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APR 26 2007

FILE: EAC 05 198 52852 Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, 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 manufacturer and wholesaler of ladies' accessories and novelties. It seeks to employ the beneficiary as a merchandise manager for a period of two years. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that: (1) the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad; (2) the petitioner had failed to set forth the proportion of time that would be devoted to productive employment or identify the number of hours that would be spent, respectively, in classroom instruction and in on-the-job training; (3) the petitioner had failed to demonstrate that the beneficiary would 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 (4) the petitioner had failed to demonstrate that its proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation.

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.

According to the training program syllabus submitted with the petitioner's initial filing, the proposed training program would consist of two distinct components: (1) two weeks of formal classroom instruction, and (2) "approximately two years" of rotational assignments in various departments. Beyond a statement that it would occur in New York and be led by senior managers, no further information was provided about the first component of the training program. The second component of the proposed training program would consist of a 109-week period during which the beneficiary would be rotated through each of the petitioner's departments. Specifically, the beneficiary would spend twenty weeks in the petitioner's product development department; forty weeks in the petitioner's sales and marketing department; four weeks in the petitioner's financial department; three weeks in the petitioner's operations department; five weeks in the petitioner's information technology department; fifteen weeks in the petitioner's production and inventory control department; one week in the petitioner's import and traffic department; twenty weeks in the petitioner's distribution center; and one week in the petitioner's human resources department.

The director found that the petitioner had failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to submit a statement which describes the career abroad for which the training will prepare the alien. The petitioner states that, upon completion of the training program, the beneficiary would be the merchandise manager for its London office. In his denial, the director stated that, since the petitioner's London office is not yet open, such a demonstration cannot be made. The AAO disagrees. The petitioner has submitted detailed evidence, including floor plans and a leasehold agreement, indicating that the London office will be open by the time the two-year training program is complete. As such, the AAO withdraws this portion of the director's denial.

However, the petition may not be approved, as the AAO agrees with the other grounds of the director's decision, including his ultimate finding that the petitioner's proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

The director found that the petitioner had failed to set forth the proportion of time that would be devoted to productive employment or identify the number of hours that would 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)(2) requires the petitioner to submit a statement which sets forth the proportion of time that will be devoted to productive employment, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(3) requires a statement detailing the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training.

The AAO agrees. In the schedule submitted in the initial filing and resubmitted in response to the director's request for additional evidence, the petitioner stated that the training program would involve two weeks of classroom instruction. However, on appeal, the petitioner states that the beneficiary would receive one week of classroom training in each department, and then lists the thirteen departments in which the beneficiary would spend one week of classroom 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).

As noted previously, the regulation specifically requires the petitioner to set forth the proportion of time that would be devoted to productive employment and to identify the number of hours that would be spent, respectively, in classroom instruction and in on-the-job training. Here, counsel assert that “[n]one of the programs involves productive employment.” However, the petitioner is still required to identify the number of hours that would be spent, respectively, in classroom instruction and in on-the-job training, and it still has not done so. Without regard to the fact that the petitioner has altered its training program on appeal, it still has not, in either version, identified the number of hours to be spent in on-the-job training. Counsel has stated that most trainees finish in a few months, and that the petitioner “put down two years because the instructions on the I-129 call for it.” Accordingly, the AAO finds that the petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(B)(2) and (3).

The director found that, as 98% of the program would be spent in on-the-job training, “a conclusion can be made” that the beneficiary would likely be placed in a position that is within the normal operation of the petitioner’s business. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(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.

Counsel did not address this finding directly, other than stating that the director’s assertion was conclusory and not supported by evidence. The AAO, however, agrees with the director. The petitioner has not provided a sufficiently detailed breakdown of the beneficiary’s activities to permit any other conclusion. For example, the petitioner stated in its syllabus that in the ten-month rotation the beneficiary would spend in the sales and marketing department, she would acquire “basic knowledge of the procedures and methodologies employed in sales and marketing,” and that she would be placed in four areas: novelties and toys, fashion, home fashion, and showroom. No further description was offered regarding the types of activities of which this portion of the training would consist. The record does not support a finding that the beneficiary would not spend any of this time engaging in productive employment.

