U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: WAC 07 220 53379 Office: CALIFORNIA SERVICE CENTER Date: AUG 15 2

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 a heating and air conditioning contractor that seeks to employ the beneficiary as an "operations trainee in HVAC system" for a period of 24 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 eight grounds: (1) that the petitioner had failed to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States; (2) that the petitioner had failed to describe the type of training and supervision to be given; (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; (7) that the petitioner had failed to establish that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; and (8) that the petitioner had failed to establish 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.

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 June 1, 2007 letter of support, the petitioner stated the following:

> [The petitioner] is a full service heating, ventilation, and air conditioning (HVAC) company and has been in business for 18 years targeting residential and light commercial projects. The services offered include HVAC installation, HVAC engineering, design/drafting, title-24, bidder-design, design-build, HVAC systems analyses, HVAC and refrigeration repairs, service and preventative maintenance.

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

> [T]he goal of the training program is to provide the trainee with expertise, knowledge[,] and practical experience on how heating, ventilation[,] and air conditioning system works [sic]. Such expertise is necessary to manage a business specialized in [the] installation [and] servicing of HVAC system[s] or the sale of HVAC equipments [sic].

The petitioner described the proposed training program as follows:

> The proposed training will last 24 months. The trainee will undergo academic instruction and practical training six training hours per day, five days per week. The trainee will continue further training sessions only upon successful completion of the prior training sessions. The trainee will receive approximately 75% academic training in class instructions and discussions, and 25% will be supervised practical training.

The petitioner explained that its proposed training program would be broken into twelve divisions: (1) Introduction to HVAC; (2) Heating; (3) Ventilation; (4) Air-Conditioning; (5) Design of HVAC; (6) Unit Ventilators; (7) Indoor Air Quality; (8) Water Source Heat Pump; (9) Fan Coil Units; (10) Outdoor Ventilation Systems; (11) Central Systems; and (12) Variable Volume Systems.

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 demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States. 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.

On the Form I-129, the petitioner certified that it intended to employ the beneficiary at the end of the training program. Further, in its letter of support, the petitioner stated the following:

> Upon successful completion and wide-ranging evaluation, the trainee will be considered as a service manager at a potential Asian branch, preferabl[y] in [the] Philippines. . . .
>
> * * *
>
> It is essential that the training be conducted in the U.S. because after the successful completion of the training, the trainee will be sent back to her home country to reapply the learning and will serve as the resource for the future training in the Philippines. . . .

In the training manual submitted at the time the petition was filed, the petitioner repeated its assertion that upon completion of the training program, the beneficiary would depart the United States and become the service manager at the petitioner's potential Asian branch.

In his December 28, 2007 response to the director's request for additional evidence, counsel stated the following:

> The petitioner's goal is not just to expand locally, but also internationally. The petitioner has constantly exchanged ideas with foreign manufacturing companies discussing new products and how to better utilize available materials to suit the customers' requirements. After successful completion of the training, the trainee will return to her home country to initially establish a lead for the petitioner's expansion project. The beneficiary will not only serve as a training resource for [the] petitioner's future employees in the Philippines.

In her February 20, 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 record indicates that if the beneficiary successfully completes the training program she will be offered a job in the petitioner's branch office in the Philippines. The petitioner states, however, that "The beneficiary will research and set up a branch office for the company and lead a new team to expand our business." This statement indicates that a branch office does not currently exist in the beneficiary's home country. The petitioner provides no evidence of pending contracts, business plan, foreign registry, lease agreements, or facility photographs that would show where or when a branch office will or might come into existence. . . .

On appeal, counsel repeats the assertions made in his response to the director's request for additional evidence, and adds the following:

> [I]f there is any delay in setting up the overseas office, [the alien] can rely on the knowledge gained from the training to find a better job and make herself more marketable for a career in her home country.

