

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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



FILE: WAC 08 224 50185 Office: CALIFORNIA SERVICE CENTER Date: **APR 28 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:



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 gasoline station that seeks to employ the beneficiary as a trainee for a period of 18 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 (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 three grounds: (1) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (2) that the petitioner had failed to demonstrate that similar training is unavailable in the Philippines, the beneficiary's home country; and, (3) 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

- (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 August 11, 2008 letter of support, the petitioner stated that it "now seeks to further expand into the lucrative Philippine market and establish a sound reputation for providing high quality fuel and oil products at competitive costs to future franchise operators." The petitioner also stated that the training program is "designed to provide a trainee with expertise in all the factors in our business successes and analyzing our strengths primarily in the United States market and thereafter duplicate this success in the Philippine[s.]" The petitioner further stated that after the completion of the training program, the trainee will be able to "effectively function in the sales and marketing operations, product development and design, distribution processes and new market business development, accounts management and marketing responsibilities to enable us to expand our reach and target the enticing Philippine market." Upon completion of the training program, the beneficiary will be appointed as the "strategic business development manager" in the Philippines.

In addition, the petitioner stated that the training program will be taught by the company President, and the supervisors and managers. The petitioner explained that the training program will consist of 80 percent of classroom instruction and 20 percent of practical training and observation.

In addition, the petitioner submitted a training program outline for the Operations/Workplace Safety Management Training Program. The program will consist of five phases: (1) Orientation (2 months); (2) Retail Operations (7 months); (3) Daily Business Record (3 months); (4) Motor Fuel Management System (6 months); and, (5) Evaluation (1 month). In addition, the outline stated that the president will act as the training supervisor, and "each session and/or program will be facilitated by an individual expert in that field."

In response to the director's RFE, counsel for the petitioner reiterated the details about the training program and its unavailability in the Philippines. In addition, the petitioner submitted documentation to support its claim that the training program is not available in the Philippines. In addition, the petitioner submitted several training manuals for ExxonMobil service stations.

Upon review, the petitioner's proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa classification.

The director found that 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 program is an 18-month training program but the training outline describes each section in only a few sentences. Although the petitioner submitted a training outline with materials and topics to be discussed in each section, much of the training is general to all business operations and not specific to the petitioner's business activities. The outline consists of general topics that would be taught in any business course on management and marketing issues. Although the petitioner submitted a voluminous amount of manuals by ExxonMobil regarding service stations, the petitioner did not explain how the materials will be utilized with the training syllabus. Furthermore, 20% of the training is on-the-job training but the petitioner does not explain what that will entail. 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. The petitioner stated that the beneficiary will take exams but it is not clear on what the beneficiary will be tested since the training program outline only provides a general explanation of topics to be discussed but does not provide the syllabus that will be followed, information on how the materials will be taught, or information on the assignments that will be assigned to the beneficiary.

The director found that the petitioner failed to establish that the proposed training could not be obtained in the Philippines, 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 "since the training program shall specifically deal with the complex issues, and strategic analysis and implementation which are all intrinsically connected with the nature of the Petitioner's business, of which is the very substance of this training program, therefore, it's equivalent training, is certainly unavailable outside the United States." The petitioner did not submit sufficient corroborating evidence to support the claim that the trainee cannot find training in gas station and convenience store operations in the Philippines even if it is not the exact standard and process found in the United States. 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 submitted a "certificate of non training available" from [REDACTED] a managing consultant. The author stated that, "though this kind of training program centers on a particular US company's areas of critical administrative, business development, and operations of their allied services, equivalent training program is likewise unavailable in the Philippines. In reviewing the letter, an adequate factual foundation to support this opinion has not been established. The author does not note the location of the petitioner, nor indicate whether she reviewed the training program or company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor does she describe the training program in any meaningful fashion. The extent of her knowledge of the proposed training program is, therefore, questionable. Thus, the petitioner has not established the reliability and accuracy of [REDACTED] pronouncements and this submission is therefore not probative of any of the criteria at issue here. Nor has the author submitted any industry data or other information to support any of her opinions. 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 not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) or 214.2(h)(7)(ii)(B)(5).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In addition, the petitioner submitted a list of available training programs and courses from the University of the Philippines – Los Banos; a list of available training workshops from the Technical Education and Skills Development Authority of 2007; and a list of available training of ECC international for the Philippines area. This is not an exhaustive list of the universities in the Philippines and thus, it is not sufficient evidence to establish that this training is not available anywhere in the Philippines.

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 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 her newfound knowledge would be for the petitioner. As the petitioner has no operations in the Philippines, there exists no setting in which she would be able to utilize her 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 only setting in which the beneficiary would utilize her 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 petitioner submitted a report on opening a business in the Philippines but the petitioner did not demonstrate any advancement in opening a franchise in the Philippines. In addition, the petitioner did not submit evidence that ExxonMobil would even allow a franchise in the Philippines. In addition, the petitioner did not provide any corroborating evidence such as a business plan, a lease for a location in the Philippines, or financial statements to support the opening of a franchise. 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). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition, as required by 8 C.F.R. § 214.2(h)(7)(iii)(G).

In regard to the physical location of the training program, the petitioner submitted photographs of the office. The photographs show two small offices with a desk and chair. The photographs also show the gas station from the outside. The photographs of the petitioner's offices do not show a training area to train the beneficiary for 18 months. It appears that the office only has two desks that are presumably the desks that are used by employees for work purposes. It is not clear where the beneficiary will receive 80 percent of the classroom instruction for 18 months when there is no classroom for the beneficiary. In addition, 20 percent of the training program is on-the-job instruction but it is not clear what that will consist of when the rest of the photographs show the outside of a gas station. 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.

Counsel's appeal brief states the following with regard to supervision of the beneficiary:

The trainee shall be under the overall supervision of the President, who will at the beginning and end of each phase, shall [*sic*] meet with the Trainee to discuss and review the chronological order of the training program, particularly the goals and objectives of each phase of the program.

* * *

The general training program was conceptualized by the President with the specific training modules developed with the input provided by the senior managers or supervisors with expertise in the particular field.

Counsel's assertion that the petitioner has sufficient manpower to conduct the training is insufficient. The petitioner does not identify the senior managers and supervisors who will assist in the training program. According to the organizational chart submitted by the petitioner, the employees are a president/station head, vice president/assistant station head, manager/lead cashier, cashier, and two mechanics. It is not clear how the petitioner will continue normal operations for 18 months and provide 18 months of full-time training with only six employees. Moreover, while the company claims to have a gross annual income of over four million dollars, the petitioner never explained how the trainers will be able to attend to their regular duties. According to the schedule provided at the time the petition was filed, the beneficiary would spend 75 percent of her time in classroom instruction. In a company that is relatively small, such as the petitioner, it is reasonable to question who would attend to the trainers' regular job duties during their absence from their normal positions. 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).

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.