

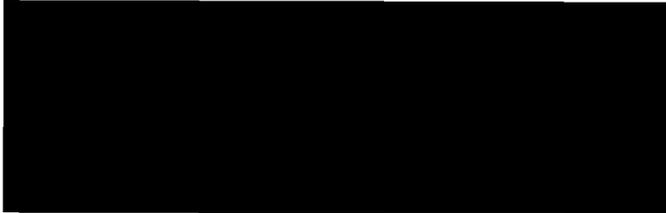
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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FILE: WAC 08 004 51134 Office: CALIFORNIA SERVICE CENTER Date: **APR 08 2010**

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

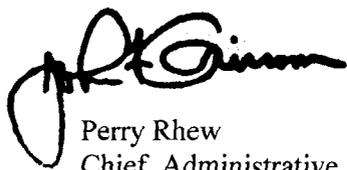
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the
 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:
[Redacted]

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. On appeal, the Administrative Appeals Office (AAO) withdrew the director's decision and remanded the matter to the service center for entry of a new decision. The director sent a request for further information to the petitioner which was subsequently answered. The nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the AAO for review pursuant to 8 C.F.R. § 103.4. The decision of the director will be affirmed and the petition will be denied.

The petitioner is a car wash with a convenience store, and it seeks to employ the beneficiary as a management trainee for a period of twenty 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; (5) the petitioner's Form I-290B and supporting documentation; (6) the AAO's decision to remand the matter to the director; (7) the director's second RFE; (8) the petitioner's response to the second RFE; and (9) the director's Notice of Certification. The AAO reviewed the record in its entirety before issuing its decision.

The director's January 27, 2010, Notice of Certification, denied the petition concluding that the petitioner had failed to establish (1) that the proposed training program would benefit the beneficiary in pursuing a career abroad; (2) that the beneficiary would not be placed in a position which is in the normal operation of the business; and (3) that the petitioner has sufficient physical space and sufficiently trained manpower to provide the training specified.

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 17, 2007 letter of support, the petitioner explained its goal in offering the training program as follows:

Based on thorough research, [the petitioner's owner] is now interested in branching out of the U.S. and becoming an international business owner and will now focus his business on car washes. . . . In order to initiate a business in the Philippines, [the petitioner's owner] requires a loyal hardworking and effective manager to be placed in the Philippines. As a result, he implemented an innovative training program and invited [the beneficiary], a Philippines national, for the future position.

On June 25, 2008, the director denied the petition concluding that the proposed training program dealt in generalities with no fixed schedule, objectives, or means of evaluation. On September 3, 2008, the petitioner submitted an appeal to the director's denial. On March 16, 2009, the AAO remanded the matter to the director, so that the director could afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the petitioner has established that the proposed training would benefit the beneficiary in pursuing a career outside the United States.

On September 28, 2009, the director sent a request for evidence specifically asking for further information regarding how the training program will benefit the beneficiary in pursuing a career abroad.

In the response letter, dated November 4, 2009, the petitioner states that it wishes to train the beneficiary for the "purpose of preparing her for a management position at the company's forthcoming Philippines operations." The petitioner also stated the following regarding the expansion plans:

In addition to plans being contingent on our ability to train someone to manage our Philippines operations (preferably [the beneficiary]), there are a few other business conditions and events that would need to occur before we can begin implementing our expansion.

1. Global economy status and condition. Global economy improves as measured by worldwide average GDP, which should be at least 75% of where it was before the same month in 2007.
2. US and Philippine economy improves as measured by worldwide average GDP, which should be at least 75% of where it was before the same month in 2007.
3. Finalize the purchase of prospect locations in Philippine [*sic*] by June of 2010 and start the construction immediately.
4. [The beneficiary] and other key staff training and certification to be completed according to the schedule above.
5. To complete the Patent of our new invention in carwash industry in Philippine [*sic*] and abroad by June 2010.

On January 27, 2010, the director sent a Notice of Certification concluding that the petitioner did not provide sufficient evidence of a career abroad for the beneficiary. The director noted that the "claimed business expansion appears to be dependent on assumptions." The director also noted that the petitioner failed to present corroborating documentation of the expansion such as market research studies, marketing plans, an estimate of start-up costs and funds needed for the expansion, timelines, competition, equipment information and necessary research to open a branch office.

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 entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices in order to manage a branch office in the Philippines.

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.

The petitioner has asserted that the beneficiary will aid it in establishing operations in the Philippines. 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 only setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that it will commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence, beyond the assertions of record, 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).

As noted by the director in her decision, the "claimed business expansion appears to be dependent on assumptions and the existence of the beneficiary's career abroad is not supported by evidence." In reviewing the petitioner's RFE response letter dated November 4, 2009, the petitioner clearly states that "a few other business conditions and events" that need to occur before implementing the expansion including the improvement of the global economy, the purchase of a location and starting construction, and obtaining a patent of a new invention by the petitioner. These three issues are contingencies that do not have a set timeline. The improvement of the global economy may take years and it does not provide a definite time period where the expansion may occur. The same is true in obtaining a patent which may take years. Furthermore, as discussed above, the petitioner did not provide any corroborating evidence of the expansion plan such as contracts to purchase a location in the Philippines; plans for the construction of the new location; financial records to indicate that an expansion abroad is even possible; and other documentation evidencing a plausible intention to open a branch office abroad. Therefore, the petition may not be approved at this time.

The director also denied the petition because 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 submitted an outline of the training program showing that the president, assistant operations manager and the operations manager will be in charge of different sections of the training program. In addition, the petitioner stated that approximately 65% of the training program will be academic instruction and approximately 35% will be devoted to on-the-job training.

The record of proceeding, as currently constituted, does not adequately explain who will perform the workload of the president, operations manager and assistant operations manager while they are instructing the beneficiary for a period of 20 months. The petitioner has a gross annual income of over \$1 million dollars and it never explained how the president, operations manager and assistant operations manager can continue to run the business while also devoting so much time in training the beneficiary.

In addition, as noted by the director, the pictures of the training location are of the petitioner's business location, a car wash location. The petitioner submitted a picture of a desk and chair and indicated that it is the training area. It is not clear how a 20 month training program, with 65% classroom instruction, can occur in a small office with a desk when that is the only desk and office for the whole business. The petitioner did not explain where the other employees will work if the training will occur in the petitioner's single office. In addition, the pictures do not show where the beneficiary will receive the on-the-job training. The pictures indicate the car wash area and the lobby with the cashier. The evidence submitted is insufficient to establish that the petitioner has the physical location to train the beneficiary for 20 months. The regulation at

8 C.F.R. § 214.2(h)(7)(iii)(G) therefore precludes approval of this petition. For this additional reason, the petition may not be approved.

As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The decision of the director will be affirmed and the petition will be denied.