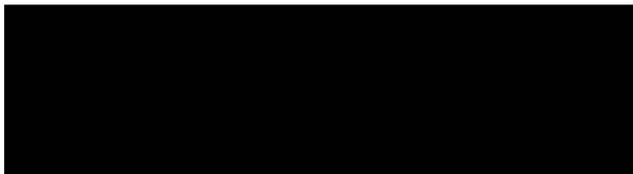




**U.S. Citizenship
and Immigration
Services**

S4



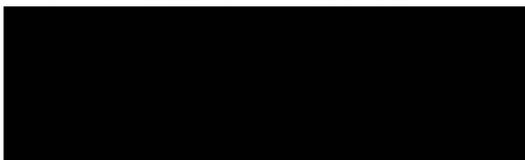
FILE: EAC 08 179 50049 Office: VERMONT SERVICE CENTER Date: **DEC 04 2009**

IN RE: Petitioner:
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:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
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 health and beauty product retailer that seeks to employ the beneficiary as a marketing developer for a period of ten 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 evidence (RFE); (3) the petitioner's request for an extension to respond to the director's RFE; (4) the director's denial letter; and, (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the following grounds: (1) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; (2) the petitioner failed to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States; and, (3) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation. 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 a letter dated June 5, 2008, the petitioner explained that it created the training program as a "response to the increased necessity of having qualified and trained individuals conduct our operations on the international arena." The petitioner further stated that it has a sister company, [REDACTED] located in Israel. The petitioner stated that the training will be provided by management level employees, and that the training program will be most effective taught in the United States as it is "not only more reflective of the global business arena than Israel, but it is also by far the largest market for cosmetic products line. . ." In addition, the petitioner stated that once the beneficiary completes the training program, "we plan to employ them oversees within our sister company, [REDACTED] or other of our affiliates in Israel, South America, Australia and Canada." The petitioner also stated that upon completion of the program, the trainees will have the "skills to work as Business Managers, Service Managers, Operations Managers, Supply Chain Managers and Strategic Managers."

The petitioner submitted a "training manual for management trainees." The manual described the nature of the management training program as follows:

[The petitioner's] program focuses on learning rather than production. New trainees will spend most of their time on educational activities and while experiencing task related activities they will be constantly accompanied and supervised by current employees. Throughout the program the trainees will be exposed to classroom instruction, independent study, distance learning, community service and hands-on tasks.

The program outline submitted by the petitioner consists of four phases: Introductory Training (6 weeks); Knowing the Company's Business Environment/Advanced Marketing (16 weeks); Intensive Educational Program (12 weeks); and, Management Responsibilities/Conclusion (6 weeks).

The petitioner also submitted a "time table chart" for each phase of the training program. The charts and tables for each phase are not consistent with each other. The charts indicate that the training will consist of more classroom training than hands-on experience but according to the

tables, the beneficiary will receive approximately four to six hours a week of classroom training which is significantly less than the hands-on experience.

The petitioner also submitted a second training manual entitled "Marketing Training." The training summary stated the following:

The trainees will be assigned on a rotational basis to all existing divisions of [the petitioner's] organizational structure. Emphasis will be placed on Marketing and Operations. Trainee will also receive on-the-job experience in the other income producing areas of our operations, including the Retail Department, Customer Service Division, Warehouse, etc. The rotational assignments and the training modules will last for approximately 40 weeks.

On appeal, the petitioner reiterated that the "principal purpose is to provide qualified individuals with first-hand knowledge of the company's unique retail management practices and business strategies so that they can take this knowledge and skills abroad."

The petitioner also submitted a letter, dated November 14, 2008, which states that the petitioner has "joined efforts with [REDACTED], a wholesaler and importer of Dead Sea cosmetics products from Israel." The letter also states that [REDACTED] is preparing documentation to show the partnership between the petitioner and [REDACTED], but the petitioner never forwarded this documentation.

Upon review, the petitioner's proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

The petitioner failed to establish that the proposed training could not be obtained in Israel, the beneficiaries' home country. 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.

