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

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FILE: WAC 08 134 50807 Office: CALIFORNIA SERVICE CENTER Date: MAY 01 2009

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the nonimmigrant petition seeking to classify the beneficiary as 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 petitioner, a wholesale distributor of mobile phone accessories, seeks to employ the beneficiary as a management trainee for a period of 15 months.

The director denied the petition on two separate and independent grounds, concluding: (1) that the petitioner failed to set forth with specificity the training program being offered, including the type of training and supervision to be given and the structure of the training program; and (2) the petitioner failed to establish that it has sufficiently trained manpower to provide the training specified.

On appeal, counsel for the petitioner asserts that all requirements for H-3 classification were met and that the director denied the petition in error. Counsel submits a brief and additional evidence in support of the appeal.

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.

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, Notice of Appeal or Motion. The AAO reviewed the record in its entirety before issuing its decision.

The first issue to be addressed is whether the petitioner set forth, with specificity, the type of training and supervision to be given and the structure of the program, as required by 8 C.F.R. 214.2(h)(7)(ii)(B)(*1*). The regulations prohibit approval of a training program which deals in generalities with no fixed schedule, objectives, or means of evaluation. 8 C.F.R. § 214.2(h)(7)(iii)(A).

The petitioner described its operations and the proposed training program in a letter dated April 3, 2008. The petitioner is a California-based wholesale distributor of mobile phones and accessories, with branch offices in Miami, Florida and Seoul, Korea. The petitioner indicated that, based on the success of its Korean office, it now seeks to open a branch office in the Philippines and is therefore recruiting potential managers for the branch.

The petitioner provided a four-page overview of its training program, broken down into topics to be taught on a weekly basis, which is summarized below:

Month 1:	Orientation (Introduction to the company, company information, understanding the business)
Months 2-4:	Wireless Industry & Technologies (Overview of Wireless Technologies, Peripherals & Accessories, Coverage and Security Issues, Trends and Expansion)
Months 5-7:	Human Resources (Human Resources Overview, Performance Management & Appraisal, Compensating Employees, Training & Developing Employees, Managing HR Globally)
Month 8:	Basics of Accounting[1]
Months 9-13:	Strategic Management
Months 14-15:	Conclusion and Final Evaluation (Review of Lectures, Final Evaluation, Conclusive Discussions)

The petitioner further stated:

> The training method is to use about 70% academic instruction (such as lectures, discussions, readings, and completing assignments), 10% practice (such as making a cash flow statement from past year's data to practice accounting knowledge or to look at a competitor's data and try to assess their strengths and weaknesses), 20% observation (observing during meetings and watching the trainers demonstrate).

The petitioner indicated that the trainee would be evaluated in his or her understanding of the material at the conclusion of the program, with periodic "smaller-scale evaluations." The petitioner stated that a "higher level manager-in-charge" will check with the trainers on the trainee's results on these evaluations and general

[1] Other evidence in the record, including the petitioner's training syllabus and a letter from the petitioner dated June 9, 2008, indicates that the beneficiary will complete training in accounting during months 8 to 10, and then complete training in "Strategic Management" between months 11 and 13.

progress." According to the petitioner, the trainee will be evaluated in assignments, attendance, case analyses, evaluative tests and presentations.

The petitioner also submitted a document titled "Training Syllabus for Foreign Operations," which included essentially the same description of the training program. The syllabus also identifies the titles of human resources, accounting, and management textbooks to be used in the training program.

As evidence of its proposed training materials, the petitioner provided copies of its inventory listing, order invoices, and product descriptions and photographs. The petitioner indicated that no trainees have previously completed the program.

The director denied the petition on August 28, 2008, concluding that the petitioner did not describe in detail the type of training 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 director observed that the petitioner failed to submit course materials clearly describing the program, or evidence of training materials that would be utilized to train the beneficiary in a management position, other than the company's inventory list and product descriptions.

On appeal, counsel for the petitioner asserts that the petitioner discussed its training program in detail in its letter dated April 3, 2008, and also submitted a training manual and course materials describing in detail the type of training, its structure, and its contents. Counsel asserts that the petitioner has met its burden to describe the training program in detail.

