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U.S. Citizenship
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FILE: EAC 08 149 53247 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.

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 food production and is a restaurant chain that seeks to employ the beneficiary as a 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 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) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; and, (2) the petitioner failed to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States.

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 the support letter, dated April 24, 2008, the petitioner stated that it “owns and operates a 10,000 square foot sushi and food manufacturing and commissary facility and eight full service Asian Restaurants under the brands Canton and Sushi Maki.” The petitioner explained that the training program will “provide trainees from its overseas supplier food service companies with expertise in the fast-growing area of sushi food manufacturing, sales and distribution.” The petitioner also stated that the “long-term goal is to open sushi production facilities in Philippines, and eventually in Thailand, Singapore and Taiwan.” The petitioner further stated that it is already in “pre-negotiation with Max’s Restaurant” for market shares and joint-venture. The petitioner explained that the training program is not available in the Philippines because the training is “specifically tailored around our needs and our manner of conducting our business.”

The letter of support stated the duties the beneficiary will perform abroad upon completion of the training program are as follows:

The beneficiary will be prepared to be the Operations Manager of the branch in the Philippines. Her duties will include enforcing safety and sanitation regulations. She will direct and coordinate the activities of employees engaged in the production of processing of goods. She will plan and establish work schedules, assignments, and production sequences to meet production goals, and also inspect the materials, products, and equipment to detect defects or malfunctions. It will be her responsibility to demonstrate the equipment operations and work and safety procedures for new employees, or assign employees to experienced workers for training. She will confer with the management in the Philippines and US to resolve worker problems, complaints, or grievances. She will test cooked food to ensure palatability and flavor conformity. She will investigate and resolve complaints regarding food quality, and service. Her duties will include to schedule and receive food and beverage deliveries, checking delivery contents to verify product quality and quantity. Other duties will be to monitor food preparation methods, portion sizes, and garnishing and presentation of food to ensure that food is prepared and presented in an acceptable manner. [The beneficiary] will monitor budgets and payroll records, and review financial transactions to ensure that expenditures are authorized and budgeted. She will be in charge of establishing the standards for personnel performance and customer service.

The petitioner submitted a training program outline that indicated that the beneficiary will receive 1870 hours of classroom instruction and 1250 hours of on-the-job training. The petitioner submitted a ten-page training outline, and reading materials.

On May 13, 2008, the director requested additional information. In part, the director requested additional information regarding the availability of this type of training in the beneficiary's home country, and further evidence to establish that the training program will assist the beneficiary in obtaining a job in her home country.

In the response letter, dated June 25, 2008, the petitioner explained that the training is not available in the beneficiary's home country and stated the following:

Our program consists in theoretical classroom instructions and on the job training instructions. The on the job training instruction hours are designed for the trainee to observe how our company is managed in the U.S., for her to be able to manage our business in the Philippines the exact same way we are managing our business here in the U.S. Our company abroad will hire [the beneficiary] at the completion of the training. In order to protect our investments we need an Operations Manager to be able to manage the operations abroad in the same way we are doing it here in the U.S. There is no training courses or companies able to provide a training program for Operations Mangers that will guarantee us the same results that we will have by training the Operations Manager here in the U.S. by our own workforce. Our training program is unique and is not available in Philippines, because the final goal that we want to achieve is to have an Operations Manager able to manage the operations abroad at the same high standards as here in the U.S. and therefore protecting our investments and interest abroad. The proposed training is strictly tailored around our needs and internal methods.

The petitioner also stated that the beneficiary will be hired "by our affiliate Max's Restaurant in the Philippines as the Operations Manager." The petitioner submitted a letter from Max's Restaurant that stated it will hire the beneficiary upon completion of her training program with the petitioner in the U.S.

On appeal, counsel for the petitioner also explained how the training program is unique and not available in the Philippines and stated the following:

The company's business it's not for a simple restaurant. The training is not for managers in restaurants of any size as the officer concludes, is specifically designed for sushi food manufacturing, sales and distribution operations managers. The duties, knowledge and responsibility are far more complex. The companies abroad can not train their staff to the same level in their home countries, since there are no similar companies operating abroad willing to pass their business know how.

The type of restaurant abroad that the Service is referring to, it is not a common restaurant; it is an affiliate of the US Company, a branch that will operate under the same rules, management techniques and internal policies. The petitioner emphasized in his answer to the Request for Additional Evidence and in his

statement that the training program is designed and tailored around their specific needs and internal management methods.

The director found that the petitioner 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.

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 itself offers this training in the alien's home country. In other words, 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.

As stated above, counsel for the petitioner contends that the training program is not available in the Philippines because the "training program is unique and is not available in Philippines, because the final goal that we want to achieve is to have an Operations Manager able to manage the operations abroad at the some high standards as here in the U.S. and therefore protecting our investments and interest abroad." The petitioner emphasized that the training program is "strictly tailored" to teach the operating methods of the U.S. company. Although the petitioner explained that the training is specific to the petitioner, it did not provide any corroborating evidence to support that claim. The petitioner did not provide evidence that the Philippines does not have other food manufacturing facilities that provide similar services that the petitioner does. In addition, the beneficiary will return to the Philippines and work for Max's restaurant that has a food manufacturing facility. Thus, it is not clear why the beneficiary cannot receive the training at the petitioner's branch office 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)).

In addition, it is not clear how the petitioner is connected to the food manufacturing facility. Upon review of the petitioner's website, <http://www.cantonrestaurants.com/>, it states that the petitioner owns three Chinese restaurants in Florida. It does not mention any ownership of a food manufacturing facility. In the support letter, dated April 24, 2008, the petitioner stated that it "owns and operates a sushi and manufacturing and commissary facility and eight full-service Asian Restaurant under the branch of [the petitioner] and Sushi Maki." However, the petitioner did not submit any documentation of a joint venture with Sushi Maki and ownership of the manufacturing food facility. 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).

The AAO now 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 the United States.

As noted by the petitioner, in the present case, the goal of the training program is to assist with the international expansion of the petitioner's company, and the trainee will return to her home to work as an operations manager at an affiliate branch office. 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 her newfound knowledge. Since her newfound knowledge 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. In reviewing the initial support letter, dated April 24, 2008, the petitioner stated that it was in "pre-negotiation with Max's Restaurant, which has a good manufacturing facility." In response to the director's request for evidence, the petitioner submitted a letter from Max's Restaurant that stated it was an affiliate of the petitioner and would hire the beneficiary as an Operations Manager. Max's Restaurant allegedly became an affiliate of the petitioner after the initial petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date 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 addition, the petitioner did not provide any evidence to establish that Max's Restaurant became an affiliate of the petitioner such as stock certificates, corporate stock certificate ledger, stock certificate registry, corporate bylaws, or shares issues to the petitioner. 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. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4).

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.