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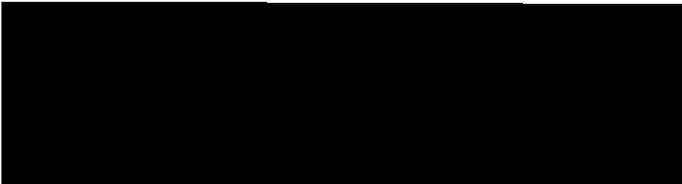
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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JUL 06 2009

FILE: WAC 08 203 51729 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).

John F. Grissom
Acting 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 engaged in the import of fine sake and seeks to employ the beneficiary as a sake and wine specialist/technician 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 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.

The director denied the petition on the ground that the petitioner failed to demonstrate that the beneficiary would not engage in productive employment. 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 a letter of support, dated May 7, 2008, the petitioner explained it is “dedicated to providing fresh, premium Japanese sake to American markets as well as to exposing Japanese markets to U.S. wines and alcohol products.” The petitioner further stated that the objective of the training program is to provide the beneficiary with the “background and experience in the United States wine market necessary to assist [the petitioner’s Japanese affiliate] (our supplier and partner in Japan) in initiating its own grape wine production.”

The petitioner provided the outline of the training program as follows:

[The petitioner’s] internship – August 2008 – September 2009
Culinary Institute of America Seminars – October 2009 – December 2009
UC Davis Extension Course Study – Winter Semester (January 2010 – May 2010)
Various Napa Valley Wine Seminars – June, July 2010

In addition, the petitioner explained that the beneficiary will learn the “fundamental departments” of the petitioner, including sales, marketing and design, and management. The petitioner also stated that the beneficiary will “attend and perform sake road shows.” At the shows, the beneficiary will “promote [the petitioner’s] sake products.” The beneficiary will participate in approximately 50 shows, 4 days each. The petitioner explained that the road shows will be at the petitioner’s client locations such as Costco and Wholefoods, and the beneficiary will “educate the American public about Japanese sake culture and production.” The petitioner also stated that the show will assist the beneficiary in learning “various sales strategies for selling sake (alcohol products) to the American population,” and the petitioner will benefit by having an employee from the foreign affiliate “educate its clientele about sake from an actual specialist who made the sake.”

In regards to the marketing rotation of the training program, the beneficiary will learn about alcohol labels and the marketing of alcoholic beverages in the U.S. The petitioner explained that the beneficiary will assist in getting all [foreign affiliate] labels approved by the BATF, and he will design two to three new labels.

The petitioner also explained that the beneficiary will learn management strategies, and together with the president, will “decide on a new product to launch into the United States wine market and develop it through all stages of importation.”

The petitioner further explained that the beneficiary will participate in several wine seminars at the Culinary Institute of America in Napa Valley, California for a total of 24 days. The beneficiary will also attend classes at the University of California, Davis as a full-time extension

student for one semester during the Winter semester of 2010. In addition, the beneficiary will attend summer seminars about the wine industry.

On July 25, 2008, the director sent to the petitioner a request for additional information. In part, the director requested more details about the training program such as information about the trainers, the materials that will be used in the classroom training, and how the petitioner will evaluate the beneficiary's performance.

In response to the director's request, dated October 14, 2008, counsel for the petitioner stated that the proposed training is not available in the beneficiary's home country because "Japan is a master in rice wine, also known as sake, and have been unable to successfully enter the grape and fruit wine market." Counsel also stated that the beneficiary will not attend any courses at UC Davis but will attend a seminar at the Culinary Institute of America. Counsel stated that the CEO will be providing the on-the-job training and the other training will be provided from the seminars.

On October 24, 2008, the director denied the petitioner and concluded that the beneficiary will participate in productive employment while in H-3 classification. The director noted that a large portion of the training program consists of attending and performing sake road shows and thus it appears that the beneficiary will engage more in selling a product.

On appeal, counsel for the petitioner explained that any productive employment by the beneficiary will be incidental to the aims of the training program. Counsel explained the purpose of the road shows as follows:

The beneficiary will not be attending the road shows alone in order to sell a product. He will be attending the road shows in order to learn. Furthermore, the beneficiary will not be stepping into a position that citizens and resident workers are regularly employed. The road shows were included as part of the training programme in order to teach the beneficiary about the purchasing habits of American consumers. The beneficiary will gain insight into discovering which bottles American customers are attracted to. He will learn about the economic and market trends and how they affect the demand of each product and what American customers are willing to pay for wine during different times of the year according to demography. The road shows will also teach the sweetness/dryness, amino acidity, fragrance, and color. The beneficiary will also learn to successfully sell to Americans by participating in advertising, promotion, and brand development, he will learn what to say and not to say when selling wine, what words and vocabulary works for different demography.

