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

U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[redacted]

FILE: EAC 07 186 52163 Office: VERMONT SERVICE CENTER Date: JUL 0 3 2008

IN RE: Petitioner:
Beneficiary: [redacted]

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

[1] Counsel's correct mailing address is unclear. An address in Washington, DC is provided on the cover letter accompanying the appellate brief; an address in Elkton, Maryland is provided on the appellate brief itself; an address in Kennett Square, Pennsylvania is provided on the Form I-290B; and an address in Vienna, Virginia is provided on the Form G-28. As the Vienna, Virginia address is listed on the Form G-28, the AAO will utilize that address.

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 "list brokerage/list management (marketing)" company 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 three grounds: (1) that the petitioner had failed to establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) that the petitioner had failed to demonstrate that the proposed training is unavailable in the beneficiary's home country; and (3) that the petitioner had failed to demonstrate that the proposed training is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of 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 June 8, 2007 letter of support, the petitioner stated the following:

> [The petitioner] was formed in 1989 and is a full service list brokerage and list management firm with over eighteen years of experience specializing in political and non-profit fundraising lists. [The petitioner] has built a broad and impressive list of clients on its reputation for providing the most responsive and cost effective audiences for its mailer's messages.
>
> The key to [the petitioner's] success is its solutions based operational model. This model allows [the petitioner] to work directly with its clients to understand their long and short-term donor, member, or subscriber acquisition goals and to use this information to craft custom, specialized list brokerage and list management solutions that not [only] meet their immediate goals, but provide the foundation for achieving the organization's ultimate objectives.

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

> The program is designed to prepare the participant to manage an expansion branch overseas. All participants are paid a stipend for their participation by our Human Resources Department.

The petitioner explained that the beneficiary would participate in a rotation plan, and spend the majority of his time with senior managers. After a one-week program introduction and overview, the beneficiary would participate in four rotations: (1) Leadership and Team Building (this rotation would last four months); (2) List Brokerage and List Management (this rotation would last approximately six months); (3) Account Management (this rotation would last approximately five months); and (4) Administrative Functions (this rotation would last approximately five 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 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.

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 first rotation, "Leadership and Team Building," would last four months. The petitioner states that, during this time, the beneficiary will learn about leadership and management training; effective communication; group dynamics; goal setting; dealing with change; team building; supervisory and management effectiveness; top teams workshops; organizational design; and performance management systems. 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.

The petitioner's description of much of the rest of its proposed training program suffers similar deficiencies. The third rotation, "Account Management," would last approximately five months. The petitioner's description of how the beneficiary would spend this period of time is presented in summary form: seven brief bullet-points and a four-sentence summary, without specific descriptions of the daily training program.

Nor is the schedule clear. For example, the petitioner states that the second rotation will last "Months 5 through 10." The petitioner then states that the third rotation will last "Months 10 through 14," and the fourth rotation will last "Months 14 through 18." It is unclear at what point in the tenth month of the training program the second rotation ends and the third rotation begins, and at what point in the fourteenth month of the training program the third rotations ends and the fourth rotation begins. This is not indicative of a training program with a fixed schedule.

Finally, it is unclear to the AAO why the beneficiary would need to spend 210 classroom hours "attending education modules on various autism disorders." Given the goals and objectives of the proposed training program, it is unclear why such training would be necessary. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Again, 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 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. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director found that the petitioner had failed to establish that the proposed training is unavailable in Zimbabwe, 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.

In her August 21, 2007 response to the director's request for additional evidence, counsel stated the following with regard to this issue:

> Petitioner's training program is unique in that it focuses on list management and list brokerage in the not-for-profit and political areas and incorporates [the petitioner's] more than 18 years of experience in this industry. Petitioner's proprietary marketing and list performance evaluation strategy combined with its focus and commitment to providing outstanding customer service is what has permitted the company to not only survive, but thrive in the competitive and confusing area of list management and brokerage. The key coordination of strategy and collaboration between list providers, list management, and customer service is what makes the Petitioner unique. To accomplish its mission,

> Petitioner internal [sic] specifically developed and designed its training program content to compliment its proprietary marketing and list performance strategies and for this reason, along with Zimbabwe's status as an emerging economic country, a similar training program is not available in [the beneficiary's home country].
>
> In the alternative, we submit Petitioner's training program qualifies as an H-3 training program because Section 8 C.F.R. § 214.2(h)(7) which governs H-3 trainee visas does not preclude the granting of H-3 status even when such training is available in the beneficiary's home country . . . As 8 C.F.R. § 214.2(h)(7) does not in its plain language preclude a grant of H-3 status if a comparable training program is available in the beneficiary's home country, we respectfully submit that no such requirement was meant to be imposed.

In his September 6, 2007 denial, the director found counsel's assertions unconvincing, stating the following:

> The petitioner makes the claim that it is unique in the way it does business, which is not convincing evidence that there isn't a similar or equal training. . .

