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

U.S. Citizenship and Immigration Services

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FILE: WAC 07 183 50519 Office: CALIFORNIA SERVICE CENTER Date: APR 0 1 2008

IN RE: Petitioner: [redacted]
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:

[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.

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

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

The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition.

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 22, 2007 letter of support, the petitioner stated the following:

> The purpose of the training is to develop highly qualified individuals to fill in key positions [in the petitioner's company], particularly its existing branches and future affiliates abroad. This training was specifically designed to provide the trainee with extensive direct exposure to the industry of wellness, relaxation[,] and health care.

The petitioner listed three objectives of its proposed training program:

1. Introduce the trainee to [the petitioner's] operational and marketing system.

2. Prepare the trainee in areas such as overall management and operations of the business.

3. Expose the trainee to the key departmental/unit responsibilities, namely, overall administrative operations, acquisition, marketing[,] and sales. This cross-functional exposure is a mechanism through which the trainee will learn all the aspects of management.

The petitioner explained that the beneficiary would "undergo a hands-on, practical training in almost all aspects of the company's operations." In the training outline submitted at the time the petition was filed, the petitioner stated that the training program would consist of five phases. The first phase, entitled "General Orientation & Industry Familiarization," would last two months and consist of three sessions: (1) General Orientation; (2) Management Level Exposure; and (3) Industry Familiarization. The second phase, entitled "Operations & Procedures," would last five months and consist of five sessions: (1) Product Orientation; (2) Warehousing; (3) Sales and Distribution Management; (4) Management Information Systems; and (5) Import and Export Transactions. The third phase, entitled "Marketing," would last seven months and consist of four sessions: (1) Marketing Foundations; (2) Market Research; (3) Strategic Marketing; and (4) Internet Marketing and e-Commerce Solutions. The fourth phase, entitled "Merchandise Strategies," would last two months. The fifth phase, entitled "Evaluation/Performance Evaluation," would last two months.

The petitioner stated that the beneficiary would spend forty-five percent of his time in classroom training; forty-five percent of his time in practical and/or on-the-job training; and ten percent of his time observing the petitioner's day-to-day activities.

In his August 8, 2007 response to the director's request for additional evidence, former counsel stated that no one, other than the petitioner's president, "is competent to impart the training. Only the President can conduct it."

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. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition in which the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified.

In her August 29, 2007 denial, the director stated the following:

> In response to the director's request for evidence the petitioner's attorney letter indicates that the training program is conceptualized by the President and cannot be duplicated. Only the President is competent to conduct the training. The petition states that the petitioner has five employees. It seems that if the President will be providing full-time training, it would be difficult to maintain the petitioner's business for the duration of the 18-month training program.

On appeal, counsel states that the training will be conducted by two people: (1) the petitioner's president; and (2) the petitioner's vice president/operations manager. Counsel states that the president will spend four hours per week providing training, and that the vice president/operations manager will spend six hours per week providing training.[1] Counsel states specifically that the petitioner's other employees will not be involved in the training. According to counsel, "[t]his leaves sufficient time during the week for them to manage the company's regular business activities."

Thus, according to counsel, the beneficiary would spend ten hours per week in supervised training. He would be unsupervised for the remaining thirty hours per week, as counsel has made clear that the president and vice president/operating manager would spend only ten hours per week with the beneficiary, and that no other employees of the petitioner would be involved in the training program. However, this conflicts directly with the training outline submitted at the time the petition was filed, which stated that the beneficiary would spend forty-five percent of his time in classroom training. It also conflicts with earlier statements in the record regarding the president being the only person qualified to provide the training.

This change in the proposed training program does not merely clarify the initial submission or submit additional details to fill in missing information. Rather, it constitutes a material alteration to the proposed training program as set forth initially. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Moreover, the AAO also notes inconsistencies in the record. As noted previously, counsel has attempted to amend the proposed training program on appeal. Not only do counsel's amendments conflict with the earlier version of the training program that would have the beneficiary spending forty-five percent (now twenty-five percent) of his time in classroom training, and in which the petitioner's president was the only person qualified to provide the training, they also conflict with the "sample of the trainee's typical schedule," which indicated that the beneficiary would spend 27.5 hours per week in direct instruction, with the other 12.5 hours per week in supervised training. There are now three iterations of the training program contained in the record. 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).

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[1] The petitioner's October 24, 2007 letter states that the president will spend "about two hours" on Tuesdays and Thursdays with the beneficiary.

The AAO will not accept counsel's amendments on appeal. The petitioner has stated that the petitioner's president is the only person qualified to provide the training. It has not, however, established that he has the time to provide the classroom training and supervised practical training that compose the bulk (ninety percent in the version of the training program that existed at the time the petition was filed) of the program and still manage the business affairs of the company. The information submitted on appeal is insufficient to overcome the director's decision on this ground.

The petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the proposed training. It has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G).

Accordingly, the AAO agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa. Beyond the decision of the director, the AAO finds that the petition may not be approved for additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) requires a demonstration that the beneficiaries will not engage in productive employment unless such employment is incidental and necessary to the training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program which will result in productive employment beyond that which is incidental and necessary to the training.

The record clearly establishes that the beneficiary would engage in a great deal of productive employment. As originally envisioned, the training program would have the beneficiary spending forty-five percent of his time in practical and/or on-the-job training. The petitioner did not establish how the beneficiary was to be supervised during this time. Counsel's assertions on appeal weaken the petitioner's case in this regard, as it appears that the beneficiary would be completely unsupervised for thirty hours per week. Absent any supervision, under the revised training program, if such revisions were to be accepted on appeal, the beneficiary would be engaging in productive employment during this time.

The petitioner has failed to establish that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

For this additional reason, the petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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