The AAO finds deficient the assertion that the beneficiary could utilize her training at an entity other than the petitioner. Stating that the beneficiary would become "more marketable" as a result of her newfound training, and thus implying that she could work for an entity other than the petitioner, conflicts with

assertions made by counsel and the petitioner elsewhere in the record. Both counsel and the petitioner have made repeated assertions regarding the lack of computer and internet training in the Philippines. For example, the petitioner stated the following in its letter of support:

> It is well known that [the] Philippines has problems with advanced education and training in technology and other fields primarily because of poor elementary and secondary education, lack of qualified faculties and shortage in facilities and weaknesses in planning, budgeting[,] and implementing processes. In order to excel in management analysis and HVAC systems, one must be familiar with the use of the Internet. However, most Filipinos live below the poverty lines [sic] where computing and [the] Internet are unthinkable frivolities. The lack of adequate infrastructure to deliver basic social services also contributes to the inadequate technologies. In addition, the lack of facilities, schools that offer computers and access to the Internet also make the knowledge of computers [and] IT knowledge a luxury in the Philippines.

Counsel reiterated this paragraph in his response to the director's request for additional evidence, and added the following:

> The use of [the] Internet for product research and management is essential to provide the best medical services to the customers. . . .
>
> Computer use in the custom cooling and heating manufacturing field is also necessary as experience and solutions in manufacturing and researching the right materials and products can easily be accessible to the industry worldwide. . . .
>
> The Philippines does not have the resources and technology of its own but has to be dependent on imported technologies to advance its own development in the technological world.
>
> [T]he technical education and accessibility to computers and other information needed in the healthcare field are very limited in the Philippines.[1] Most, if not all, of the petitioner's logistics and management training will be conducted on computers. Thus, the necessary training to be provided to the beneficiary is not available in the Philippines.

Given the assertions of counsel and the petitioner regarding the lack of access to computers in the Philippines, and that the lack of access to such technology is so acute in that country that the beneficiary is unable to find training there (and must travel to the United States in order to receive it), it is unclear to the AAO what type of position she would be able to fill in the Philippines as a result of having obtained the training, if she is not to work for the petitioner. If the assertions of counsel and the petitioner are correct, then it is unclear to the AAO what types of companies or organizations that would employ the

[1] Given the goals and objectives of the petitioner as set forth in the record of proceeding, it is unclear to the AAO why the beneficiary would need technical education in the healthcare field. 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.* at 591.

beneficiary in the Philippines would have access to the computers and information technology that the beneficiary will utilize during her training. Therefore, the AAO finds deficient counsel's assertion that the proposed training will make the beneficiary a more marketable candidate when she returns to her home country. For this same reason, it also finds deficient the June 1, 2007 letter from New FS Cool Aire Industries, which states that the beneficiary could work for that company as a project and service manager upon her return to the Philippines. The petitioner has failed to establish that New FS Cool Aire Industries has access to the types of sophisticated computer systems upon which the petitioner claims its training program is based. Without demonstrating that the company has access to such technology, it is unclear to the AAO how the beneficiary would be able to utilize her training at that company.

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 only setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that it actually has plans to commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence, beyond the assertions of record, 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)(ii)(A)(*4*).

The petitioner has failed to establish that its proposed training program will benefit the beneficiary in pursuing a career outside the United States. It has failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*4*) and 214.2(h)(7)(ii)(B)(*4*).

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, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*). The AAO agrees.

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. For example, the first division of the proposed training program would last one month. The petitioner divides it into four units: (1) definition and bases of HVAC; (2) functions of HVAC; (3) HVAC industry; and (4) introduction to major terms. However, it is unclear what the beneficiary would actually be doing during this time. It appears that approximately one week would be spent on each unit, and the petitioner has stated that the beneficiary will spend 75% of her time in classroom instruction. The training manual contains two paragraphs of text for the first three units and two pages of text for the fourth unit. It is unclear how the petitioner will stretch this material to cover an entire month of classroom instruction.

The petitioner's description of the rest of its proposed training program suffers similar deficiencies. For example, the fifth division of the proposed training program would last four months. The training manual contains eight pages of text for use during this time period. Again, if the beneficiary is to spend 75% of her time in classroom instruction, it is unclear to the AAO how the petitioner will stretch this material to cover four months. The petitioner offers additional information on appeal, to include training assignments, but its descriptions remain inadequate. The training assignments involve such tasks as

taking heat measurements of various items, but the petitioner still fails to explain how it proposes to fill the large amounts of classroom 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. 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; 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; and 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)(*2*), (*3*), and (*6*). The AAO disagrees. The petitioner provided this information in its June 21, 2007 letter of support and supporting documentation. Accordingly, the AAO finds that the petitioner has overcome the concerns of the director in this regard, and it withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had 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. The AAO agrees. 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 of the vague and generalized nature of the petitioner's description of the proposed training program. Again, while the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, it 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.

