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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 07 169 53109 Office: VERMONT SERVICE CENTER Date: MAY 01 2009

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.

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, Vermont 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 beneficiaries as nonimmigrant trainees 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 is self-described as a food services company that owns and operates full service Asian restaurants in the South Florida area. It seeks to employ the beneficiaries as operations management trainees in sushi food manufacturing, sales and distribution for a period of approximately 20 months.

The director denied the petition on two separate and independent grounds, concluding that the petitioner failed to demonstrate: (1) that the proposed training is not available in the beneficiaries' home countries of Jamaica and the Philippines; and (2) that the petitioner has the physical plant required to provide the training specified. The director also observed that one of the two beneficiaries was not maintaining a valid nonimmigrant status and the petitioner failed to provide a justifiable reason for the delay in filing the instant request to change and extend his status.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that the type of training to be provided is not available in the beneficiaries' home countries, and that the petitioner has the physical premises required to provide the proposed training. Counsel also asserts that both beneficiaries were maintaining their nonimmigrant status at the time the petition was filed. 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 demonstrated that the proposed training is not available in the beneficiaries home countries, as required by 8 C.F.R. 214.2(h)(7)(ii)(A)(*1*). The regulation at 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 petitioner filed the nonimmigrant petition on May 25, 2007. In a letter dated April 20, 2007, the petitioner described the objectives of its training program as follows:

> We recently established our Sushi Food Manufacturing, Sales & Distribution – Operations Management training program . . . to provide trainees from its [*sic*] overseas supplier food service companies with expertise in the fast-growing area of sushi food manufacturing, sales and distribution. We believe that as various countries in Asia continue to rapidly develop, especially China, there will be an overwhelming market demand for high-quality fresh sushi products, as has been experienced in North America. The long-term goals is to open sushi production facilities in Jamaica and the Philippines, and eventually in Thailand, Singapore and Taiwan. By offering this training program, [the petitioner] hopes to lay the foundation for its overseas expansion by developing skilled international workers in these countries for a potential overseas labor pool. The program is designed to provide trainees with the skills and knowledge to develop parallel manufacturing facilities and fulfill managerial roles for those operations.

The petitioner stated that "there is no Company or School in Philippines nor Jamaica that could provide the training program here proposed, with the theoretical instruction AND on the job training that we will provide."

In support of the petition, the petitioner submitted a 10-page overview of its "Sushi Food Manufacturing, Sales & Distribution – Operations Manager Training Program." Briefly, the 104-week program will include the following topics:

Week 1:	Introduction and orientation to the United States
Weeks 2-11:	Instruction and study on Japanese culinary arts and cuisine, including culinary history, food specialties, etiquette and tools.
Weeks 12-21:	Production facility set-up and maintenance, including planning and design of manufacturing, layout of sushi production line, and maintenance and care of sushi equipment

Weeks 22-31: Food procurement and processing, including instruction in steps in food purchasing process; selecting suppliers, negotiation of volume purchasing; storage and handling procedures, inventory control.

Weeks 32-41: Quality and process control, including instruction on standards, principles and procedures for quality control of manufactured foods; selection of quality raw materials

Weeks 42-43: Sanitation, including sanitation standard operating procedures, hygiene, proper food handling

Weeks 44-51: Sushi preparation, focused on sushi bar

Weeks 52-59: Distribution, including introduction to distribution planning, selecting channels of distribution, wholesale & retail distribution, packaging, review of food delivery vehicles, sushi packaging and storage.

Weeks 60-75 Sales and marketing, including advanced marketing principles, understanding consumer decision-making, developing target marketing strategy, advertising and promotion, pricing strategies.

Weeks 76-90: Accounting and organizational administration, including principles of hospitality accounting, accounting forms, accounting analyses, pricing and forecasting, cash management, internal controls and auditing, tax considerations and computer accounting programs.

Weeks 91-104: Human resources management in food/hospitality industry.

The petitioner also submitted a letter from [redacted], human resources manager for Saisaki Restaurants, located in Manila, Philippines. Ms. [redacted] indicates her company's intent to offer an operations manager position to one of the beneficiaries in 2008, after he completes the petitioner's training program. Ms. [redacted] states that the theoretical and on-the-job training offered by the petitioner "is not available in the Philippines," and that a foreign-trained operations manager would be a great asset to the company, which operates one or more Japanese restaurants and sushi bars.

