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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 07 800 12068 Office: CALIFORNIA SERVICE CENTER Date: NOV 17 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.

John F. Grissom, Acting 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 an electronics assembly company that seeks to employ the beneficiary as a trainee for a period of "between 10 and 15 months." 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 August 17, 2007 request for additional evidence; (3) the director's first denial letter, dated August 29, 2007; (4) the petitioner's first Form I-290B, submitted as a motion to reopen, dated September 28, 2007; (5) the petitioner's response to the director's request for additional evidence, dated November 6, 2007; (6) the director's June 24, 2008 decision, which granted the petitioner's motion to reopen the petition, but denied the petition on its merits; and (7) the petitioner's second Form I-290B and supporting documentation, dated July 24, 2008. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on five grounds: (1) that the petitioner had failed to demonstrate that the proposed training does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) 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; (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.

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 August 3, 2007 letter of support, the petitioner stated the following:

> [The petitioner] is a premier manufacturing service contracting company to the electronics industry . . . The Company has been engaged in the business of electronics contract manufacturing for over twenty (20) years, providing a wide range of services including management, full turnkey "box-build" manufacturing solutions, design, purchase, assembly, integration, quality assurance, testing, packaging, and inspection.

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

> The Company intends to ensure [the] success of its future affiliate abroad by promoting trust-based business and ensuring a high standard of operations and services to its future off-shore customers.
>
> To guarantee the success of its future off-shore affiliate, the Company has modified its established in-house training program to meet the customer-specific manufacturing ("Process Control Management") training regimen. The modified Process Control program will equip and provide individuals with the necessary tools to prepare them to become effective, both, as local, and international, representatives of the Company.
>
> It is within the framework of off-shore expansion that the Company resolved to offer [the beneficiary the opportunity] to participate in the Company's Process Control Training Program. . . .

The petitioner explained that the proposed training program would consist of two modules: (1) In-House Training; and (2) Offshore Training. The first module would be broken into five sections: (1) Customer Orientation; (2) Product Review; (3) Process Control; (4) Integration; and (5) Prototype. The second module would be broken into four sections: (1) Orientation; (2) Review; (3) Process Control; and (4) Continuing Education.

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.

The AAO agrees with the director. 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. The petitioner's description of how the beneficiary is to spend her time consists of brief summaries. Goals and objectives are presented, but lists of goals and objectives are not substitutes for descriptions of how those goals and objectives are to be accomplished; the petitioner has not explained what the beneficiary will actually be doing during this time. Nor is any other evidence submitted, such as sample lesson plans or copies of reading materials, which would assist the AAO in determining how the beneficiary would actually be spending her time. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every hour, or even every single day, of the training program. However, the petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing while participating in the proposed training program.

Moreover, the petitioner has failed to establish that its proposed training schedule has a fixed schedule. As noted previously, the petitioner stated that the program would last "between 10 and 15 months." The petitioner offers estimates of how long each section of the program would last: for example, the second section of the first module would last "4-6 weeks"; the third section of the first module would last "6-8 weeks"; and the fourth section of the first module would last "5-7 weeks." Such uncertainty is not indicative of a program with a fixed schedule.

For all of these reasons, 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of this petition.

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 AAO incorporates here its previous discussion regarding the general nature of the petitioner's proposed training program, as well as the uncertainty regarding its length. Again, the petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every hour, or even every single day, of the training program. However, the petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing while participating in the proposed training program. Its 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. The AAO disagrees. Both counsel and the petitioner have asserted that the proposed training program will not involve productive employment. Given the goals and objectives of the training program as set forth in the record of proceeding, the AAO finds this assertion reasonable. Therefore, the AAO withdraws that portion of the director's decision finding otherwise.

The director also found 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. The AAO disagrees. The petitioner provided this information at the time the petition was filed. The AAO finds no reason to doubt these figures and, accordingly, withdraws that portion of the director's decision finding otherwise.

The director also found 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. The AAO disagrees. The petitioner indicates that the beneficiary will receive an allowance of $12 per hour. The petitioner has also described its plans for the beneficiary after she returns to the Philippines. While those plans may not have satisfied other regulatory criteria at issue in this case, they do satisfy

C.F.R. § 214.2(h)(7)(ii)(B)(*6*), and the AAO withdraws that portion of the director's decision finding otherwise.

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, 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.

CIS has found the petitioner in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*). Again, the question to be addressed when attempting to satisfy these two criteria is not whether the petitioner offers this training in the alien's home country. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

However, in the present case, and as noted above, the reason for creation of the training program is to train the beneficiary on the petitioner's own business practices.

Having made such a demonstration, however, 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 (the knowledge that cannot be obtained in the Philippines) 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 (again, if the knowledge can be used at employment other than for the petitioner, it is therefore not wholly specific to the petitioner's business, and therefore can be obtained in the Philippines).

The petitioner has failed to establish that there is in fact exists a career abroad in which the beneficiary can utilize the training to be imparted via the proposed training program. As the purpose of the proposed training program is to train the beneficiary on the petitioner's unique business practices, the only setting in which the beneficiary would be able to utilize her newfound knowledge would be for the petitioner.

As the petitioner has not yet established its affiliate office in the Philippines, there exists no setting in which she would be able to utilize her newfound knowledge. 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 setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that, at the time the petition was filed, it actually had plans to commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no documentary evidence of the petitioner's expansion plans at the time the petition was filed, beyond training the beneficiary. Nor has the petitioner submitted any documentary evidence, beyond its own assertions, 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)(2)(A)(*4*). For this additional reason, the petition may not be approved.

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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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