Moreover, the AAO notes a material alteration to the proposed training program on appeal. As noted previously, the petitioner stated in its letter of support that "[t]he trainee will undergo academic instruction and practical training six training hours per day, five days per week." However, on appeal, the beneficiary is to spend eight hours per day in academic instruction and practical training. This is a 33% increase in the amount of time that the beneficiary is to spend in the petitioner's proposed training program. It is not indicative of a training program with a fixed schedule.

Further, the AAO finds that this change (i.e., a 33% increase in the amount of time to be spent in the program) to the proposed training program on appeal does not clarify the proposed training program or submit additional details to fill in missing information. Rather, it constitutes a material alteration to the proposed training program as set forth initially. However, 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). 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 its associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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. *Id.*

For all of these reasons, 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).

Finally, the director found that the petitioner had failed to establish that the proposed training program is not designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States, and 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 8 C.F.R. §§ 214.2(h)(7)(iii)(F) and 214.2(h)(7)(ii)(A)(*2*). The AAO disagrees. Although the AAO has found that the petitioner's proposed training program does not meet many of the regulatory criteria required for approval of the petition, it does find its assertions in this regard reasonable. Therefore, it withdraws the director's conclusion to the contrary.

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 an additional reason.

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) requires a demonstration that the proposed training is not available in the alien's own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

The AAO finds counsel's assertion that the beneficiary's training "will first be focused on the US market, its business environment and the sophisticated heating and air conditioning industry" deficient. Counsel has submitted no evidence to establish that the United States HVAC industry is different from that of the Philippines. Simply 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).

Further, counsel states that computer and IT knowledge is "a luxury" in the Philippines and that, for most Filipinos, "computer and Internet surfing are unthinkable frivolities,"[2] and submits evidence regarding its educational system.[3] The issue to be addressed is not whether the Filipino economy is less advanced than that of the United States. The issue is whether similar training is available in the Philippines. The Philippines possesses many well-established, and well-respected, colleges and universities. Many of these schools offer computer training, upon which the lack thereof counsel rests his argument. The AAO

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[2] As of April 2007, the Philippines had 14,000,000 internet users. *See* http://www.internetworldstats.com/asia.htm (accessed July 24, 2008).

[3] A simple google search reveals that many colleges and universities offer undergraduate and graduate training in computer science. *See, e.g.* http://www.engg.upd.edu.ph/cs/undergraduate_program.html (accessed July 24, 2008); *see also* http://www.engg.upd.edu.ph/cs/graduate_program.html (accessed July 24, 2008, 2008); *see also* http://www.ics.uplb.edu.ph (accessed July 24, 2008).

also takes note here that many United States firms have outsourced information technology functions to the Philippines.[4] This does not necessarily demonstrate that training programs similar to that proposed here exist in the Philippines, but it does undermine the evidence submitted by the petitioner. The petitioner has not established that similar training is unavailable in the Philippines. It has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) or 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*). 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.

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[4] *See, e.g.,* http://www.businessweek.com/print/globalbiz/content/sep2006/gb20060919_639997.htm (accessed July 24, 2008): "[The] Philippines gets high marks for its large educated talent pool and English language skills . . . [t]he recent growth spurt in the outsourcing industry in the Philippines has been fueled not by traditional low-valued-added call centers but by more higher-end outsourcing such as legal services, Web design, medical transcription, software development, animation, and shared services. . . ." *See also* http://www.computerworld.com/action/article.do?command=view ArticleTOC& specialReport+ID=360&articleID=84815 (accessed July 24, 2008): "[T]he Philippines' popularity [for IT outsourcing is due to] its English proficiency, a highly skilled workforce (380,000 college graduates annually) . . . [T]here are about 10,000 software programmers nationwide."