In addition, the petitioner submitted a letter from [redacted], human resources manager for Versair Inflight Services Ltd., located in Kingston, Jamaica. Ms. [redacted] indicates that her company, which provides in-flight meals to airlines, is interesting in implementing large-scale production, sales and distribution of sushi, and requires a well-trained operations manager with skills in sushi food manufacturing, sales and distribution. Ms. [redacted] indicates that her company is interested in having one of the beneficiaries trained by the petitioner, and notes that "there is no training available . . . which includes theoretical and practical training, here in the Philippines."

The director issued a request for additional evidence (RFE) on June 6, 2007, but did not specifically request additional evidence to establish whether the training to be provided is available in the beneficiaries' home countries. The director did request additional evidence regarding the specific positions or duties for which the beneficiaries would be prepared at the conclusion of the proposed training.

In a response dated August 20, 2007, counsel for the petitioner asserted that the beneficiaries would be trained to perform the following duties:

1. Directs and supervises employees engaged in sales, inventory-taking, reconciling cash receipts or performing specific service.
2. Plans and prepares work schedules and assigns employees to specific duties.
3. Hires, trains and evaluates personnel in sales or marketing establishment.
4. Coordinates sales promotion activities and prepares merchandise displays and advertising copy.
5. Confers with company officials to develop methods and procedures to increase sales, expand markets, and promote business.
6. Keeps records of employees' work schedules and time cards.
7. Prepares sales and inventory reports for management and budget departments.
8. Assists sales staff in completing complicated and difficult sales.
9. Listens to and resolves customer complaints regarding service, product, or personnel.
10. Keeps records pertaining to purchases, sales, and requisitions.
11. Examines merchandise to ensure that it is correctly priced, displayed or functions as advertised.
12. Formulates pricing policies on merchandise according to requirements for profitability of store operations.
13. Analyzes customers' wants and needs by observing specified merchandise which sells most rapidly.
14. Inventories stock and reorders when inventories drop to specified level.
15. Prepares rental or lease agreement, specifying charges and payment procedures, for use of machinery, tools or other items.

The director denied the petition on September 6, 2007, concluding that the petitioner did not demonstrate that the training to be provided is unavailable in Jamaica and/or the Philippines, and therefore failed to satisfy the regulation at 8 C.F.R. 214.2(h)(7)(ii)(A)(*1*). In denying the petition the director determined that the specific skills and knowledge to be taught during the course of the petitioner's program "are common to the restaurant industry throughout the world." The director found that the duties are typical of restaurant managers in operations of any size and noted that the evidence was not persuasive in establishing that Japanese/Chinese restaurants in China and the Philippines are not able to train their staff in such skills. Finally, the director stated that the petitioner "chose not to submit documentation showing that similar training is unavailable abroad."

On appeal, counsel for the petitioner asserts that the issue of whether the training to be provided is unavailable in the beneficiaries' home countries was not addressed in the request for evidence. Counsel contends that the service center director misunderstood the nature of the petitioner's business, and clarifies that the petitioner operates a "complex, multi-faceted food service operation involving two multi-unit restaurant chains, and extensive corporate, retail, delivery and catering operations," with a state-of-the-art production facility and a "huge retail and catering business that extends far beyond the restaurant business."

Counsel further asserts that the director misunderstood the nature of the position, noting that the beneficiaries are being trained for the position of operations manager for sushi manufacturing, sales and distribution, not for the position of operations manager in a sushi restaurant. Counsel asserts that, as such, the duties, knowledge and responsibilities are "far more complex," and that companies abroad with less extensive operations "can not train their staff to the same level."

Finally, counsel asserts that the petitioner provided evidence that the training is not available in the Philippines or Jamaica. Counsel refers to the above-referenced letters from [redacted] and [redacted] Counsel further states:

> The principal focus of the petitioner is to open sushi production facilities in Jamaica and Philippines. [The beneficiaries] will be prepared as Operations Manager for sushi manufacturing, sales and distribution, in order for them to be able to run the businesses abroad, in the exact same way that the Petitioner operates its business in the US. The training offered by the petitioner is unique; it is the Petitioner's successful way of managing its business in the US. The on-the-job aspects of the training program, reflecting the Petitioner's organization in action are not available abroad.
>
> . . . [I]t is important to stress that other parts of the world and specifically Jamaica and the Philippines do not have this type of large scale sushi manufacturing facility. The Service fails to understand the true nature of the operations.