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 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 petitioner indicated in its initial letter that the beneficiary will devote 21 weeks to studying "Strategic Management," however, its description of this training is limited to the titles of chapters from a strategic management textbook. It is also unclear that it would require a total of 525 classroom hours to go over the material in a single textbook. However, the AAO notes that the petitioner indicates that four entire weeks, will be devoted to a chapter titled "Creating Value Through Diversification." Such generalized descriptions fail to explain what the beneficiary would actually be doing during this time, particularly during "observation" and "practice" portions of the training.

Similarly, the petitioner's descriptions of its proposed human resources training, which is to last 12 weeks, is also taken from the table of contents of a text book. The petitioner indicates that the beneficiary will devote a total of 400 hours to studying four chapters in one book, and fails to indicate what the beneficiary would be doing during "observation" and "practice" portions of the program. Again, such limited descriptions, presented in summary form, do little to educate the AAO about what the beneficiary would actually be doing while participating in the petitioner's proposed training program other than reading a few textbooks.

Furthermore, in responding to a Notice of Intent to deny issued on May 28, 2008, the petitioner maintained that it would follow a weekly schedule involving 5 hours of academic instruction and two hours of

observation and practice daily, but in the same letter, submitted a weekly breakdown indicating that each week would either involve 100 percent classroom instruction or 100 percent on-the-job instruction. 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). For example, the petitioner indicated that the beneficiary would receive three weeks of full-time "on-the-job" training in peripheral devices and accessories. The limited course materials provided offer no insight into what the beneficiary would do during the 18 weeks devoted solely to full-time on-the-job training.

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.

Further, the AAO agrees with the director that the training materials submitted by the petitioner are of limited probative value in determining what the beneficiary would actually be doing on a day-to-day basis. Although the petitioner has provided a "training syllabus," it includes such information as a short description of the company, its management and its services, such as backorder policies, order processing, product availability and return policies. It contains eight pages of information regarding wireless technologies, but does not mention any other course materials to be used during this phase of the training. The AAO is not persuaded that it would require three months to cover these eight pages of material. The sections on human resources, accounting and strategic management are mostly dedicated to listing topics from the tables of contents of textbooks in these areas. Although the petitioner indicates that this training program was designed to be tailored to and unique to its operations, the record, as it currently stands, fails to establish the existence of any training materials designed specifically for the proposed training program. Rather, it appears that the beneficiary would spend over 1,500 hours in an academic setting studying a total of three management, accounting and human resources textbooks.

Finally, the petitioner has also submitted two different versions of its schedule, one which indicates that the beneficiary will devote one month to accounting topics and five months to strategic management, and one which indicates that she will devote three months to each of these topics. 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).

For all of these reasons, the AAO concludes that the petitioner has failed to set forth, with specificity, the type of training and supervision to be given and the structure of the program, as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*). The regulations prohibit approval of a training program which deals in generalities with no fixed schedule, objectives, or means of evaluation. 8 C.F.R. § 214.2(h)(7)(iii)(A). Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that it has sufficiently trained manpower to provide the training specified, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G).

In its letter dated April 3, 2008, the petitioner's president explained that the five-person company can provide the training without its business performance being negatively affected, as follows:

> Prior to recruiting the trainee, we have discussed the schedules and reflected back to the time when we were preparing for placement of those in the Korea branch office. During the discussion of the schedule, we only prepare 5 hours/day for lectures. As the main trainer and President of the company, I make decisions on how I schedule my tasks. Since I have a flexible schedule and have planned to devote my hours to supervising the trainee, I have already prepared others in the office for tasks I will delegate to them. Others who will share the training duties with me include [redacted] our Managing Director, and [redacted] our Vice President. We have worked together for a few years and I fully trust them to be able to perform tasks I assign as well as balancing training duties.

The petitioner also provided a breakdown of who would serve as instructor during each week of the training program, and indicated that [redacted] president, would provide 12 weeks of instruction, [redacted] would provide 27 weeks of instruction, and [redacted] will provide 21 weeks of instruction. [redacted] normal job functions, as provided by the petitioner, include developing and implementing selling strategies and product line plans, procuring all products sold, monitoring market conditions, and managing marketing programs. Mr. [redacted] regular duties include attending trade shows, conferences and other sales-related travel, establishing sales goals, working with sales associates to ensure that customers are well-informed, and establishing good relationships with customers. The petitioner also claims to employ one sales person and one accountant, who will not be involved in training the beneficiary. The petitioner provided photographs of its offices, training room, warehouse and showroom and a lease for its 6,400 square foot premises.

