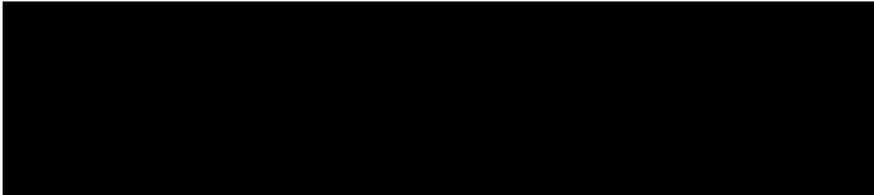


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Du

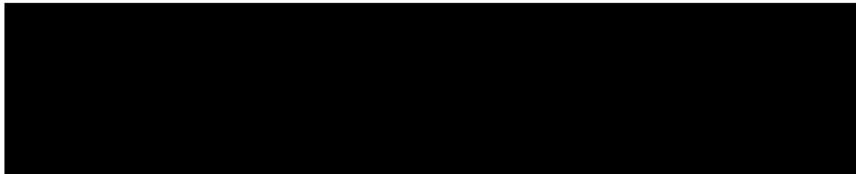
FILE: EAC 07 001 52428 Office: VERMONT SERVICE CENTER Date: FEB 21 2008

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 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 petition will be denied.

The petitioner sells jewelry and watches and provides watch repair services. It seeks to employ the beneficiary as a management trainee for a period of eighteen 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 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 six grounds: (1) that the petitioner failed to demonstrate that the proposed training program is unavailable in the beneficiary's home country; (2) the petitioner failed to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside of the United States; (3) that the petitioner failed to demonstrate that its proposed training program does not deal in generalities; (4) that the petitioner failed to demonstrate that it has a physical plant and sufficiently trained manpower to provide the training specified; and (5) that the beneficiary does not qualify for classification as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Act.

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 Form I-129, the proposed training program would last eighteen months. The training program submitted with the petitioner's September 25, 2006 letter of support indicated that the proposed training program would consist of nine components: (1) one week of orientation; (2) eleven weeks of customer service/public relations; (3) one week of basic concepts of computers and the internet; (4) fourteen weeks of "The Money"; (5) eleven weeks of the jewelry business; (6) thirteen weeks of fine jewelry service; (7) thirteen weeks of pre-owned jewelry; (8) eleven weeks of marketing tools management; (9) and five weeks of evaluation period. The descriptions for weeks 2 – 12, 14 – 21, 28 – 38, 39 – 51, 52 – 63, and 64 – 74 are essentially identical. Weeks 24 – 27 will be spent viewing Quickbooks videos. The training program will comprise of approximately 2,000 classroom hours and approximately 1,650 on-the-job training hours for a total of approximately 3,650 hours.

The AAO agrees with the director 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 establish that the proposed training could not be obtained in Argentina, the beneficiary's home country. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) 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. Whether the petitioner itself offers similar training in the beneficiary's home country is not the issue; the question is whether the training is unavailable anywhere in the beneficiary's home country, irrespective of whether it would be provided by the petitioner or another entity.

In the present case, however, the entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Moreover, the petitioner in this particular case has submitted sufficient evidence to demonstrate that its business practices are sufficiently unique that such knowledge could not be obtained at another facility. The AAO finds, in this case, that the petitioner has established that the proposed training is not available in Argentina, and finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Accordingly, the AAO withdraws that portion of the director's decision stating the contrary.

The AAO turns to the director's finding that the petitioner had failed to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States. The AAO agrees. 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 of the United States.

In his denial, the director quoted from the petitioner's response to his request for evidence and stated that the petitioner's own statements "have clearly shown that any partnership in Argentina is speculative."

Counsel states the following on appeal:

[T]he Service is not considering that any partnership involved countless negotiations, meetings, contract drafts, and attorney meetings from both sides. At the time of the answer to your request for additional evidence, the partnership had not been signed yet, it was in the negotiation stage. The statement presented as answer explains the difficulty that the petitioner has in finding the right partner...

* * *

The petitioner's statement and the letter from the company abroad clearly prove that a negotiation is taking place for a partnership.... The petitioner is now in the situation of having the partnership signed...

