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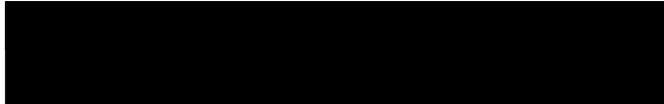
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FILE: WAC 08 010 50462 Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2008**

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.

for Michael T. Kelly
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 wholesaler of garment-quality fabrics that seeks to employ the beneficiary as a quality assurance trainee for a period of 20 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 notice of intent to deny the petition; (3) the petitioner's response to the director's notice; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on two grounds: (1) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the proposed training; and (2) that the petitioner had failed to establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

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 September 26, 2007 letter in support of the petition, the petitioner stated the following:

[The petitioner] is a wholesaler of garment quality fabrics in the U.S. and international market, with annual sales totaling \$50 million. We have been in the business for over 10 years . . . Beyond just fabric, [the petitioner] also offers a full garment package which expands our abilities in the market.

The concept behind the formulation of this company was the fact that there is a tremendous demand for quality fabrics in the U.S. as well as abroad. To satisfy this demand, some goods are imported from China and other such countries. All major manufacturers offer their overstocked and returned goods at a very high discount. [The petitioner] also buys these goods directly or indirectly from these and other manufacturers and meets different types of demands from its customers.

[The petitioner] basically caters to three types of major customers – (1) wholesale to the distributors, (2) wholesale to wholesale in the U.S., and (3) [the] retail market in the U.S. and abroad. The first two categories are our main source of revenue. Our goal is to also increase the market share steadily over the next five years.

With regard to why it is offering the training program, the petitioner stated the following:

We are able to utilize profits to expand our services even further and are in the process of negotiating with agents to represent and promote our fabrics in Canada, South America, Europe, and Asia. As a result, we will need . . . representatives to ensure that the agents are complying with company policies. With the training that [the beneficiary] will receive, she will be fully qualified to become our Quality Assurance Manager and work with agents to guarantee that the quality of [the petitioner's products] remain the same no matter where they are generated from.

The petitioner described the proposed training program as follows:

[The petitioner] has an in-house training program to provide our trainees with the expertise in quality processes, quality assurance, quality control, quality costs, total quality management, inventory of textiles, quality in purchasing textiles, and in-house quality standards and technical reports. . . .

Our training program in its entirety covers a 20-month period. The program will provide our trainee . . . with excellent exposure to our operations before working with our overseas agents. . . .

The petitioner explained that the proposed training program would last 20 months and be composed of eight modules: (1) Quality Procedures at [the Petitioner]; (2) Quality Assurance of Textiles; (3) Quality Control of Textiles; (4) Quality Costs; (5) Total Quality Management; (6) Inventory of Textiles; (7) Quality in Purchasing of Textiles; and (8) In-house Quality Standards and Technical Reports.

Upon review, the AAO agrees with the director's 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 establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO disagrees.

In her March 28, 2008 denial, the director noted that the petitioner had not explained how the trainers would be able to attend to their regularly-scheduled duties while also training the beneficiary. On appeal, the petitioner submits additional evidence regarding the trainers' duties, as well as information regarding the individuals who would perform their regular duties when they were themselves unable to do so. The AAO finds the petitioner's submission reasonable, and finds that it has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G). The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

The director also found that the petitioner had failed to adequately describe the career abroad for which the training will prepare the beneficiary. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to describe the career abroad for which the training will prepare the alien.

In its September 26, 2007 letter of support, the petitioner stated the following:

The infrastructure and expertise that enable us to maintain our current success is all located at our main office in [the] U.S. . . .

* * *

Following our training program, [the beneficiary] will be equipped and knowledgeable with skills in textile development, inventory management, fabric purchasing, and more. She will be able to apply aptitudes and abilities to our upcoming branch in a management position that we are offering here in the Philippines. Furthermore, she will be able to use this knowledge in any career outside the United States, if she chooses not to become employed with our company.

In his October 4, 2007 letter of support, counsel stated the following:

The Petitioner has invited the Beneficiary for the sole purposes [sic] of receiving instruction and training in the areas of management for the petitioner's overseas branch.

In its February 20, 2008 response to the director's request for additional evidence, the petitioner stated the following:

[T]he substance of this training is quality assurance management for [the petitioner]. . . .

* * *

[T]he proposed training program is offered to [the beneficiary] in order to prepare her for employment with our company at our upcoming **Philippines branch** [emphasis in original]. . . .

The petitioner also included a September 16, 2007 letter to the beneficiary with its response to the director's request for additional evidence. In this letter, the petitioner offered the beneficiary a position abroad at the conclusion of the training program.

In her March 28, 2008 denial, the director stated the following:

[T]he petitioner stated that its goal was not just to expand locally, but internationally. The petitioner further stated that the objective was to develop highly qualified individuals for key positions of responsibility specifically intended for the petitioner's international branches and future companies abroad. The petitioner has made a statement, but provided no evidence to support it.

On the Form I-290B, submitted on April 30, 2008, counsel states the following:

The record shows that the training will prepare the alien for the position of Textile Wholesale Quality Expert at [the petitioner] in the Philippines.

