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

U.S. Citizenship and Immigration Services

dentifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

DY

[redacted]

FILE: WAC 08 011 50486 Office: CALIFORNIA SERVICE CENTER Date: SEP 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.

for Michael T. Kelley
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 non-medical homecare agency that seeks to employ the beneficiary as a trainee for a period of 18 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 the petition; (3) the petitioner's response to the director's notice; (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 it has the physical plant and sufficiently trained manpower to provide the proposed training; (2) 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 (3) that the petitioner had failed to establish that the beneficiary would not be placed in a position which is in the normal operation of its 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 September 17, 2007 letter in support of the petition, the petitioner stated the following:

> [The petitioner] is a non-medical homecare agency that provides homecare services to the elderly and other adults who wish to continue living in their homes. We offer caring, experienced[,] and dependable caregivers who are available on an hourly, daily[,] or extended/live-in basis. Our mission is to provide affordable reliable and compassionate in-home supportive services to the elderly and disabled individuals in our community.

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

> [The petitioner] is planning to establish a satellite office in the Philippines to reinforce our services and expand the pool of intelligence we may draw from.

The petitioner explained that the proposed training program would last 18 months. The beneficiary would spend fifty percent of her time in classroom instruction, forty percent of her time in practical training and/or on-the-job training, and ten percent of her time in observation. The proposed training program would consist of four modules: (1) the first module, entitled "Corporate Orientation," would last two months; (2) the second module, entitled "Overseas Recruitment," would last eight months; (3) the third module, entitled "Logistics," would last seven months; and (4) the fourth module, entitled "Evaluation Case Study Assessment," would last one month.

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 the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO agrees.

The petitioner stated the following with regard to supervision in its letter of support:

> Due to the significance of the Overseas Recruitment & Logistics Management Trainee, the President, [redacted] is in charge of full supervision. Although, each session and/or program will be facilitated by an individual expert in that field. . . .

In its January 8, 2008 response to the director's request for additional evidence, the petitioner provided additional information regarding the individuals who would provide the training. According to the petitioner, [redacted] would provide the training during the first module of the proposed training program, which would last two months. [redacted] would provide the training during the second module, which would last eight months. [redacted] and [redacted] would provide the training during the third module, which would last seven months. [redacted] and [redacted] would provide the training during the fourth module, which would last one month.

The director found the petitioner's assertions unconvincing, and stated the following in her February 12, 2008 denial:

> Although the petitioner has the physical premises in which to provide the training, the petitioner has not established that it has enough sufficiently trained manpower to provide the training specified. The petitioner provided an organization chart showing that its staff consists of twelve persons, which include marketing managers and coordinators, case managers, recruitment specialists and a director of nursing. The petitioner states in her letter, that she and her staff will be providing the beneficiary's training. However, the petitioner has not explained how they will still be able to perform their professional duties.

On appeal, counsel offers the following in rebuttal:

> Although the organizational chart does not completely state the job descriptions of the Trainers, this does not mean that the Petitioner has no qualified or sufficient manpower to conduct the program. It will be unfair for the Service to conclude or even to doubt the veracity and reliability of the evidence so presented.
>
> * * *
>
> [I]t is most respectfully submitted, that the pieces of the evidence that the Petitioner-Appellant has presented to support the existence of a physical plant space and sufficiently trained manpower, is more than adequate and the same should not be summarily dismissed and completely ignored, specially [sic] so in the absence of any evidence to the contrary. What voluminous proof does the adjudicator further need to arrive at the only logical conclusion, which is that the petitioner's photographs and manpower documentation are more than sufficient to meet this standard? What else is more convincing than the actual photographs of the whole business premises and its training area, along with the details of the trainers who are indeed the key employees of the business and the very same individuals who have invested their precious time, whole-hearted efforts, and kept a high regard for its clientele to project and [sic] enhanced business reputation and respectable and reliable image of the Company's [sic] within the industry?

The AAO agrees with the director's analysis. The AAO notes that the director entered a specific finding that the petitioner had demonstrated that it possesses the physical plant to provide the training. The director's denial under this criterion was based upon her conclusion that the petitioner had failed to demonstrate that it has sufficiently trained personnel to provide the training. As noted previously, the director found that the petitioner had failed to explain how the individuals providing the training would be able to both conduct the training and attend to their normal duties.

Counsel fails to provide additional information on appeal. Rather, he quotes from materials that were already before the director at the time she issued her decision and states that she committed error. He does not address the issue raised by the director. As asserted by the petitioner, its President, [redacted], would personally provide four hours of classroom instruction, and then four hours of on-the-job training, every day, for two months. In a company that is relatively small, such as the petitioner, it is reasonable to question who would attend to [redacted]'s job duties during his absence from his normal position.

