U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 14 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as an eight-employee enterprise engaging in the sale and repair of rugs and tapestries. In order to employ the beneficiary in what it designates as a trainee position, the petitioner seeks to classify her as a 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 director denied the petition on the basis of her determination that the petitioner failed: (1) to establish that similar training is unavailable in the beneficiary's own country; (2) to adequately describe the type of training and supervision to be given, and the structure of the training program; (3) to set forth the proportion of time that will be devoted to productive employment; (4) to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; and (5) to indicate the source of any remuneration received by the trainee and the benefit which will accrue to the petitioner for providing the training.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has overcome the director's findings that it failed: (1) to establish that similar training is unavailable in the beneficiary's own country; (2) to set forth the proportion of time that will be devoted to productive employment; (3) to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; and (4) to indicate the source of any remuneration received by the trainee and the benefit which will accrue to the petitioner for providing the training.

However, the petitioner has not overcome the director's finding that it had failed to adequately describe the type of training and supervision to be given, and the structure of the training program. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds four additional aspects which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely, the petitioner's failures to: (1) establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) establish that the proposed training would benefit the beneficiary in pursuing a career outside the United States; (3) demonstrate that the training program is not in a field in which it is unlikely that the knowledge or skill will be used outside the United States; and (4) establish that it has the physical plant and sufficiently trained

manpower to provide the training specified in the petition.[1] For these additional reasons, the petition must also be denied.

I. Law

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)(1)(ii)(E) states, in pertinent part, the following:

> An H-3 classification applies to an alien who is coming temporarily to the United States:
>
> (*1*) As a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution. . . .

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.

[1] The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified these additional four grounds for denial.

(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.

II. The Proposed Training Program

In its March 27, 2012 letter of support, the petitioner stated that it imports its rugs from carefully selected manufactures around the world, and that it is always searching for new markets offering creative, quality products. The petitioner explained that the Philippines presents a market that it is eager to explore, as it "would offer styles distinct from those which we already carry." According to the petitioner:

> By personally training [the beneficiary] who will return to the Philippines, we ensure a contact knowledgeable in the principles which guide our company [and] who can guide us in exploring potential manufacturers from whom to import. . . .
>
> * * *
>
> The Principal Objective of this training is to prepare [the beneficiary] to serve as a representative of our [company] in the Philippines.

The petitioner specified three primary objectives of the proposed training program:

- To educate the beneficiary on the petitioner's policies and operational systems, placing particular emphasis on its U.S. operations and distribution of its products in the U.S. market, so that she can apply those concepts in other markets;
- To educate the beneficiary in all aspects of the specialized sourcing and distribution strategies that are applied in the rug industry; and
- To equip the beneficiary with the relevant aptitude and practical knowledge in design and merchandising management, and to ensure she understands her responsibilities.

The petitioner stated that the training program would last 18 months, and that the beneficiary would spend 60 percent of her time receiving academic instruction, 25 percent of her time observing the petitioner's employees, and 15 percent of her time in practical training. The petitioner explained that although it was possible the beneficiary could perform a minimal amount of productive employment while receiving practical training, such productive employment is not an objective of the training program.

In the program outline it submitted in response to the director's RFE, the petitioner claimed that the training program would be comprised of nine phases.

- The first phase, which would last one month, would consist of two sessions: (1) General Orientation, Company Structure, Personnel and Policy; and (2) Training Orientation.

- The second phase, which would last two months, would also consist of two sessions: (1) Introduction of Rugs; and (2) All About Rugs.

- The third phase, which would last two months, would consist of three sessions: (1) Standards; (2) Design; and (3) Care and Maintenance.

- The fourth phase, which would last three months, would consist of two sessions: (1) Merchandise Strategies; and (2) Import/Export Transactions.

- The fifth phase, which would last two months, would consist of one session: Showroom Display.

- The sixth phase, which would last three months, would consist of three sessions: (1) Market Entry; (2) Specialized Marketing: Product Survey; and (3) Specialized Marketing: Contract Bidding.

- The seventh phase, which would last two months, would consist of one session: Customer Service.

- The eighth phase, which would last two months, would consist of one session: Management Level Exposure.

- The ninth phase, which would last one month, would consist of one session: Review and Performance Evaluation.

The petitioner provided a brief description of each phase of the training program, which included the objectives of each phase as well as the skills which would be used by the beneficiary during each phase.[2]

The petitioner explained that, on a daily basis, the beneficiary would spend four hours receiving a lecture, two hours in practical training, and one hour observing the petitioner's other employees. In his March 27, 2012 letter, one of the petitioner's partners, claimed that "I will personally supervise the training program and classroom instruction will be conducted by me."

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[2] The petitioner's organizational chart identifies the beneficiary as a graphic design and photography trainee. However, the training materials and outlines submitted by the petitioner do not indicate that the training program focuses on graphic design and photography in any way, and this discrepancy undermines the credibility of the petition. 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).

Finally, when it filed the petition the petitioner submitted a letter dated March 21, 2012 in which it claimed that when the beneficiary completes the training program, it will offer her a position entitled "overseas consultant," and that her job duties would include "identifying potential manufacturers from whom to import."