In its May 8, 2008 letter, the petitioner stated the following:

Submitted with our response to the Service's Request for Evidence was a copy of the offer employment letter which was accepted by [the beneficiary]. This letter is documentary evidence in support of the statement which we made. . . .

* * *

The record should be clear that upon completion of our training program, [the beneficiary] will immediately return to the Philippines and assume the position of Textile Wholesale Quality Expert at our impending Philippines branch. We anticipate that this branch will be fully operational by the time [the beneficiary] completes her training, however, even if it is not, [the beneficiary] will still be employed by our company in the Philippines. She will be expected to utilize the knowledge and skills gained in training to assist in the implementation of quality operations in order to facilitate opening of our Philippines branch. Once the branch is fully operational, she will responsible for overseen [sic] all of the branch's quality control processes.

In his May 28, 2008 letter, counsel states the following:

The petitioner reiterates . . . that upon completion of the training program, the beneficiary will immediately return to the Philippines and assume the position of Textile Wholesale Quality Expert with the petitioner in the Philippines.

The AAO agrees with the director. The petitioner has failed to establish that there in fact exists a career abroad in which the beneficiary can utilize the training to be imparted via the proposed training program. As the 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 be able to utilize her newfound

knowledge would be for the petitioner.¹ As the petitioner has not yet established its “upcoming branch” in the Philippines, there exists no setting in which she would be able to utilize her 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). In this particular case, since the proposed training is specific to the petitioner, and the setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that it actually has plans to commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no documentary evidence of the petitioner’s expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any documentary evidence, beyond its own assertions, to demonstrate that it is in the process of setting up operations in the Philippines. The September 26, 2007 letter from the petitioner offering the beneficiary employment in

¹ The AAO notes the petitioner’s assertion in its letter of support that completion of the proposed training program will benefit the beneficiary “in any career outside the United States.” In making this assertion, counsel is in essence asserting that the skills to be imparted by the proposed training program go beyond those that are specific to the petitioner’s company. If the skills can be utilized in “any career outside the United States,” or even in a related career, then those skills are clearly not specific to the petitioner’s method of conducting business. If the AAO were to accept this argument, which it does not, the AAO would be compelled to enter a finding that the petitioner had failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and (5). 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. If the petitioner is to assert that the skills and knowledge that the beneficiary would learn during the proposed training program are not specific to the petitioner, and could therefore be used at other companies, the AAO questions why the beneficiary cannot obtain such skills in the Philippines. The petitioner has failed to demonstrate the lack of availability of training in textile quality assurance and management in that country. For example, the AAO has looked to the website of the Philippine Textile Research Institute (PTRI), which was established by the government of the Philippines in 1967 (*see* <http://www.ptri.dost.gov.ph/> (accessed August 5, 2008)). On its website, the PTRI states that it “supports the local textile and allied industries achieve global competitiveness through utilization of indigenous resources, *and development of technical competence in textile production and quality assurance* [emphasis added].” Further, the AAO notes that, according to the Office of the United States Trade Representative, in 2005 the United States imported two billion dollars’ worth of textiles and apparel from the Philippines. *See* http://www.ustr.gov/Document_Library/Press_Releases/2006/August/US_Trade_Representative_Susan_C_Schwab_Philippines_Secretary_of_Trade_Industry_Peter_B_Favila_Sign_Textile_MOU.html (accessed August 5, 2008). Given the size and importance of this industry to the economy of the Philippines, it is unclear how individuals working in quality assurance in the Philippines, and particularly those individuals working for the PTRI, obtained their knowledge. Nor is the petitioner’s assertion in its letter of support regarding higher education in the Philippines persuasive. According to the petitioner, “the top 25 universities in the entire world consist of 18 United States universities. In fact, none of the universities in the Philippines rank amongst the top 100 Asia Pacific universities. Therefore, training that [the beneficiary] will receive with our company in the U.S. will tremendously benefit him for careers outside of the U.S.” The AAO does not find this study useful in its determination of whether the proposed training is unavailable in the Philippines. The record fails to demonstrate that, if the proposed training is not specific to the petitioner, that similar training cannot be obtained in the Philippines, the beneficiary’s home country.

the Philippines upon completion of the training program is not persuasive in this regard. 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).

Pursuant to the above discussion, the AAO agrees with the director's decision that the proposed training program does not meet the regulatory requirements for approval of the nonimmigrant visa.

Beyond the decision of the director, the AAO finds that the petition may not be approved for an additional reason.

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of a petition that deals in generalities with no fixed schedule, objectives, or means of evaluation. In its September 26, 2007 letter of support, the petitioner stated that the first module of the proposed training program would last one month; the second module would last five months; the third module would last five months; the fourth module would last two months; the fifth module would last three months; the sixth module would last three months; the seventh module would last two months; and the eighth module would last one month.

In its February 20, 2008 response to the director's request for additional evidence, the petitioner amended this schedule. While the third module was originally to last five months, it would now last four months. While the fifth module was originally to last three months, it would now last two months. While the sixth module was originally to last three months, it would now last two months. While the eighth module was originally to last one month, it would now last two months.

These changes are not indicative of a training program with a fixed schedule. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(A) precludes approval of this petition. For this additional reason, the petition may not be approved.

For all of these reasons, the petition may not be approved. 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 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.