The AAO notes that the question to be addressed when attempting to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5) is not whether the petitioner offers this training in the alien's home country. In other words, 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.

The petitioner stated in a letter dated June 5, 2008, the beneficiaries will "learn the ins and outs of [the petitioner's] business strategies." However, it is not clear why the beneficiary cannot learn the company's business strategies from the subsidiary in Israel. In its support letter, the petitioner stated that the training program is more effective in the United States because it is

"more reflective of the global business arena than Israel," and it is the "largest market for cosmetic products." As the petitioner and the company in Israel are affiliates, it is reasonable to conclude that they practice the same business strategies, goals, and operations. Therefore, it is also reasonable to conclude that the trainees would receive similar training in the petitioner's sister company in Israel.

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.

With regard to the beneficiary's career abroad, the petitioner stated that upon completion of the program "we plan to employ them [the trainees] overseas within our sister company, [REDACTED], or other of our affiliates in Israel, South America, Australia and Canada."

The petitioner has failed to establish that there 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.

The record does not indicate that the petitioner has any business operations in Israel. The petitioner claims that it has an affiliate in Israel, however, the petitioner did not provide any evidence to establish that the petitioner does in fact have an affiliate in Israel, and that a position is open and available for the trainee upon completion of the training program. The petitioner has failed to establish that there is in fact a career abroad in which the beneficiary can utilize the training to be imparted via the proposed training program. If the proposed training is specific to the petitioner's unique methods of conducting business, then it is unclear how that training could be utilized by another employer. 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 failed to establish that it has any business operations in Israel or any other part of the world, there exists no setting in which he would be able to utilize his 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). The record, as presently constituted, contains no documentary evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any documentary evidence to demonstrate that it is in the process of setting up operations abroad. 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).

The director also found that the petitioner failed to demonstrate that it has an established training program, and that the petitioner failed to submit evidence that the training program does not deal with generalities with no fixed schedule, objectives, or means of evaluation. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a petition where the petitioner submits a training program that deals in generalities with no fixed schedule, objectives, or means of evaluation.

The petitioner has not established that its training program does not deal in generalities. 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. The program is a ten-month training program but the petitioner's outline of the program provides a short description of each classroom topic. In addition, the petitioner stated in the support letter that the beneficiary will be trained in management operations, and it provided a program outline for training in management issues. However, the petitioner stated on the Form I-129 that the trainee will be a marketing developer, and the petitioner submitted a second training program outline that focuses on marketing training. One program outline is for 10 months, and the other one is for 40 weeks. The outlines are different. 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). 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).

In addition, the petitioner provided inconsistent information regarding the time the trainee will spend on classroom instruction and hand-on experience. The petitioner provided percentages of time the trainee will spend in classroom instruction versus hands-on experience. The percentages indicated that the majority of the training program will consist of classroom instruction. However, in reviewing the amount of classroom time allotted for each session, it appears that the classroom instruction will consist of approximately two hours per day. Again, 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. at 591-92.

The petitioner did not explain how the different sessions would be divided among the portions of the training program devoted to classroom training, written and oral presentation, and practical training. 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. Again, 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 not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

In addition, the petitioner did not provide an explanation of how the beneficiary will be evaluated throughout the training program. The petitioner stated that the beneficiary will have to take quizzes and tests. It is not clear on what the beneficiary will be tested, as the training program outline only provides a general explanation of topics to be discussed but does not provide a syllabus that will be followed, information on how the material will be taught, information on the assignments that will be assigned to the beneficiary or materials that the beneficiary will use in order to learn the topics to be discussed. In addition, the petitioner did not explain who will provide the training. The petitioner only stated that it will utilize its managers but it did not provide any further evidence of the manager's title and duties as trainers. Finally, on appeal, the petitioner stated that it operates several retail mall kiosks. The mall kiosks do not provide any space for classroom instruction for the beneficiary. The petitioner never explained where the beneficiary would obtain its classroom instruction.

The AAO finds that the petition was properly denied and, for the reasons set forth in the preceding discussion, will not disturb the director's denial of the petition.

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.