

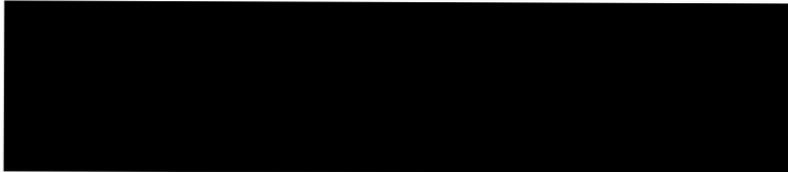


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FILE: WAC 07 208 52146 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 2008

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:

SELF-REPRESENTED

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 restaurant management company that operates a Denny's restaurant franchise. It 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 notice of intent to deny (NOID) the petition; (3) the petitioner's response to the director's NOID; (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 adequately describe the career abroad for which the training will prepare the beneficiary; (2) that the petitioner had failed to demonstrate that the beneficiary would 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; and (3) that the petitioner had failed to establish that its proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States.

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 12, 2007 letter of support, the petitioner stated the following:

[I]n 2004, [the petitioner] became a full-grown franchisee of Denny's restaurant. With just barely two years of existence, [the] Petitioner's gross income has grown to a total of \$1,200,000.00 and is expected to rise as we open our business into international trade.

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

[The reason for the proposed training program is] to develop highly qualified individuals for key positions of responsibility specifically intended for [the petitioner's] existing and future branches and affiliates. This has been developed to provide the trainee with maximum direct exposure to the marketing, accounting, administrative[,] and operational responsibilities of managing a company through assignments to the different departments or units of our business. It also offers an educational component that complements and enhances the experience acquired while on training. This unique training opportunity allows participants to gain practical experience in management.

* * *

This training was developed to give our future *Franchise Operations Manager* the opportunity to learn the management and operations of Denny's Restaurant [emphasis in original]. This is a valuable opportunity for him/her because it will teach specific franchise marketing and sales strategies. This will also allow participants to gain practical experience in operations. Ultimately the knowledge gained will be used in the capacity of a managerial appointment, specifically in Operations, once assigned to our future branch office abroad. He/She shall establish a global network between our U.S. company and the future affiliate branch abroad.

The petitioner explained that the beneficiary would participate in the proposed training program forty hours per week. It would consist of four modules: (1) Orientation; (2) Restaurant Operations; (3) Franchising; and (4) Logistics (Supply Chain Management).

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 has 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.

As noted previously, the petitioner stated in its letter of support that the reason for the proposed training program is "to develop highly qualified individuals for key positions of responsibility specifically intended for [the petitioner and] its existing and future branches and affiliates."

The reason for creation of the training program at issue here is to train the beneficiary on the petitioner's own business practices. Having made such a demonstration, 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 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.

There is no evidence in the record of proceeding to indicate that the petitioner had any concrete plans for such expansion at the time the petition was filed. 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 its response to the director's notice of intent to deny the petition, the petitioner submitted two letters. The first letter, dated June 30, 2007, was written by the petitioner, was addressed to the beneficiary, and offered her a position as a franchise operations manager, in Southeast Asia, upon completion of the proposed training program. The second letter, dated September 3, 2007, was addressed to [REDACTED]

[REDACTED] In this letter the petitioner informed [REDACTED] that it wished to expand into the Philippines, that it is in the process of acquiring a facility in Manila, and that it wished to do business with him.

However, these letters do not satisfy the petitioner's burden of proof. Both of these letters were produced by the petitioner, and the petitioner has submitted no evidence to document the assertions it makes in them. The record contains no evidence of pending contracts, business plans, or facility photographs to document the petitioner's expansion plans. The record contains no documentary evidence of the petitioner's expansion plans, beyond training the beneficiary. 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)). Accordingly, the petitioner has not established that the proposed training would prepare the beneficiary in pursuing a career abroad. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(4).

The director also found that the petitioner had failed to demonstrate that 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, as required by C.F.R. § 214.2(h)(7)(ii)(A)(2). The AAO agrees.