On appeal, counsel repeats the arguments of August 21, 2007, and adds the following:

> The Petitioner's unique and proprietary approach to the list brokerage/list management field is also why it is imperative that she receive the training offered by [the] Petitioner's program.

The AAO agrees with the director. First, the AAO rejects counsel's assertions that the regulation "does not preclude the granting of H-3 status even when such training is available in the beneficiary's home country" and that "no such requirement was meant to be imposed." To the contrary, and as noted previously, 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.

Further, the AAO finds unconvincing counsel's assertion that it is the petitioner's proprietary approach to list management and brokerage that makes the program unique to the United States. The record contains no evidence, beyond the unsupported assertions of counsel, that the petitioner's business practices and methods are unique. The statement that it is the petitioner's "coordination of strategy and collaboration between list providers, list management, and customer service" that makes it unique is insufficiently general. The only portion of the training program, as set forth in the petitioner's letter of support, that appears in any way specific to the petitioner is the third rotation ("Account Management"). However, the petitioner's description of that rotation is insufficiently broad, which precludes the AAO from determining that the skills to be imparted via the training could not be obtained elsewhere.

Finally, the AAO notes that no evidence has been submitted to document counsel's assertions regarding the unavailability of training in Zimbabwe. 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 petitioner has failed to establish that the proposed training is unavailable in the beneficiary's home country. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*), and 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) precludes approval of the petition.

The director also found that the petitioner had failed to establish that the proposed training program is not on behalf of a beneficiary who already possesses substantial training and expertise in the field. The AAO agrees. 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.

According to the beneficiary's resume, she worked as a database management assistant/list assistant from 2003 until 2004. During this time, among other duties, she became "skilled at [the] procurement of lists through rentals and exchanges with brokerage houses."

The director stated the following in his denial:

> [T]he beneficiary has previous experience working as a "database management assistant/list assistant" for another company, Direct Response Consulting Services, and therefore it appears the beneficiary is not in need of 18 months more of this training, but is capable of and will be performing this job for the petitioner.

Counsel offers the following rebuttal on appeal:

> Petitioner's response to USCIS's assertion that the requested training period is not required based on [the beneficiary's] previous work experience is unfounded [sic]. As detailed above, the Petitioner's unique and proprietary approach to the list brokerage/management field is also why it is imperative that she receive the training offered by [the] Petitioner's program. In its denial, USCIS, states that [the beneficiary] already has experience with list brokerage based upon her employment with Direct Response Consulting Services . . . Respectfully [the] Petitioner disagrees because Direct does not specialize in the areas of political and non-profit fundraising as does [the] Petitioner, and Direct does not use [the] Petitioner's unique and proprietary approach to this industry. . .

The AAO finds counsel's rebuttal deficient. First, the record fails to demonstrate why list management skills obtained in a for-profit setting would not carry over into a non-profit setting (and thus why the beneficiary's prior experience differs from the proposed training). Moreover, pursuant to the discussion above, the AAO does not find convincing the assertion that the proposed training program is primarily geared to the petitioner's own unique business practices and methods.

The record indicates that the beneficiary possesses an associate's degree in information systems technology, a bachelor's degree in computer networking, a master's degree in business administration, and has two years of experience as a database management assistant/list assistant.

A proposed training program must provide actual training to the beneficiary and not simply increase his proficiency or efficiency. *Matter of Masauyama*, 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). Although the petitioner proposes to train the beneficiary, the record establishes that the beneficiary has substantial training and expertise in the field. Accordingly, approval of the petitioner's proposed training program is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(C).

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)(*4*) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States. According to the petitioner, the proposed training program "is designed to prepare the participant to manage an expansion branch overseas." However, 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, as the petitioner states that the proposed training is specific to the petitioner, and the only setting in which the beneficiary would utilize his skills would be for the petitioner in Zimbabwe, the petitioner must document that it actually has plans to commence operations in Zimbabwe upon completion of the training. The record, as presently constituted, contains no information or evidence regarding the petitioner's expansion plans into Zimbabwe, 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)). The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*). For this additional reason, the petition may not be approved.

Finally, the AAO notes that the beneficiary is currently in F-1 nonimmigrant status. The record does not indicate whether she was granted a period of optional practical training. If she was granted a period of optional practical training and, if the present petition had been approved, there would have been no gap between the beneficiary's period of optional practical training and her H-3 status, and approval of this petition would have extended the period of time in the United States for the beneficiary to receive practical training. However, the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(H) precludes approval of a petition which is designed to extend the total allowable period of practical training previously authorized the beneficiary. The AAO, howeer, will not enter a finding in this regard, as the record is unclear as to whether the beneficiary was granted a period of optional practical training. Nor would remanding the petition to the director for entry of a finding in this regard serve any purpose, as approval of this petition is precluded by several criteria.

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.