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U.S. Citizenship and Immigration Services

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FILE: WAC 08 241 51481 Office: CALIFORNIA 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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a “full service imaging lab for studios and professional photographers” that seeks to employ the beneficiary as a trainee in operations and graphics services management and photography sales specialization for a period of four months. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s 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.

On January 30, 2009, the director denied the petition on multiple grounds: (1) the petitioner failed to establish that the proposed training is unavailable in the beneficiary’s home country; (2) the petitioner failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad; (3) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and, (4) the petitioner failed to demonstrate that it has sufficiently trained manpower to provide the training specified. 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 its letter of support, dated August 29, 2008, the petitioner stated that the training program is to “educate the Trainee with the knowledge of the company’s policies, project management and operation systems, to develop supplementary understanding and skills within the broader aspects of Graphic Services Management with the goal of applying these concepts to international markets.” The petitioner also stated that the training program will last 16 months and the trainee will receive approximately 25% of academic practical training and 75% of on-the-job training. The supervised training will be conducted by the president. In addition, the petitioner explained that the trainee will be evaluated throughout the training program with exams and practical instructions and will be graded after each phase of the training program. The petitioner also explained that the training is unavailable in the beneficiary’s home country for the following reasons:

Although Philippines is [a] developed country, it is well known that it has problems with advanced education and training in technology and other fields primarily because of poor elementary and secondary education, lack of qualified faculties and shortage in facilities and weaknesses in planning, budgeting and implementing processes. Excelling in businesses with technology as the primary medium requires familiarity and basic knowledge [of] the computer. While most Filipinos have access and knowledge about computers, it is undeniable that since the U.S. has higher standards and more exposure to advanced technological trends, the U.S. has more experts and concerned organizations involved; thus, the Philippines is still behind in providing training from well-exposed trainers and experts that came from a more advanced country, specifically that of which practices that field.

The petitioner also stated that upon completion of the training program, the beneficiary will return to his home country “to better assist the future expansion and communications between our company executives and foreign customers and suppliers on the management services we provide.”

The petitioner also submitted certification letters from businesses located in the Philippines stating that the type of training provided by the petitioner is not available in the Philippines.

In addition, the petitioner submitted a manual entitled, "Training in Operations and Graphic Services Management and Photography Sales Specialization." The training program will consist of eleven modules: (1) Operations Management (3 months); (2) Operations Strategies that support performance objectives (3 weeks); (3) Operations Manager (3 weeks); (4) Technical Operations Manager (3 weeks); (5) Sales Training (3 months); (6) Photography Sales Specialist: An Introduction (1 week); (7) Graphic Services Management: An Overview (2 months); (8) Graphic Services Manager (2 weeks); (9) Digital Imaging (3 months); (10) Noritsu QSS-1912 (3 weeks); and, (11) Choosing the Right Camera for your Services (2 weeks). The petitioner provided an outline of the topics for each module.

In response to the director's request for evidence, the petitioner reiterated the same information submitted with the initial filing, but provided additional articles about businesses in the Philippines, and additional letters from companies in the Philippines indicating that the training provided by the petitioner is not available in the Philippines. The petitioner also explained that the president will be the sole trainer of the beneficiary and during the training program, the petitioner's Management Analyst will "substitute the president." In addition, the petitioner submitted a partnership agreement with Pinoy Global Access, dated August 8, 2008. The agreement acknowledges that the petitioner does not have a branch office in the Philippines, and the agreement states that Pinoy Global Access will be the petitioner's "temporary business contact point in the Philippines which will also help fix the paperwork or requirements needed in the Philippines such as business license, permits, target location of the future office, etc."

The petitioner also submitted additional photographs of its offices and the location of the training sessions within the office. The training sessions will be provided in the front of the store where the merchandise for sale is located and where clients will submit their orders.

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

As a preliminary matter, the AAO notes that the Form I-129 stated that the training program will last for four months from September 11, 2008 through January 10, 2009. However, in the petitioner's support letter, response to the RFE, appeal brief and training manual, it indicates that the training program will last 16 months. 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). Given that most of the documents submitted by the petitioner state that the training program will consist of 16 months, the analysis in this decision will be based on the described 16 month training program.

The director found that the petitioner failed to establish that the proposed training could not be obtained in the Philippines, the beneficiary's home country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(I) 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 is not available in the Philippines since that society has not yet developed the training standards and frameworks as they exist in the United States. The petitioner did not submit sufficient corroborating evidence to support the claim that the trainee cannot find training in image processing in the Philippines even if it is not the exact standard and 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 submitted several certification letters from schools and companies located in the Philippines that state the petitioner's training program is not found in the Philippines. In reviewing the letters, however, 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 and, thus, 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).

