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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

D4

JUL 06 2009

FILE: EAC 07 267 50271 Office: VERMONT SERVICE CENTER Date:

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).

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 a pool and spa service provider that seeks to employ the beneficiary as a management trainee for a period of two years. 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 response 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 two grounds: (1) the petitioner failed to demonstrate that it has an established training program; and, (2) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country. 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 the letter of support, dated September 17, 2007, the petitioner stated that "our company's training program has been developed to offer the candidate the necessary knowledge, skills, and expertise to have a successful career in the recreational water industry." The petitioner explained that the program consists of classroom training, one-on-one interaction between the candidate and instructor, and hands-on training. Specifically, the classroom training will be "done in hour long segments that precede the hands-on training." The training will follow the National Pool and Spa Institute's "Service Tech Manual." The petitioner also stated that "neither this program nor anything similar to it is available in [the beneficiary's] home country...because Romania is still in a phase of post-Communism Westernization."

The petitioner submitted an outline of the training program which is broken down into the following eleven phases: Practical Knowledge (3 months); Structures and Finishes (3 months); Electrical Systems (3 months); Hydraulics (2 months); Pumps, Pump Motors, Spa Packs, Air Blowers and Associated Control Systems (3 months); Filtration Systems (1 months); Heaters (1 month); Water Chemistry (3 months); Chemical Feeders and Generators (1 month); General Maintenance (3 months); Review for Certification (1 month). The petitioner also submitted a copy of the Service Tech Manual from the Association of Pool and Spa Professionals.

In response to the director's request for evidence, the petitioner added that "the Beneficiary will not engage in any productive employment that is not a part of his training." The petitioner further stated that the training program will consist of an hour-long segment of classroom training and then a demonstration of the practical application, which may occur on-site or at the client site. Following the demonstration, the trainee will be given "an opportunity to attempt the application themselves."

On appeal, in the petitioner's letter, dated July 18, 2008, the petitioner states that a "significant portion of the training requires on-site observation, evaluation and instruction," and "while the nature of our program is based on the structure of the NPSI program alluded to above, it does require some flexibility and is more hands-on training oriented."

The petitioner also submitted an outline of the training program that includes the percentage of instruction for classroom and on-site instruction for each phase of the training program. The percentages of classroom instruction versus on-site instruction vary for each phase.

The director 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 two-year training program but the petitioner's outline of the program consists of three pages. The outline follows the table of contents of the Service Technical Manual developed by the Association of Pool and Spa Professionals. Although the petitioner submitted the manual consisting of approximately 600 pages, it failed to explain how the trainer will utilize the manual and develop a two-year training program. The phases of the program are not explained in any detail and it appears that the majority of the program will consist of hands-on training on client projects that will come up in the next two years. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis.

Nor has the petitioner clearly explained how the different phases would be divided among the portions of the training program devoted to classroom training, written and oral presentation, and practical training. The petitioner had stated in several occasions that the training program will consist of a one hour classroom segment and the rest of the time will be devoted to hands-on training. However, on appeal, the petitioner submitted a breakdown of the percentages of classroom training and on-site training which is not consistent with what the petitioner originally explained. 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). 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. 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, or information on the assignments that will be assigned to the beneficiary.

The director also found that the petitioner failed to establish that the proposed training could not be obtained in Romania, the beneficiary's 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.

On appeal, counsel for the petitioner states that "such training cannot be obtained in Romania as the growing but young industry has not yet developed the training standards and frameworks as exists in the United States." The petitioner did not submit sufficient corroborating evidence to support the claim that the trainee cannot find training in pool and spa services in Romania even if it is not the exact standard and certification process found in the United States. 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 also submits, on appeal, two opinion letters.

The first opinion letter is from a "certified pool service specialist" and the president of Sears Pool Management Consultants, Inc., located in Georgia. The author stated that he is competent in the subject of the availability of pool and spa service training in Eastern Europe because he had "more than several dozen" pool and spa service employees from Eastern Europe, and he has traveled to Eastern Europe region and is "familiar with the pool and spa industry there and the training programs offered." The author stated that "there exists no pool and spa certification process or organized pool management training matrix" in Romania.

The second letter is from the President of All American Custom Pools and Spas, located in Connecticut. The author stated that he attended "numerous pool and spa industry trade conventions in Eastern Europe and has visited Romania 3 times over the previous 18 months." The author stated that he knows of no comparable training program in Romania as to the one offered by the petitioner, "which incorporates the NPSI standards."

In reviewing the letters, an adequate factual foundation to support these opinions has not been established. The authors do not note the location of the petitioner, nor indicate whether they reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor do they describe the training program in any meaningful fashion. The extent of their knowledge of the proposed training program is, therefore,

questionable. Thus, the petitioner has not established the reliability and accuracy of their pronouncements and this submission is therefore not probative of any of the criteria at issue here. Nor have the authors submitted any industry data or other information to support any of their opinions. Thus, the petitioner has not established that its business practices are so unique and specialized that such knowledge could not be obtained from similar companies. The petitioner has failed to demonstrate that the proposed training could not be obtained in the beneficiary's home country. It has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) or 214.2(h)(7)(ii)(B)(*5*).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Beyond the decision of the director, the petitioner failed to demonstrate 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, and that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(*2*) requires a demonstration 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. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(*3*) requires a demonstration that the beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a training program which will result in productive employment beyond that which is incidental and necessary to the training.

The AAO incorporates its previous discussion regarding the vague and generalized description of the training program contained in the record, particularly regarding the rotational assignment portions of the training. As noted by the petitioner, the trainee will receive one hour of classroom training and then the rest of the training will consist of on-site demonstrations or observation and hands-on training at the client site. The petition indicates that the majority of the two-year training program will consist of hands-on training. Without additional information regarding what the beneficiary will actually be doing while he is on the client's site and receiving hands-on training, it can be concluded that he will in fact be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed, and that he will engage in productive employment beyond that which is incidental and necessary to the training. The petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(ii)(*2*), 214.2(h)(7)(ii)(A)(ii)(*3*), or 214.2(h)(7)(iii)(E).

Beyond the decision of the director, the petitioner failed to demonstrate that it has sufficiently trained manpower to provide the training specified. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition in which the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified. On the Form I-129, the petitioner indicated that it employs 22 individuals and has a gross annual income of approximately 2 million. In the letter of support, dated September 17, 2007, the

petitioner stated that the training program comprises of one hour long segments of classroom training which will precede hands-on training. The petitioner also stated that the president/owner will provide the training and supervise and evaluate the trainee. The petitioner did not explain how the president/owner of a company of 22 employees and a gross annual income of approximately 2 million can continue his day-to-day duties for two years and also provide classroom training and on-the-job training to 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. at 165.

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.

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 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.