Further, the record's description of the structure of the proposed training program contains inconsistencies. In the program outline submitted at the time the petition was filed, the petitioner stated that the beneficiary would spend 50 percent of her time in academic and/or classroom training; 40 percent of her time in practical and/or on-the-job training; and ten percent of her time in observation. Thus, a total of 50 percent of the beneficiary's time would be spent in practical and/or on-the-job training and observation. However, later in this same outline the petitioner stated that the beneficiary would spend 70 percent of her time in practical training and observation. 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.*

For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(1).

The director also found that the petitioner had failed to set forth the proportion of time to be devoted to productive employment, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(2). The AAO disagrees. Both counsel and the petitioner have asserted that the proposed training program will not involve productive employment. Given the goals and objectives of the training program as set forth in the record of proceeding, the AAO finds this assertion reasonable. Therefore, the AAO withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(3). The AAO agrees, and incorporates here its previous discussion of the petitioner's conflicting statements contained in the program outline submitted at the time the petition was filed. Again, the petitioner stated first in that document that the beneficiary would spend 50 percent of

her time in practical and/or on-the-job training and observation. However, the petitioner stated later in this document that the beneficiary would spend 70 percent of her time in practical training and observation. 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 satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(3).

The director also found that the petitioner had failed to indicate the source of remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(6). The AAO disagrees. The petitioner indicates that the beneficiary will receive an allowance of \$350 per week. The petitioner has also described its plans for the beneficiary after she returns to the Philippines. While those plans did not satisfy other regulatory criteria at issue in this case, they do satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(6), and the AAO 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 program does 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). The AAO agrees.

The AAO here incorporates its previous discussion regarding the petitioner's vague and generalized description of its training program, as well as the uncertainty surrounding the percentage of time (50 percent versus 70 percent) that the beneficiary will spend in on-the-job training and observation. While the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute, or even every single day, of the training program, 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. It has failed to establish that its proposed training program does not deal in generalities. Moreover, the petitioner's varying accounts of the percentage of time that the beneficiary is to spend in on-the-job training and observation does not lead to a conclusion that the proposed training program has a fixed schedule. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of this petition.

Finally, 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 provided the names of the individuals who would provide the training in its response to the director's request for additional evidence. The AAO finds the petitioner's submission reasonable, and withdraws this portion of the director's denial.

For the reasons set forth in the preceding discussion, the AAO will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.