III. Unavailability of Similar Training in the Beneficiary's Own Country

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) forbids approval of a petition in which the petitioner fails to establish that similar training is unavailable in the beneficiary's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*) requires the petitioner to submit a statement which 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.

The director raised this issued in her April 11, 2012 RFE, and the petitioner's response was two-fold. First, the petitioner claimed that the training "is not available in the Philippines as it is proprietary." Second, the petitioner submitted a June 1, 2012 letter from the Technical Education and Skills Department Authority (TESDA), which stated, in pertinent part, the following:

> This is to certify that the Technical Education and Skills Department Authority (TESDA) and its network of about 4,500 public and private training institutions in the Philippines do not offer any training program in the rug and carpet industry.

The director did not find the petitioner's response persuasive. On appeal, counsel submits several articles regarding the textile and garments and industry in the Philippines, and one article discussing the state of the Filipino economy more generally. Counsel also submits an updated letter from TESDA on appeal, in which the representative of that agency explained that TESDA is overseen by the Department of Labor of the Philippines, and reiterated her earlier claim regarding the lack of similar training in the Philippines, stating the following:

> TESDA is currently unable to provide this type of training to the Philippine community due to the lack of skilled individuals available to provide training.

The evidence from TESDA is not sufficient to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) or 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*). The fact that TESDA "and its network of about 4,500 public and private training institutions" do not offer similar training does not satisfy the petitioner's burden, as it is not a public or private training institution, either. TESDA's letter does not address whether similar training is unavailable in the Philippines from private companies such as the petitioner. Nor do the various articles submitted by the petitioner on appeal satisfy these regulatory criteria. The petitioner has not established the relevance of the state of the textile and garment manufacturing industry in the Philippines to the issue on appeal. Given the petitioner's ability to offer this training program in the United States despite a marked decline in textile and garment manufacturing in the United States, it is not clear how a similar decline in textile and garment manufacturing in the Philippines would preclude a company in that country from offering a similar training program there.

That being said, the petitioner has nonetheless satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) and 8

C.F.R. § 214.2(h)(7)(ii)(B)(*5*) because it has established the proprietary nature of the knowledge to be imparted to the beneficiary. Although the petitioner's description of the training program remains generalized in nature,[3] it nonetheless appears as though it is tailored specifically to the petitioner's own business. The petitioner has therefore satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*5*), and the director's contrary determination is hereby withdrawn.

IV. Submission of a Statement Describing the Type of Training and Supervision to be Given, and the Structure of the Training Program; Generalities with No Fixed Schedule, Objectives, or Means of Evaluation

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) requires the petitioner to submit a statement which describes "the type of training and supervision to be given, and the structure of the training program," and 8 C.F.R. § 214.2(h)(7)(iii)(A) forbids approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation."

In her September 18, 2012 decision denying the petition, the director found that the petitioner had failed to explain the training program in sufficient detail; failed to submit a detailed breakdown of each phase of the training program; provided no details on how each topic will be taught; and failed to include training materials for each phase of the training program.

On appeal, counsel refers the AAO to the evidence it submitted below. The petitioner also refers the AAO to the evidence it submitted below and additionally submits copies of reference materials that will be used during the second, third, fourth, and sixth phases of the training program.

Upon review, the AAO does not find the evidence of record sufficient to satisfy either 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) or 8 C.F.R. § 214.2(h)(7)(iii)(A), as it does not make clear what the beneficiary would actually be doing while taking part in the petitioner's proposed training program. For example, as noted above the first phase of the training program would last one month and consist of two sessions: (1) General Orientation, Company Structure, Personnel and Policy; and (2) Training Orientation. The petitioner claims that during this one-month period, the beneficiary will be lectured by [redacted] for four hours every day. While the petitioner's brief summary of this portion of the training program is acknowledged, it is still not clear what the beneficiary would actually be doing during this period of time, or how [redacted] will be able to "lecture" the beneficiary on these topics for such an extended period of time.

In similar fashion, the second phase of the training program would last two months and would also consist of two sessions: (1) Introduction of Rugs; and (2) All About Rugs. The petitioner's description of how the beneficiary would spend her time consists of a three-sentence paragraph. This brief description is not probative. Nor does the 16-page training manual submitted on appeal that the petitioner claims pertains to the second phase establish what the beneficiary would actually be doing during this phase. Furthermore, the petitioner claimed, again, that [redacted] will lecture the beneficiary for four hours each day. However, the record contains no sample lecture topics or other similar information to explain how [redacted] would be able to lecture on these topics for such an

[3] The AAO will discuss this matter in further detail below.

extended period of time.

The fifth phase of the training program – "Showroom Display" – would last two months. Again, the petitioner's description of how the beneficiary would spend her time consists of a three-sentence paragraph which, again, is not probative. Nor did the petitioner explain how Mr. will lecture the beneficiary for four hours each day on this topic.

The remainder of the petitioner's descriptions of the proposed training program contains similar defects. While the petitioner is certainly not required to provide an exhaustive plan accounting for each minute of the beneficiary's time, in this case it has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing on a daily basis while participating in the training program.