Next, the regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

As the claimed purpose of the proposed training program is to train the beneficiary on the petitioner's unique business practices, the only setting in which the beneficiary would logically be able to utilize his newfound knowledge would be for the petitioner. As the petitioner has no operations in the Philippines, there exists no setting in which he would be able to utilize his newfound knowledge. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

As stated above, the record only contains a partnership agreement between the petitioner and a company located in the Philippines, Pinoy Global Access. The agreement acknowledges that the petitioner does not have a branch office in the Philippines and the agreement states that Pinoy Global Access will be the petitioner's "temporary business contact point in the Philippines which will also help fix the paperwork or requirements needed in the Philippines such as business license, permits, target location of the future office, etc." This agreement is not sufficient evidence to establish that the petitioner has or will even have an office abroad to employ the beneficiary upon completion of the training program. It is also not clear how the petitioner has the financial ability to open a branch office with a net income of \$62,497.00, according to the Form I-129. In addition, the petitioner did not provide any corroborating evidence such as a business plan, a lease for a location in the Philippines, or financial statements to support the opening of a 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4). For this additional reason, the petition may not be approved.

The director also found 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 sixteen-month training program that is divided into eleven modules. Although the petitioner submitted a training outline with materials and topics to be discussed in each module, much of the training is general to all business operations and not specific to the petitioner's business activities. The outline consists of general topics that would be taught in any business course. In addition, the photographs submitted by the petitioner show that the classroom instruction will occur in the front of the store, i.e., not in a classroom. Thus, it is also not clear how the petitioner will receive 25% of his training for sixteen months in the front of the store where the merchandise is sold and the orders are taken for customers, which will present constant interruption to the claimed classroom instruction. In addition, 75% of the training is on-the-job training, but the petitioner does not explain what that will entail. Again, the training will occur

in a small store, and it is not clear how the beneficiary will receive training when the equipment is needed everyday to complete customer's orders and run the business. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis. 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. Therefore, it has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

In addition, the petitioner did not provide a clear explanation of how the beneficiary will be evaluated throughout the training program. The petitioner stated that the beneficiary will take exams but it is not clear on what the beneficiary will be tested since the training program outline only provides a general explanation of topics to be discussed. The training program outline, for example, does not provide the syllabus that will be followed, information on how the material will be taught, information on the assignments that will be assigned to the beneficiary, or materials that the beneficiary will use in order to learn the topics to be discussed.

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.

The organizational chart submitted by the petitioner indicated that it currently employs six individuals. One of these employees is the petitioner's president who, according to the petitioner's letter of support, would supervise the beneficiary at all times. In response to the director's RFE, the petitioner explained that the Management Analyst will substitute for the president during the training program. However, it is not clear how the Management Analyst can take over the duties of two positions for sixteen months. The record of proceeding, as currently constituted, does not adequately explain who will perform this individual's workload while he is instructing the beneficiary during this time, particularly during the 25% of the time that he will spend providing the beneficiary with classroom instruction. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) therefore precludes approval of this petition. For this additional reason, the petition may not be approved.

In addition, the director stated that the petitioner provided sufficient evidence to establish that it has the physical plant to provide the training program; however, the AAO disagrees. In response to the director's RFE, the petitioner submitted additional photographs of its store and the location where the training sessions will occur. As noted above, the training sessions will occur in the front of the store where the merchandise for sale is displayed and where the customers enter and place their orders. It appears highly unlikely that 25% of the time to be spent on classroom instruction for 16 months will happen in the front of the store and not affect business operations, or affect the ability to get through the classroom instruction. The entrance to a store is not an adequate location for a training program. In addition, the rest of the store has all the equipment

to perform the business operations, and it is not clear how the beneficiary will receive on-the-job training on this equipment when it is needed to finalize customer orders and run the business.

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 hereby 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. Without additional information regarding what the beneficiary will actually be doing while he is being rotated through several divisions of the petitioner's business, the AAO concludes 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 incidental and necessary to the training. As noted above, the evidence indicates that the beneficiary will receive at least 75% on-the-job training at a very small store with a few stations of equipment that are needed to prepare customers orders. If the beneficiary will work on these stations, it is not clear if he will actually be preparing customer orders and doing productive employment for the petitioner. As such, 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).

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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