As a preliminary matter, the AAO acknowledges counsel's assertion that the director did not provide the petitioner with an opportunity to address all of the director's concerns through the request for evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) states that a petition may be denied without the issuance of a request for evidence "if all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility." Similarly, USCIS may deny a petition without issuing a request for evidence where all required initial evidence has been submitted but the evidence submitted does not establish eligibility. 8 C.F.R. § 103.2(b)(8)(iii). The regulation at 8 C.F.R. § 103.2(b)(8) states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. The director is not required to issue a request for evidence in every potentially deniable case, nor is she required to address every possible ground for denial in the request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. The AAO will consider the totality of the evidence, including evidence submitted on appeal.

Upon review, the petitioner has not demonstrated that the training to be provided is not available in the beneficiaries' home countries of Jamaica and the Philippines.

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 similar training would take longer in the beneficiary's home country, or whether such training would be inferior to that available in the United States. Whether similar training in the beneficiary's home country would take longer to complete or would be inferior is not material; 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 fact that a training program offered by a United States employer is better than a similar program in a foreign country does not establish eligibility under this regulation.

While the petitioner claims to operate a sushi production operation that is significant in size and scope, the topics of the training program are common to the restaurant and food manufacturing industry, and deal with Japanese cuisine, sushi preparation, food procurement, quality and process control, food safety and sanitation

and food distribution. The AAO is not persuaded that there are no similar seafood processing facilities or Japanese restaurants operating in Jamaica or the Philippines where a person could be trained in these areas. While the petitioning organization has claimed to produce sushi on a larger scale than similar overseas companies, it has not established that the fundamental knowledge and skills needed to oversee the food production, sales and distribution are substantially different based on the size and scope of the organization. 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)).

Regardless, only 10 weeks of the 104 week program are dedicated to instruction in planning and managing a sushi production line. Most of the remaining 94 weeks of proposed training is in general management topics such as sales and marketing, accounting, and organizational administration, all of which would reasonably be included in any university-level business management or hospitality management program. The unsubstantiated claim that such training is not available in Jamaica or the Philippines is not persuasive.

The only evidence submitted to establish that similar training is not available overseas were the letters from [redacted] and [redacted] Ms. [redacted], who works for a Japanese restaurant and sushi bar located in Manila, Philippines, states that a foreign-training operations manager would be a great asset because its clientele is becoming "international" and it would like to offer "services of the best quality." She does not indicate that the restaurant operates or intends to operate a large-scale sushi production line. Clearly, an active Japanese restaurant and sushi bar would already have management staff who are similarly trained in overseeing food preparation, food safety and quality control, sales, marketing, and financial and administrative aspect of the business. [redacted] did not specify how the training would differ from the training and knowledge already possessed by the restaurant's current staff, or where such staff received their training. She simply stated that "this training, which includes theoretical and on the job training aspects, is not available in the Philippines."

states no basis or support for this conclusion, and her unequivocal statement cannot be accepted as fact when it may simply represent her opinion to the best of her knowledge. [redacted] seems to single out the petitioner's offering of combined theoretical and practical training as unusual, however, as discussed above, all of the skills and knowledge to be imparted are common in the restaurant, management and food production industry and could reasonably be obtained through a combination of formal education and on-the-job training. The fact that Filipino companies may not offer both types of training in combination does not mean that the training is unavailable in that country.

[redacted] states that she works for a Jamaican company which has been in the business of providing in-flight meal services to airlines since 1980, and is interested in enhancing its business by implementing large-scale production, sales and distribution of sushi products. [redacted] states that there is no similar training program "which includes theoretical and practical training, here in Jamaica." Again, she does not state what her basis is for this conclusion or indicate that she has researched this issue before identifying the petitioner to provide the training. Moreover, the AAO notes that the letter is addressed to the petitioner and provides an introduction to the beneficiary, noting that the petitioner would like to hire him after he is trained by the company. At the time the petition was filed, the beneficiary in question had been in the United States since 2001 in H-4 status. The record shows that the beneficiary's spouse works for a company that appears to be affiliated with the petitioner, so it seems unlikely that this letter served as the petitioner's introduction to him.