The petitioner has not adequately described "the type of training and supervision to be given, and the structure of the training program," as required by 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*). Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

Beyond the decision of the director, it has also failed to demonstrate that the proposed training does not deal in generalities or demonstrated that the training program has a fixed schedule, as required by 8 C.F.R. § 214.2(h)(7)(iii)(A). Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

V. Submission of a Statement Setting Forth the Proportion of Time That Will be Devoted to Productive Employment

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*2*) requires the petitioner to submit a statement setting forth the proportion of time that will be devoted to productive employment. The record contains such a statement, and the director did not explain why she found it deficient. The AAO finds it sufficient and hereby withdraws this portion of her decision denying the petition.

VI. Submission of a Statement Showing the Number of Hours that will be Spent, Respectively, in Classroom Instruction and in On-the-Job Training

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*3*) requires the petitioner to submit a statement showing the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training. The record contains such a statement, and the director did not explain why she found it deficient. The AAO finds it sufficient and hereby withdraws this portion of her decision denying the petition.

VII. Submission of a Statement Indicating the Source of Any Remuneration to be Received by the Trainee and Any Benefit Which will Accrue to the Petitioner for Providing the Training

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*6*) requires the petitioner to submit a statement indicating the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training. The record contains such a statement, and the director did not explain why she found it deficient. The AAO finds it sufficient and hereby withdraws this portion of her decision denying the petition.

VIII. Pursuit of a Career Outside of the United States

Beyond the decision of the director, the AAO finds that the petitioner has failed to satisfy both 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*), which requires the petitioner to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States, and 8 C.F.R. § 214.2(h)(7)(iii)(D), which forbids approval of a training program that is in a field in which it is unlikely that the knowledge or skill will be used outside the United States.

As discussed above, the petitioner has established that the training is proprietary and unique to its company. However, it is not at all clear how the beneficiary would be able to utilize such proprietary knowledge for anyone other than the petitioner. Thus, in order to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) and 8 C.F.R. § 214.2(h)(7)(iii)(D), the petitioner must demonstrate that it had business operations abroad for which the beneficiary would work or, at minimum, concrete plans for such expansion, as of the date it filed the petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date 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'r 1978).

In her RFE the director requested that the petitioner "provide evidence to establish that the petitioner is actively doing business in the beneficiary's home country." No such evidence was submitted. The record, therefore, contains no evidence with regard to the petitioner's current operations in,[4] or plans to expand to, the Philippines or, for that matter, any other country. As the knowledge the beneficiary would gain from the training program would be specifically tailored to the petitioner's unique business operations, and the record lacks any evidence regarding the petitioner's current operations in, or plans to expand to, the Philippines or any other country, the petitioner has satisfied neither 8 C.F.R. § 214.2(h)(7)(ii)(A)(*4*) nor 8 C.F.R. § 214.2(h)(7)(iii)(D). Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

[4] It is noted that the petitioner provided evidence regarding the business travels of one of its partners. However, this particular partner made these business trips from his base in the United States. These trips are not evidence that the petitioner had already established business operations abroad at the time it filed this petition.

IX. Sufficiently Trained Manpower to Provide the Training Specified in the Petition

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) forbids approval of a petition where the petitioner fails to establish that it has sufficiently trained manpower to provide the training specified in the petition. The petitioner claims that the beneficiary would be provided with a lecture for four hours each day while participating in the proposed 18-month training program, and that one of the partners, would provide those lectures. It is unclear how would be able to perform his normal job duties, particularly in light of his claims regarding his travel schedule,[5] while simultaneously lecturing the beneficiary for four hours each day over an 18-month period. Simply 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The petitioner has not established that it has sufficiently trained manpower to provide the training specified in the petition and consequently the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) forbids its approval. Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

X. Conclusion

The petitioner has overcome the director's findings that it failed: (1) to establish that similar training is unavailable in the beneficiary's own country; (2) to set forth the proportion of time that will be devoted to productive employment; (3) to show the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training; and (4) to indicate the source of any remuneration received by the trainee and the benefit which will accrue to the petitioner for providing the training.

However, the petitioner has not overcome the director's finding that it had failed to adequately describe the type of training and supervision to be given, and the structure of the training program.

Beyond the decision of the director, the AAO finds additionally that the petitioner has failed to: (1) establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) establish that the proposed training would benefit the beneficiary in pursuing a career outside the United States; (3) demonstrate that the training program is not in a field in which it is unlikely that the knowledge or skill will be used outside the United States; and (4) establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition.

Consequently, the appeal will be dismissed and the petition will be denied.

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[5] In his June 26, 2012 letter Mr. claimed that he traveled to Nepal during the period of December 3-10, 2010; to New York during the period of January 16-22, 2011; to Egypt and Israel during the period of January 23-31, 2011; to Dallas during the period of February 25-March 16, 2011; and to India during the period of April 20-May 1, 2012. If is required to spend four hours each day over the next 18 months lecturing the beneficiary, it is unclear who will assume his travel responsibilities.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.