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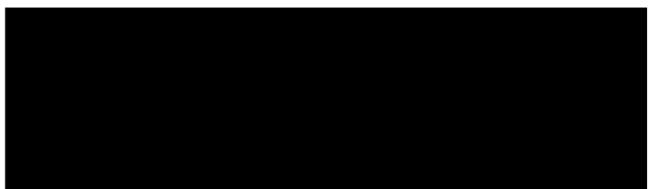
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D4



APR 06 2010

FILE: WAC 09 126 50475 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).

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 an “importer, roaster, wholesaler and retailer of high end specialty coffee,” that seeks to employ the beneficiary as a manager of retail development and operations 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 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.

On May 18, 2009, the director denied the petition on two independent grounds: (1) the petitioner failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training; and (2) the petitioner failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad. 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 letter of support, dated March 25, 2009, the petitioner explained that it has grown from a single coffee bar with an in-store roaster, to the leading company in Specialty Coffee with roasting facilities and coffee bars in Chicago and Los Angeles and training facilities in Chicago, Los Angeles and New York.” The petitioner also stated that the trainee’s schedule is comprised of the following areas of responsibility:

1. Budget planning and monthly profit and loss responsibility from start up to operational profitability. This will occupy approximately 15% of trainee’s time.
2. Working closely with retail staff, quality control, and training departments, to consistently deliver an unparalleled coffee experience in a ‘concept/experimental’ retail environment. This will occupy approximately 25% of trainee’s time.
3. Marketing unique coffees to the public through weekly tastings, educational seminars, classes and events. This will occupy approximately 15% of trainee’s time.
4. Overall management of retail staff; with guidance from [the petitioner’s] human resources and retail team, including but not limited to, recruiting, hiring, and performance management. This will occupy approximately 20% of the trainee’s time.
5. Overseeing daily, weekly, monthly, quarterly and annual retail operations including ordering, store maintenance, inventory control, and cash handling and management. This will occupy approximately 15% of the trainee’s time.
6. Working with the training department to implement and maintain the very highest of quality standards in the coffeebar. This will occupy approximately 10% of the trainee’s time.

The petitioner also stated that the “trainee will gain insight into all phases of running a successful coffee bar/coffee retailer, from post construction, including start up, hiring and training of staff, budget planning, P & L responsibilities, as well as marketing via nontraditional outreach including public tastings, educational seminars, classes and events.”

In the support letter, the petitioner stated the following with regard to the beneficiary’s background:

[The beneficiary] is well qualified for this training program at [the petitioner]. His high-touch culinary background, in addition to his extensive Specialty Coffee experience enables him to provide a seasoned and unique perspective with the discipline required to successfully manage and assist in launching a new concept coffeebar/coffee retail experience. At his young age, [the beneficiary] has already been the coach of two National Barista Champions (Ireland and UK) as well as working both as barista and general Manager in some of the most renowned and busiest coffeebars in the UK and on international assignments for a coffee catering company that is deployed for tradeshow events throughout Europe.

The petitioner also stated that its “eventual expansion plan includes Europe and Australia.” The petitioner further stated that upon successful completion of the training program, the beneficiary’s “skills and unique involvement from participation in opening a new concept to seeing its success would position him to play a meaningful role in this expansion.”

On April 1, 2009, the director requested further detail on the petitioner’s H-3 training program. In response to the director’s request for evidence, the petitioner submitted the petitioner’s organizational chart; the training plan; the floor plan and furniture plan of the location where the H-3 training program will occur; the beneficiary’s employment letters; and letters from Specialty Coffee Association and World Barista Championship.

The training program submitted by the petitioner stated that it is a “7-Stage Barista Certification” which will last for 52 weeks at 40 hours per week. The topics listed on the training outline include the following: Basic Coffee Knowledge; Coffee Brewing; Espresso; Drink Construction; Sensory Skills; Advanced Coffee Knowledge; Customer Service; and Evaluation. The petitioner also submitted a floor plan of the location where the training program will occur which appears to be a coffeebar.

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 failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The petitioner submitted experience letters of the beneficiary. The beneficiary was employed as a contract freelance for [REDACTED] for approximately one year; and was employed as a [REDACTED] and “on several occasions he acted as [REDACTED]” at [REDACTED] for two years and eight months; and was employed at [REDACTED] for four months. In addition, the petitioner submitted a letter from a [REDACTED] that stated the beneficiary “played a crucial role in assisting my preparation for the 2008 Irish Barista Competition.” According to the training outline, the training will consist learning the techniques to be a barista which the beneficiary has ample knowledge through his multiple years working in

coffeehouses and further proven by his ability to help train the world champion of the Irish Barista Competition. In addition, the petitioner was employed by coffee companies for over four years, and thus, it appears that he has substantial knowledge of this industry and does not require further training. The petitioner did not submit any evidence to establish otherwise, and the petition must be denied on this basis.