The same question arises upon analysis of the remainder of the proposed training program. For example, the petitioner asserts that [redacted], its Vice President, would personally provide four hours of classroom instruction, and then four hours of on-the-job training, every day, for eight months. Again, it is reasonable for CIS to question how her normal job duties will be performed while she is working with the **beneficiary on a full-time basis during this time period. Similarly, [redacted] and [redacted] will** supervise the beneficiary during the third component of the proposed training program, which would last seven months. Again, there is no indication in the record as to how their duties would be performed during this period.

Further, the AAO notes that, according to the Form DE-6, Quarterly Wage and Withholding Report submitted in response to the director's request for additional evidence, the petitioner had four employees in January 2007, eleven employees in February 2007, nine employees in March 2007, thirteen employees in April 2007, nine employees in May 2007, eleven employees in June 2007, ten employees in July 2007, ten employees in August 2007, and eight employees in September 2007.[1] Again, given the relatively small size of the petitioner and the fact that it does not employ full-time trainers who would not be setting other job functions aside while providing the training, it is reasonable for the director to question how the president's and vice president's normal job duties will be accomplished while they are training the beneficiary on a full-time basis.

Counsel's assertions that the petitioner has sufficient manpower to conduct the training, after being placed on notice of the director's concerns via the denial letter, are insufficient. 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 it has sufficient manpower to provide the training specified in the petition. It has failed to explain how the trainers' normal job duties will be accomplished while they are training the beneficiary. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition.

The director also found that the petitioner had failed to establish that the beneficiary would not be placed in a position which is in the normal operation of its business and in which citizens and resident workers are regularly employed, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(*2*). The AAO agrees.

---

[1] The AAO notes that on September 30, 2007, the petitioner certified on the Form I-129, under penalty of perjury, that it had sixteen employees. However, the Form DE-6 submitted in response to the director's request for additional evidence indicates that the petitioner had eight employees in September 2007. 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.*

The AAO incorporates here its previous discussion of the petitioner's failure to demonstrate that it has sufficiently trained personnel to provide the training. Again, the petitioner has failed to explain how the duties of the petitioner's president and vice president would be performed while they are providing training to the beneficiary on a full-time basis. Coupled with the uncertainty in the record regarding the petitioner's number of employees at the time it signed the Form I-129 (i.e., the petitioner certified that it had sixteen employees, but the Form DE-6 indicated a total of eight full- and part-time employees), the petitioner has failed to establish that the beneficiary would not be placed in a position which is in the normal operation of its 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*).

Finally, the director also found that the petitioner had failed to demonstrate that the beneficiary will not engage in productive employment. 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.

As noted by the petitioner, the beneficiary would spend forty percent of his time in "practical and/or on-the-job training." While spending such a high percentage of time in practical training may not be problematic, in this particular case the petitioner has failed to provide a comprehensive description of what the beneficiary would actually be doing during this time. Absent such evidence, the record fails to establish that the beneficiary would not be engaged in productive employment while engaging in practical or on-the-job training. Forty percent of the beneficiary's time is not incidental to the training program. 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.

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)(iii)(A) precludes approval of a petition that deals in generalities with no fixed schedule, objectives, or means of evaluation. The information contained in the record of proceeding 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. The petitioner is not required to account for every minute of the beneficiary's time, but the description contained in the record is deficient.

For example, the second module of the proposed training program, entitled "Overseas Recruitment," would last eight months. While the record contains the training manual that will be utilized during the training program, the AAO notes that the material pertaining to the second module contains 24 pages of reading material. However, the training manual does not relate this reading material to the classroom instruction in any meaningful way: for example, it does not indicate whether the beneficiary will read this material in class, whether it is to be read before class and discussed during class, etc. The training manual offers no guidance as to what will actually take place in the classroom on a day-to-day basis. Nor does it offer any guidance as to what the beneficiary will be doing, on a day-to-day basis, during this period of time while participating in practical training. Finally, it is unclear what will happen after this 24-page excerpt has been read; it is unclear how the petitioner will be able to stretch the material to cover seven months.

The training manual's description of the third module, which would last eight months, suffers similar deficiencies. The training manual contains nine pages of material for this module, and does not relate the text to either the classroom or practical training portions of the third module in any meaningful way. Again, it is unclear what the beneficiary would be doing on a day-to-day basis, as it is unclear how the petitioner will be able to stretch these nine pages over an eight-month period of 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.

For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A). The petitioner has failed to demonstrate that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation, as required by 8 C.F.R. § 214.2(h)(7)(iii)(A). For this additional reason, the petition may not be approved.

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. The AAO incorporates here its previous discussion regarding the generalities in the petitioner's description of its proposed training program. The AAO also incorporates here its previous discussion of the unanswered questions regarding the supervision that the beneficiary would receive. For both 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.

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.