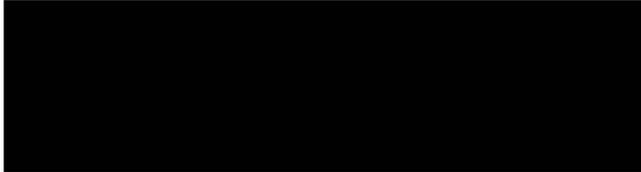




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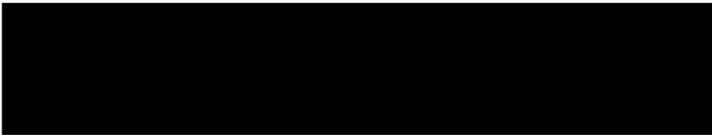


FILE: WAC 08 052 52211 Office: CALIFORNIA SERVICE CENTER Date: **DEC 01 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 jewelry manufacturer and retailer that seeks to employ the beneficiary as an inventory management trainee for a period of sixteen 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 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 an established training program that does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and, (2) that the petitioner had failed to demonstrate that the proposed training is unavailable in the beneficiary's home country.

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 an addendum to the Form I-129, the petitioner stated that the training will provide the beneficiary with the "knowledge of gold and custom jewelry manufacturing, sales, marketing, and general business operation in the U.S. market." The petitioner also stated that if the beneficiary completes the training program, "a job offer in our branch office in the Philippines will be offered to the trainee," and the beneficiary will "research and set up a branch office for the company and lead a new team to expand our business."

In the letter of support, dated December 3, 2007, the petitioner stated that the training will "provide the trainee with the knowledge of the company's policies, project management and operation systems, placing particular emphasis on management analysis and inventory management for gold and jewelry products in the United States market, with the goal of applying these concepts to international markets." The petitioner also stated that the trainee will be evaluated periodically with examinations and the trainee will be required to provide work samples for the practical instructions. The training program will be overseen by the president and by "other qualified trainers."

The training consists of five sections and each section is broken down to sub-sections. The five sections are as follows: (1) Orientation and Information about Petitioner; (2) Manufacturing Quality; (3) Manufacturing Management; (4) Lean Manufacturing; and, (5) New Methods of Inventory. Each component would consist of 65% classroom instruction and 35% on-the-job training.

The petitioner explained that the training program is unavailable in the beneficiary's home country because the training will be "focused on the U.S. market, its business environment and the sophisticated gold and jewelry industry." The petitioner further contends that "it is well known that Philippines has problems with advanced education and training in technology and manufacturing 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."

On January 31, 2008, the director requested further information from the petitioner. The petitioner requested information regarding the availability of training in the alien's home country;

the remuneration provided to the beneficiary; further evidence of the training program; photographs of the training facilities; employer verification records; and, an explanation of how the training program will prepare the beneficiary for a career abroad.

In a response letter, dated April 22, 2008, counsel for the petitioner contends that the training is not available in the beneficiary's home country because it will be "focused on the US market, its business environment and the fast-changing jewelry industry." Counsel submitted several articles regarding the Philippines; however, as noticed by the director, several articles were published years ago. Counsel further states that upon completion of the training program, the beneficiary will utilize his "skills in its forthcoming overseas operation." Counsel reiterated the goals and mission of the training program as stated in the initial filing.

The director found that the petitioner had failed to establish that it has an established training program that does not deal in 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 that deals in generalities with no fixed schedule, objectives, or means of evaluation.

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 outline of the training program consists of 49 pages but the explanations for each phase of the program are brief and vague. It is not clear how the beneficiary will learn the subject matters listed in the outlines. *The petitioner did not provide any resources or reading materials that will be utilized during the program.* Such a vague, generalized description 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.

In addition, in reviewing the outline, it appears that a large portion of the training program is learning about the manufacturing process. However, it does not appear that the petitioner has a facility that manufactures jewelry. The photographs of the petitioner's facilities include a training room, a storage room, a print room, inventory/show room, and a repairs room. *According to the petitioner's facilities, it appears that the petitioner is a distributor of jewelry rather than a manufacturer.* Thus, it is not clear why the training program will focus on 12 months of teaching manufacturing issues when the petitioner does not appear to manufacture the jewelry.

The AAO finds this description deficient. 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. It has failed to satisfy 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director also found that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, the beneficiary's home country. 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, and 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 evidence, counsel for the petitioner stated that the training program is not available in the Philippines since the training will be "focused on the US market, its business environment and the fast-changing jewelry industry. In the letter of support, the petitioner stated that the training program will "teach theoretical and practical knowledge and skills applicable to [the petitioner's] operations.

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 reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. The AAO finds that, in this particular case, the petitioner has established that the proposed training is not available in the Philippines, 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). The AAO, therefore, withdraws that portion of the director's decision finding otherwise.

Beyond the decision of the director, the petitioner did not establish that the training program will benefit the beneficiary in pursuing a career abroad. 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.

With regard to the beneficiary's career abroad, the petitioner stated when the beneficiary completes the program, the petitioner will offer him a job in its branch office in the Philippines. The petitioner stated that the beneficiary "will research and set up a branch office for the company and lead a new team to expand our business."

As discussed previously, the petitioner is in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Again, the question to be addressed when attempting to satisfy these two criteria 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, as noted previously, the basis of the AAO's determination that the proposed training is unavailable in the beneficiary's home country is its focus on the petitioner's specific business practices, as discussed by the petitioner.

Having made such a demonstration, however, the petitioner is compelled to further demonstrate that there is a setting in which the beneficiary will be able to use his newfound knowledge. Since his newfound knowledge (the knowledge that cannot be obtained in the Philippines) will be specific to the petitioner, an operation run by the petitioner would be the only setting in which he would be able to use the knowledge (again, if the knowledge can be used at employment other than for the petitioner, it is therefore not wholly specific to the petitioner's business, and therefore can be obtained in the Philippines).

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 his newfound knowledge would be for the petitioner.

However, the record does not indicate that the petitioner has any business operations in the Philippines. The petitioner stated that the beneficiary will help open a branch office.

If the proposed training is specific to the petitioner's unique methods of conducting business, then it is unclear how that training could be utilized by another employer. 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 his newfound knowledge would be for the petitioner. As the petitioner has failed to establish that it has any business 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). In this particular case, since the proposed training is specific to the petitioner, and the setting in which the beneficiary would utilize his 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. 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).

Beyond the decision of the director, the petitioner did not establish that it has the physical plant and sufficiently trained manpower to provide the training specified. 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 petitioner states that it currently employs 10 individuals and has a gross annual income of approximately \$6.5 million. The petitioner also stated that the training program will be supervised by the president and "other qualified trainers." The petitioner did not provide any information about the "other qualified trainers" that will assist in the training program. In addition, it is unclear how the petitioner's president will be able to spend this amount of time with the beneficiary and still attend to his other duties. The record of proceeding, as currently constituted, does not adequately explain who will perform the workload of the president and the "other qualified trainers" while they are instructing the beneficiary during the sixteen months of the training program, particularly during the 65% of the classroom instruction. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition. For this additional reason, 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.