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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 200 52917 Office: VERMONT SERVICE CENTER Date: AUG 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.

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 engaged in the business of wireless communication service, sales, and repairs. It seeks to employ the beneficiary as a trainee for a period of sixteen and a half months.[1] The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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.[2] The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on four grounds: (1) that the petitioner had failed to demonstrate that the proposed training is unavailable in the beneficiary's home country; (2) that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary; (3) that the petitioner had failed to demonstrate that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and (4) that the beneficiary had failed to maintain valid nonimmigrant status prior to filing the petition.[3]

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—

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[1] The petitioner requested, on the Form I-129, a period of approval of sixteen and a half months. In its letter of support, the petitioner stated that the training program would last "approximately one year." 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).

[2] At one portion of the Form I-290B, counsel indicates that additional evidence would be submitted to the AAO within 30 days. However, at another portion of the Form I-290B, counsel indicates that the information she submitted with the Form I-290B constituted the entire appeal, and that no additional evidence is forthcoming. The AAO attempted to fax counsel a letter requesting clarification of this issue, but the number provided by counsel is no longer in service. Given that counsel does indicate on the Form I-290B that no additional evidence is forthcoming, and that she did in fact submit additional evidence with the Form I-290B, the AAO deems the record complete and ready for adjudication.

[3] The AAO will not address this matter in its decision, as issues surrounding the beneficiary's maintenance of valid nonimmigrant status are beyond the scope of its jurisdiction.

(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 letter of support, the petitioner stated the following:

> [The petitioner] is a major U.S. company which offers a full range of services to corporations and individuals involving the provision of service, sales, and repairs in wireless communications. . . .
>
> * * *
>
> The program covers a one-year period, and upon completion of the U.S. training, each trainee will be fully qualified to operate one of our overseas subsidiaries or branches. . . .
>
> The overall scope of the training program is to provide ongoing training for the use of specific, cutting edge, sophisticated machinery which is presently not available in Argentina due to its excessive cost.

According to the petitioner, its proposed training program would last "approximately one year" and consist of two components. The first component, "Formal Classroom Instruction," would last 14 weeks. The second component would consist of seven rotational assignments in the petitioner's various divisions. The first rotational assignment, entitled "Wireless Systems Operation," would last approximately three weeks. The second rotational assignment, entitled "Sales and Marketing," would last approximately twelve weeks. The third rotational assignment, entitled "New Product Development," would last approximately twelve weeks. The fourth rotational assignment, entitled "Brand Development," would last approximately twelve weeks. The fifth rotational assignment, entitled "Field Sales Management," would last approximately twelve weeks. The sixth rotational assignment, entitled "Brand Management," would last approximately twelve weeks. The seventh rotational assignment, entitled "Distributor Network Relations," would last approximately eight weeks.

Upon review, the AAO agrees with the director's determination 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 demonstrate that the proposed training is unavailable in the beneficiary's home country. The AAO agrees. 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.

As noted previously, the petitioner rested its argument that the proposed training is unavailable in Argentina on the basis of its assertion that the training was for the use of sophisticated, cutting-edge technology that is unavailable in Argentina due to the high cost of that technology. In his July 30, 2007 denial, the director stated the following:

> You have not indicated what the specific cutting edge, sophisticated machinery is and you have not provided documentary evidence to establish that it is not available in Argentina. Your statement that the training is not available in Argentina without documentary evidence to substantiate your claim is of little evidentiary value.

In her appellate submission, which was received on September 5, 2007, counsel states the following:

> The CIS erred in stating that Petiotioner [sic] did not indicate what the specific cutting edge sophisticated machinery was when it was included in the Petitioner's submission . . . Please refer to Petitioner's submission entitled "formal classroom instruction" where all the materials are listed . . . Petitioner hereby submits additional photos and clarification of the technology . . . Petitioner hereby submits more detailed descriptions of the equipment . . . Petitioner hereby submits evidence that in the past it has sent machinery to Argentina. . . .