The director found that the petitioner did not establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States. 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 above, the petitioner stated that its “eventual expansion plan includes Europe and Australia.” The petitioner further stated that upon successful completion of the training program, the beneficiary’s “skills and unique involvement from participation in opening a new concept to seeing its success would position him to play a meaningful role in this expansion.”

As the claimed purpose of the proposed training program is to train the beneficiary on the petitioner’s unique business practices, and if the AAO were to take this assertion as true, the only setting in which the beneficiary would be able to utilize his newfound knowledge would be for the petitioner. As the petitioner has no current operations in Australia, 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). The petitioner must document that it actually has set plans to commence operations in Australia upon completion of the training. The petitioner did not submit any corroborating evidence to establish that it has a branch office or will open one soon, such as a lease agreement, a business plan, financial records, and stock certificates. The evidence submitted is insufficient to establish that the petitioner will have an office abroad to employ the beneficiary upon completion of the training program. 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. 158 at 165. Moreover, even considering the training to generally be about how to be a barista, the evidence of record is again insufficient to show how the training will benefit the beneficiary in pursuing a career outside the United States, especially given the beneficiary’s current level of knowledge and experience. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that the proposed training could not be obtained in Australia, the beneficiary’s home country. 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. 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.

On appeal, counsel for the petitioner states that the beneficiary "has proven himself to have a skilled culinary background and extensive specialty coffee experience, but the Petitioner's training is at a level not yet experience by [the beneficiary], and it is the type of training he could not obtain at a national chain or independent coffee house." However, the petitioner provided the floor plan of the location where the training will occur and it appears that the beneficiary will train in a coffee bar. Although counsel for the petitioner contends that this training is not available at a national chain or independent coffee house, it appears that the beneficiary will indeed be training at a chain of a coffee house. In addition, the petitioner submitted an outline of the training program and, despite its claim that the focus of the training program will be its unique business practices, it appears that the whole training will consist of learning generally how to be a barista. The petitioner did not provide evidence to establish that this training program is not available in Australia when in fact it is a country that has several coffee houses where baristas are trained and employed. 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, the information as to the duties to be performed by the trainee are inconsistent throughout the record and thus makes it difficult to ascertain as to whether this type of training is available in Australia. As noted above, the petitioner submitted a list of duties to be performed by the trainee in its support letter, dated March 25, 2009, which involve learning the petitioner's policies and standards in opening a new coffeebar; however, the training program submitted by the petitioner in response to the RFE, only focuses on training how to become a barista. The details of the training program are inconsistent throughout the record. 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).

In addition, the petitioner has not submitted any industry data or other information to support the assertion that the training program must occur in the United States. Thus, the petitioner has not established that its business practices are so unique and specialized that such knowledge could not be obtained from similar companies. The petitioner has failed to demonstrate that the proposed training could not be obtained in the beneficiary's home country. It has therefore failed to satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) or 214.2(h)(7)(ii)(B)(5).

Beyond the decision of the director, the petitioner failed to submit evidence that 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 topics listed on the training outline include the following: Basic Coffee Knowledge; Coffee Brewing; Espresso; Drink Construction; Sensory Skills; Advanced Coffee Knowledge; Customer Service; and Evaluation. The training program also provides a description of the topics studied for each issue. The outline consists of general topics that would be taught in any coffee house. In addition, the petitioner did not provide a breakdown of time spent on classroom instruction and time spent of practical training. The vague, generalized description of the training program 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. 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 petitioner did not provide a clear explanation of how the beneficiary will be evaluated throughout the training program, or information on how the material will be taught, information on the assignments that will be assigned to the beneficiary, or materials that the beneficiary will use in order to learn the topics to be discussed. In addition, the petitioner did not explain who will train the beneficiary.

Beyond the decision of the director, the petitioner failed to demonstrate that 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, and 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)(ii)(A)(ii)(2) requires a demonstration that 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. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(ii)(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.

The AAO hereby incorporates its previous discussion regarding the vague and generalized description of the training program contained in the record, particularly regarding the rotational assignment portions of the training. In addition, the duties described in the petitioner's March 25, 2009, support letter appear to be management duties rather than training topics. For example, the petitioner stated that the beneficiary will be responsible for "budget planning and monthly payroll"; "working closely with retail staff, quality control, and training departments, to

consistently deliver an unparalleled coffee experience”; “marketing”; “overall management of retail staff”; and overseeing daily, weekly, monthly, quarterly and annual retail operations.” Thus, it appears that the beneficiary will be managing the coffeehouse, rather than receiving training from the petitioner. Without additional information regarding what the beneficiary will actually be doing while he is studying each phase of the program, the evidence is insufficient to establish that the beneficiary will not in fact be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed, and that he will engage in productive employment beyond that incidental and necessary to the training. As such, the petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(ii)(2), 214.2(h)(7)(ii)(A)(ii)(3), or 214.2(h)(7)(iii)(E).

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 except to add the additional grounds of denial discussed herein.

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.