On appeal, the petitioner offers additional information regarding the rotation that the beneficiary would spend in its sales and marketing department. However, the AAO will not address this information, as it materially alters its earlier training program. For example, the new version of this portion of the training program lasts ten months, as before, but this version of the rotation includes a rotation in the operations department (which previously lasted three weeks), a rotation in the financial department (which previously lasted four weeks), and a rotation in the production and inventory control department (which previously lasted fifteen weeks). In the earlier training program, these rotations, taken together, were to last sixty-two weeks, but they are now to last only forty weeks (ten months). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO finds that the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(2).

Finally, the director found that the proposed training program deals in generalities. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a proposed training program that deals in generalities with no fixed schedule, objectives, or means of evaluation.

The petitioner’s June 28, 2005 letter of support stated that the proposed training program would consist of two weeks of classroom instruction and “up to two years of rotational assignments.” Its August 9, 2005 response to the director’s request for evidence stated that “[t]he time required for training is variable but is normally completed in a few months.” Counsel’s appeal states that the petitioner does not prepare

daily schedules in advance, that the training program's schedule follows a schedule prepared 2-3 weeks before the program begins (and that the convenience of the presenters is a major factor), and that the time needed for the training is variable. As noted previously, the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a training program with no fixed schedule, and the statements of the petitioner and counsel are not indicative of a fixed schedule.

The AAO agrees that the syllabus submitted with the initial filing¹ dealt in generalities, and that the revised syllabus submitted on appeal also deals in generalities. For example, the petitioner states that the beneficiary would spend three months learning to "understand the sourcing of new fabrics, develop new fabrics, handle fabric approvals, maintain the development process of product to finish goods to ensure that fabrics are used in a profitable way," and "following up with new buys, deliveries[,] and lead times on all new sales order[s] placed." Such a generic description does not allow a meaningful understanding of what the beneficiary would actually be doing on a day-to-day basis. While the petitioner has offered additional information regarding the proposed training program, the information is still very general in nature. Such generalized information provides the AAO with no information on how the beneficiary would in fact be spending these two years. Moreover, as noted previously, the AAO notes that the schedule offered on appeal differs considerably with the schedule submitted in the petitioner's initial submission.

Also, the petitioner has submitted no information regarding its means of evaluation of the beneficiary. Beyond counsel's statement on appeal that "[t]he trainees are evaluated by their ability to learn and perform the tasks assigned," the record contains no evidence regarding the program's means of evaluation. 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). Moreover, counsel's statement is general in nature and indicates that the petitioner has no fixed means of evaluation. Accordingly, the AAO finds that approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A) in that the proposed training program deals in generalities.

For the reasons set forth in the preceding discussion, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO finds that the petition may not be approved for another reason. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien's own country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States.

In its response to the director's request for additional evidence, the petitioner stated the following:

The proposed training is not available in London because we are just now in the process of opening an office in London. . . .

¹ In his July 14, 2005 request for additional evidence, the director requested a complete outline of the proposed training program. The petitioner elected to resubmit a copy of the previously submitted syllabus in response.

The training takes place in the United States because the company is in the U.S. and the training is company specific. In this instant case, the London Office has not yet been opened. We don't have the facilities to provide this training in the U.K. . . .

However, the question to be addressed when attempting to satisfy this criterion is not whether the petitioner offers this training in the alien's home country. The question is whether the training is available anywhere in that country. The petitioner has submitted no evidence establishing that the training offered in this program is not available in the United Kingdom. The evidence does not support the statement by the petitioner that its program is unique. 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 established that this type of training is unavailable in the United Kingdom. Accordingly, the petitioner's proposed training program does not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(1). For this additional reason, the petition may not be approved.

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.