The AAO acknowledges counsel's submissions, and finds that she has overcome the first concern of the director, i.e., his statement that the petitioner had not identified the machinery it would use. However, counsel's assertion that the petitioner has sent machinery to Argentina in the past undermines the petitioner's case. Again, if the petitioner is asserting that the training is unavailable in Argentina because the machinery is not available there, the fact that it has sent the machinery there in the past would seem to indicate that the training could in fact occur there.

Further, the AAO notes that counsel does not address the director's finding that the petitioner had failed to submit documentary evidence to establish that the training is not available in Argentina. 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 Obaigbena*, 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petitioner has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*).

The director also 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.

The director stated the following in his denial:

> [Y]ou state the reason the machinery is nor presently available in Argentina is due to the excessive costs. You have not provided evidence to establish when or if the machinery would ever be available in Argentina.

As noted previously, counsel states on appeal that it has sent machinery to Argentina in the past. If the machinery on which the beneficiary would be trained is now available in Argentina, it is therefore possible for the beneficiary to utilize that machinery in a career abroad.[4] Accordingly, the petitioner has overcome this concern of the director, and the AAO withdraws that portion of his denial finding otherwise.

Finally, the director also found that the petitioner had failed to demonstrate that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. The AAO agrees. **The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*) requires the petitioner to** demonstrate that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training.

In his denial, the director stated the following:

> Your training consists of two phases . . . The second phase consists of what you have labeled as "Rotational assignments in various divisions." You describe this phase as follows: "The objective of this training will be to establish contacts with different areas of service at each location, store, marketing, sales, and repair and customer relations." This phase of training appears to be on the job training or productive employment with little or no formal classroom training. In addition your training program does not indicate at what point in the training process the beneficiary will be trained in the use of the specific cutting edge, sophisticated machinery, which is the reason you have requested the H-3 visa.

The AAO agrees with the director's analysis. The second phase of the petitioner's training program, which would constitute the majority of the proposed training program, appears to involve mainly productive employment, and the petitioner has not resolved the director's concerns on appeal. The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*3*).

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.

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[4] As noted previously, that the machinery on which the beneficiary would be trained is now available in Argentina undermines the assertion that the beneficiary must come to the United States in order to be trained on that equipment.

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)(ii)(B)(*1*) 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 rotational assignment, entitled "sales and marketing," would last 12 weeks. The petitioner's description of what the beneficiary would actually be doing during this time consists of a one-sentence summary. Similarly, the third, fourth, fifth, and sixth rotational assignments would also each last 12 weeks, and the petitioner's description of each one consists of a one-sentence summary. Such a vague, generalized description does not explain what the beneficiary would actually be doing on a day-to-day basis. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, but the description provided is inadequate.

Nor has the petitioner provided an adequate description of the type of supervision to be given. For example, in its letter of support, the petitioner stated the following with regard to the supervision that the beneficiary will receive during the classroom component of the proposed training program:

> Supervision by: [redacted]
>
> Day-to-day supervision and training will be conducted by [redacted] VP of Engineering

The supervision arrangement is unclear. The petitioner states [redacted] is to provide the day-to-day supervision and training, and that [redacted] will also be supervising the beneficiary. However, the petitioner does not clarify who is to provide the classroom instruction.

For all of these reasons, the petitioner 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.

Finally, 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. Again, the AAO notes the vague, generalized nature of the petitioner's description of its proposed training program, which does not explain what the beneficiary would actually be doing on a day-to-day basis. 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 description contained in the record is inadequate. The petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiaries 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.

Nor does it appear as though the proposed training program has a fixed schedule. For example, as noted previously, the petitioner requested a period of approval of sixteen and a half months on the Form I-129. In its letter of support, the petitioner stated that the training program would last "approximately one year." In the breakdown of the proposed training program provided in its letter of support, the petitioner indicated that the training program would last "approximately" 85 weeks, or about 21 months. This is not indicative of a training program with a fixed schedule.

Thus, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). 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.