The director denied the petition, concluding that the petitioner does not have sufficiently trained manpower to provide the proposed management training. The director noted that the petitioner only employs a president, a vice president, a managing director, a salesperson and an accountant, and stated that it "is not clear how the petitioner's staff would qualify to train the beneficiary as a manager."

On appeal, counsel asserts that the petitioner's president, vice president and managing director are qualified to provide the training. Counsel summarizes their duties and qualifications and asserts that they have the proper credentials to provide the training.

Upon review, the AAO concurs with the director that the petitioner has not established that it has sufficiently trained manpower to provide the proposed training, and therefore has not satisfied the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G).

However, when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i). The director's decision suggests that she found the petitioner's employees *unqualified* to provide the proposed training, but she did not clearly indicate on what basis she reached this conclusion.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial

decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Accordingly, the AAO will address the petitioner's eligibility herein.

The AAO finds that the petitioner has the requisite physical plant to provide the proposed training, and that the proposed trainers have the necessary qualifications to provide the training, based on their education and experience. However, the AAO is not persuaded that the employees can perform their regular duties while engaging in full-time training duties, sometimes for four weeks or longer at one time. The petitioner has provided no information as to how each manager's responsibilities would be delegated to other employees during those periods they are engaged in training the beneficiary for 7 to 8 hours per day. The size of the organization is a reasonable consideration, as the company has only five employees in total, and indicates a vacant salesperson position and vacant senior accountant position on its organizational chart. The petitioner also identifies a second trainee on its organizational chart, although it claims that no one has previously participated in its program. In light of these factors, the petitioner's statements that the president's schedule is flexible is not sufficient. 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)).

Beyond the decision of the director, the AAO notes that the petitioner has failed to establish that the proposed training is not available in the beneficiary's home country of the Philippines, as required by 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*).

The petitioner stated in its letter dated April 3, 2008 that its training program was created for the sole purpose of training a manager for its future branch office in the Philippines. The petitioner asserts that the program involves "company specific, proprietary training," and that the subject matter is specific to the company, its industry, and its operations. The petitioner further indicates that "no other entity, organization or institution is capable of offering the training because they do not possess the specific knowledge about our company and our operations which the training covers." The petitioner asserted that "proprietary training must be conducted by the company by the proprietor and cannot be conducted in a location where the proprietor is not present."

The question to be addressed when attempting to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) 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.

In the present case, although the stated reason for creation of the training program is to train the beneficiary on the petitioner's own business practices, the petitioner in this particular case has not submitted evidence to demonstrate that its business practices are sufficiently unique or complex that the knowledge to be imparted could not be obtained at another facility. The petitioner operates a small but successful wholesale mobile phone accessory business. The evidence of record indicates that a significant percentage of the Filipino population uses mobile phones, therefore, it is reasonable to assume that the accessories are already available in that country, as are accessory wholesalers. Although the petitioner indicates that its processes and practices

are proprietary, the record does not contain a description of its business practices or identify makes them so unusual. Furthermore, the training itself, from the limited description in the record, will focus mainly on general textbook material that will be taught in a lecture format, and it is unclear how the petitioner's practices would be conveyed in this way. The textbooks do not even appear to be specific to the petitioner's industry. The AAO is not convinced that the beneficiary could not obtain knowledge of the wireless industry, human resources management, accounting and strategic management in her home country. Again, going 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 offered any evidence that the training is unavailable in the beneficiary's home country, and the AAO finds the petitioner's arguments that its training is proprietary and specific to the petitioner to be unpersuasive. According, the petitioner has not satisfied the regulations at 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*), and the petition will be denied for this additional reason.

Finally, even assuming *arguendo* that the petitioner had established that the proposed training is unavailable in the Philippines, it would then need to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States, pursuant to 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*).

If the entire reason for creation of the training program is to train the beneficiary on the petitioner's own unique business practices, 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 allegedly cannot be obtained in the Philippines) would 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.

The record shows that the petitioner has not yet established a branch office in the Philippines. If the AAO accepted the argument that the training is specific to the petitioner and only useful within its organization, then it would be compelled to find that there is no setting in the Philippines in which the beneficiary 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, the petitioner would need to 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. The letter dated June 23, 2008 from the petitioner offering the beneficiary employment in the Philippines upon completion of the training program is not persuasive in this regard. This document does not indicate that any action has been taken in the Philippines towards establishing the branch petitioner's branch office. 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 petitioner has not satisfied the regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*).

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. at 1043.

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.