Upon review, 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 demonstrate that the beneficiary would not engage in productive employment beyond that necessary and incidental to the training program. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(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.

In the original support letter, dated May 7, 2008, the petitioner stated that the beneficiary will “perform sake road shows.” The beneficiary will “educate the American public about Japanese Sake culture and production.” The petitioner also stated that the beneficiary “will learn various sales strategies for selling sake to the American population.” The petitioner further stated that it would benefit the petitioner because having an employee from the foreign affiliate “on the floor promoting the sakes will help [the petitioner] educate its clientele about sake from an actual specialist.” The petitioner did not indicate that the beneficiary would learn about wine in the road shows. On appeal, counsel for the petitioner states that the beneficiary will learn from the road shows about selling wine products to the American public; however, the original petition stated that the road shows were for the sake product. In addition, the original petition stated that the beneficiary would work in the road shows, while on appeal counsel for the petitioner states that the beneficiary will learn from the road shows. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

In addition, the petitioner stated in the original support letter that the beneficiary will “design 2-3 new labels and get them approved by BATF.” The beneficiary will also “conduct market studies to find potential products to import into the United States,” and “develop a plan for bringing the item to the American retail shelf.” These duties are duties performed by market research analysts and marketing managers and the petitioner has not demonstrated that the beneficiary will only receive training in these areas rather than actually performing the duties for the petitioner and the foreign affiliate.

Counsel's argument on appeal is not sufficient evidence to prove that the beneficiary would not perform productive employment. The majority of the training program consists of working at road shows and performing marketing duties. The rest of the training program consists of taking courses and seminars; however, it is not clear what the beneficiary would be doing when he is not attending the seminars or courses. In addition, the petitioner failed to submit a breakdown of the classroom training and on-the-job training for this training program. 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(3), and approval of the petition is precluded by 8 C.F.R. § 214.2(h)(7)(iii)(E).

Beyond the decision of the director, the petitioner failed to demonstrate that it has an established training program and 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 two-year training program but the petitioner's outline of the program consists of two pages. The petitioner's description of how the beneficiary would spend the time to cover each topic is explained in a few sentences. The vague, generalized description of the training program does not explain what the beneficiary would actually be doing on a day-to-day basis. Nor has the petitioner explained how the different phases would be divided among the portions of the training program devoted to classroom training, written and oral presentation, and practical training. A breakdown of how the classroom training, written and oral presentation, and practical training components of the proposed training is not provided for any of the parts. 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. It has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

In addition, the training program consists of wine seminars and courses at the University of California. In response to the director's request for evidence, the petitioner stated that the beneficiary will no longer attend courses at the University of California. The petitioner provided a list of seminars the beneficiary will take but did not provide any evidence that the beneficiary was enrolled in these courses. In addition, the courses are in Napa Valley, outside of San Francisco, and the petitioner did not explain how the beneficiary will reach these courses if the petitioner's office is in San Francisco. Furthermore, the petitioner stated that the beneficiary will attend courses and seminars from October 2009 to July 2010 but the list of seminars provided from the petitioner consists of approximately 24 days of seminars. It is not clear what the beneficiary will be doing when he is not attending a seminar or course. 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)).

Beyond the decision of the director, the petitioner had failed to establish that the beneficiary would not receive training provided at, or by, an academic or vocational institution. The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E)(1) states that “[a]n H-3 classification applies to an alien who is coming temporarily to the United States: (1) As a trainee, other than to receive graduate medical education or training, *or training provided primarily at or by an academic or vocational institution* (emphasis added)”

The training program submitted by the petitioner stated that the training program will consist of seminars and course studies from October 2009 until July 2010, which is 22 months out of the 24 month training program. The word "primarily" is defined as "at first," "principally," or "chiefly." *Webster's II New College Dictionary* 877 (2001). As the training program lists 22 months of training courses at academic institutions, the trainee will receive training provided "primarily" by an academic institution.

Beyond the decision for the director, the petitioner failed to provide evidence to establish that the petitioner can employ a full time trainer, and simultaneously operate a training program and a business. 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.

The Form I-129 states that the petitioner has two full time employees and several independent contractors. In the response to the director's request for evidence, the petitioner stated that "Jarrell Sieff full-time CEO and employee will be providing the on the job training, other training will be provided from the seminars." In addition, on appeal, the petitioner states that the beneficiary will attend the 50 road shows with a representative of the petitioner. It is not credible that the petitioner's president and one senior staff member can provide all the classroom training and on-the-job instruction to the beneficiary which would leave little time to attend to other responsibilities. The petitioner has not demonstrated that it has sufficiently trained manpower to provide the training specified. Again, 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. at 165.

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.