The AAO disagrees with counsel's analysis. The director correctly identified that at the time of filing, there was no partnership agreement between the petitioner and a company in Argentina. As noted previously, 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. In this case, the petitioner has demonstrated that the purpose of its proposed training program is to educate the beneficiary on the petitioner's specific business practices and operations so that the beneficiary may act as an operations manager in Argentina upon completion of the program. As noted previously, the AAO has accepted this proposition, and has found the petitioner in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Having made such a demonstration, however, compels the petitioner to further demonstrate that there is a setting in which the beneficiary will be able to use her newfound knowledge. Since the beneficiary's training will be specific to the petitioner, an operation run by the petitioner would be the only setting in which she would be able to use the knowledge.

The petitioner has asserted, as has counsel, that the petitioner did not have a partnership with a company in Argentina when the petition was filed. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). In this particular case, the proposed training is specific to the petitioner, and the only setting in which the beneficiary would utilize her skills would be for the petitioner in Argentina. Furthermore, although counsel states that the petitioner has signed a partnership agreement, counsel does not provide a copy of the partnership agreement or of the "contract drafts" mentioned in her brief. Counsel includes a letter signed by [REDACTED] as evidence of the partnership. The letter from [REDACTED] fails to confirm that a partnership agreement exists between the petitioner and a company in Argentina. The letter was written on letterhead for [REDACTED] and yet signed by [REDACTED]. The letter does not mention the name of the company in Argentina or any information as to how the company is affiliated with the petitioner. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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 must document that it actually has a management operations position for the beneficiary in Argentina upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion

into Argentina, beyond training the beneficiary. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4).

The director also found that the petitioner had failed to demonstrate that its proposed training program does not deal 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 AAO agrees with the director.

At the outset of its analysis under this criterion, the AAO notes that the director afforded the petitioner the opportunity to supplement the record with a more detailed description of its proposed training program in his November 3, 2006 request for additional evidence. In its response to the request for evidence, the petitioner added the following: "The trainee will be evaluated at the completion of each chapter. She will have to pass a test at the completion of each chapter. She will have to have a rate of 75% correct answers. Also, she will have to prepare a business plan that will be evaluated by the curriculum staff, the rate of the grades has to be above 75%."

The AAO notes that CIS is still left with little indication of what the beneficiaries will actually be doing on a day-to-day basis. While the petitioner is certainly not required to provide a daily itinerary for an eighteen month program, the petitioner has provided little information beyond a vague, generalized description. As stated previously, the petitioner provides essentially identical descriptions for large groupings of weeks during the program. In addition, besides the time spent watching Quickbooks videos, the petitioner does not explain exactly what the beneficiary will be doing during the 2,000 classroom hours. Finally, simply stating that the beneficiary will be observing during the 1,650 on-the-job training hours is vague and the petitioner does not provide information as to how it will evaluate the beneficiary for the time spent observing.

On appeal, counsel attempts to clarify the petitioner's statements about on-the-job training and states that "the statement [was] made ... as an explanation of the on the job training method and it was meant to explain that the trainee will not be engaged in any productive activities while training." Counsel's statement does not eliminate the generalities presented by the observation portion of the program.

For all of these reasons, approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(A). The AAO finds that the record fails to demonstrate the existence of a training program that does not deal in generalities.

In addition, the director found that the petitioner did not have the manpower necessary to devote to 2,000 hours of classroom instruction. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition where the petitioner has failed to demonstrate that it has the physical plant and sufficiently trained manpower to provide the training specified.

In response to the request for evidence, the petitioner states that it has four supervisors that will take turns in the training. The AAO finds, in this case, that the petitioner has established that it has sufficiently trained manpower to provide the training specified, and finds that the petitioner has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G). Accordingly, the AAO withdraws that portion of the director's decision stating the contrary.

Finally, the director found that the beneficiary did not qualify for classification as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Act, which requires the beneficiary to have no

intention of abandoning her foreign residence. In part 2, question 7 of the Form I-129, the petitioner indicated that it had filed an immigrant petition for the beneficiary and did not provide an explanation. In its response to the director's request for evidence, the petitioner stated that a Form I-485 Application to Register Permanent Residence or Adjust Status was filed for the beneficiary based on a Form I-140 Immigrant Petition for Alien Worker filed for her husband and that the beneficiary's Form I-485 was denied. The petitioner has not adequately established that the beneficiary intends to resume her foreign residence, as she filed an application to adjust status to permanent resident. Therefore, the AAO is unable to determine that the beneficiary qualifies for classification as a nonimmigrant worker trainee pursuant to section 101(a)(15)(H)(iii) of the Act.

For the reasons outlined above, the petition may not be approved, and the AAO 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.