Finally, the AAO notes that the beneficiary filed an application for U.S. permanent residence while the instant petition was pending. These facts raise questions as to the credibility of the statements made in the letter. There is no evidence that the beneficiary has any relationship with the Jamaican company or that it ever intended to hire him.

Although the director found the letters from foreign employers to be insufficient, the petitioner has offered no additional evidence on appeal to establish that the training to be provided is unavailable in Jamaica and the Philippines. Counsel asserts that "other parts of the world and specifically Jamaica and the Philippines do not have this type of large scale sushi manufacturing facility." 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).

Finally, counsel asserts on appeal that "the principal focus of the petitioner is to open sushi production facilities in Jamaica and Philippines." Counsel states that the beneficiaries will "run the businesses abroad, in the exact same way that the Petitioner operates its business in the US." While the petitioner initially stated that it was in "pre-negotiation" with the Jamaican and Philippines companies "for market shares and joint venture in the future," there is insufficient evidence to establish that the beneficiaries would be establishing affiliate operations of the petitioner abroad which would require knowledge that is unique and specific to the petitioner's organization. The letters from the foreign employers make no such reference to any potential joint venture with the petitioner. Regardless, as discussed above, the AAO concurs with the director's determination that the training to be provided is general training in restaurant and food production management, rather than highly specialized training that is unique to the petitioner or unavailable in the beneficiaries' home countries. The petitioner has not established that its business practices are so unique that such knowledge could not be obtained from educational institutions or similar companies operating in the industry abroad.

Based on the foregoing, the AAO is not persuaded that the training to be provided is unavailable in the beneficiaries' home countries. Accordingly, the petitioner has failed to satisfy the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) and the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner established that it has the physical plant and sufficiently trained manpower to provide the training specified, as required by at 8 C.F.R. § 214.2(h)(7)(iii)(G). The director specifically found that the petitioner did not provide evidence that it has a training or instruction room, where much of the training is to take place.

The AAO disagrees. The petitioner has established through submission of a lease and photographs of its premises that it has the physical plant necessary to provide classroom instruction to two trainees. Therefore, this ground for denial will be withdrawn.

The final issue addressed by the director is whether the beneficiaries were maintaining their valid nonimmigrant status at the time the petition was filed, as the petitioner requested that both beneficiaries be granted a change of status to H-3, and an extension of stay until December 15, 2008. One beneficiary was admitted to the United States in B-2 status on October 24, 2006, and his status expired on April 23, 2007.

The director noted in the decision that the instant petition was filed on May 25, 2007, and the petitioner provided no evidence of a justifiable reason for the delay in filing. Therefore, the director found that the beneficiary was not in a lawful nonimmigrant status.

Counsel asserts that the petition was in fact filed on April 24, 2007, and notes that the petitioner provided a copy of its mailing receipt as evidence of filing on that date.

In accordance with 8 C.F.R. § 103.2(a)(7)(i), an application received in a U.S. Citizenship and Immigration Services (USCIS) office shall be stamped to show the time and date of actual receipt, if it is properly signed, executed and accompanied by the correct fee. For calculating the date of filing, the petition shall be regarded as properly filed on the date that it is so stamped by the service center. In the present matter, according to the date stamp on the Form I-129, the petition was received as properly filed on May 25, 2007.

While the record shows that the petition was initially submitted on April 24, 2007, it was in fact rejected and returned to the petitioner. Counsel does not acknowledge that the petitioner re-submitted the petition on May 27, 2007 and it was accepted as properly filed and assigned a receipt date at that time. Counsel has not submitted evidence on appeal to overcome the director's finding that one of the beneficiaries was not maintaining his nonimmigrant status. Regardless, even if the petition had been properly filed on April 24, 2007, it would have been filed one day after the beneficiary's B-1 status expired. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the instant petition was not timely filed, it is noted for the record that the beneficiary is ineligible for a change of status or extension of stay in the United States.

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.