The petitioner has failed to explain how the proposed training program differs from the training it offers its American management staff. Moreover, in its letter of support, it specifically stated that one of the reasons for creation of the training program is to develop staff for its existing restaurants. The petitioner has failed to establish that the training program would not place the beneficiary into a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

The director also found that the petitioner had failed to establish that its proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States, as required by 8 C.F.R. § 214.2(h)(7)(iii)(F). The AAO agrees.

Again, the petitioner has failed to explain how the proposed training program differs from the training it offers its American management staff and, in its letter of support, specifically stated that one of the reasons for creation of the training program is to develop staff for its existing restaurants. It appears as though the beneficiary is being brought to the United States to participate in the management training program that the petitioner offers to all management staff. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(F) precludes approval of this petition.

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 three additional reasons.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(I) requires the petitioner to describe the type of training and supervision to be given, and the structure of the training program. However, much of the information submitted by the petitioner 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. For example, the second module of the proposed training program, entitled "Restaurant Operations," would last 28 weeks and consist of four courses: (1) menu planning, design, pricing, and evaluation; (2) managing food and beverage production; (3) restaurant human resources and labor cost controls standard; and (4) accounting and financial management.

The training manual submitted by the petitioner, however, does not explain what the beneficiary will actually be doing during this time. Rather, it consists of reading material that the AAO presumes the beneficiary will be reading during this time. It is unclear where this material fits into the classroom portion of the training program (it clearly is not part of the productive employment portion). For example, it is unclear whether the beneficiary will read this material during the classroom portion of the training, or whether he will be expected to have read it before arriving to class. Given that this portion of the manual is only 38 pages long, it is unclear how the petitioner will stretch this material to cover at least 19.5 hours per week of classroom instruction for 28 weeks.

Nor do the training materials submitted with the petitioner's October 24, 2007 response to the director's notice of intent to deny the petition satisfy this criterion, as they do not address the beneficiary's actual, day-to-day activities. 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 of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(I). For this additional reason, the petition may not be approved.

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 AAO incorporates here its previous discussion regarding the vague, generalized nature of the petitioner's description of its proposed training program, which leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. While the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, the description provided by the petitioner is inadequate. The petitioner has failed to provide a meaningful description of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program.

Nor is the means of evaluation clear. The "Performance Appraisal" submitted by the petitioner does not appear tailored to the proposed training program in any meaningful way. Rather, it appears to be a general employee review form used by the petitioner to evaluate all of its employees. The written exercises submitted by the petitioner in response to the director's request for additional evidence suffer

the same deficiency: they appear to be used for all of the petitioner's employees, not just its H-3 trainees. It is unclear how the beneficiary's evaluation would differ from that of the petitioner's hourly staff.

The AAO finds that the petitioner has failed to establish that it has an established training program that does not deal in generalities with no fixed schedule, objectives, or means of evaluation. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). For this additional reason, it may not be approved.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The record indicates that the beneficiary earned a bachelor's degree in hotel and restaurant management in 2000. Her transcript indicates that she took, among other courses, the following: Business and Tourism Law; Bar Management; Bar Management Lab; Food Selection & Preparation; Food Selection & Preparation Lab; Catering & Banquet Management; Qty. Food Production; Qty. Food Production Lab; Business Policy with Human Resource Entrep.; Management of Human Resources; International Cookery; International Cookery Lab; Bakery Science and Technology; Bakery Science and Technology Lab; Human Resource Cost Control and Analysis; Basic Accounting; Management of Human Resources; and Managerial Accounting.

A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masuyama*, 11 I&N Dec. 157 (Reg. Comm. 1965); *Matter of Sasano*, 11 I&N Dec. 363 (Reg. Comm. 1965); *Matter of Koyama*, 11 I&N Dec. 424 (Reg. Comm. 1965). The record establishes that the beneficiary has substantial training and expertise in this field. Accordingly, approval of the petitioner's proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(C). 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.