

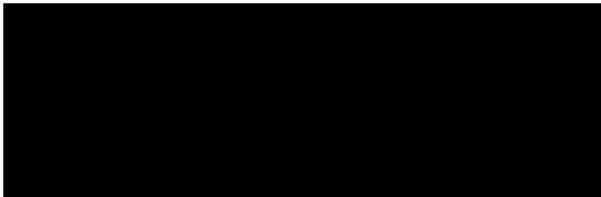
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



84

FILE: WAC 08 208 50815 Office: CALIFORNIA SERVICE CENTER Date:

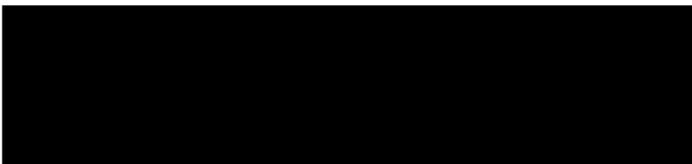
APR 28 2010

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 a pharmacy and durable medical equipment and supplies provider that seeks to employ the beneficiary as a trainee for a period of one year and eight 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 April 25, 2009, the director denied the petition on multiple 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) the petitioner failed to establish that the proposed training program would benefit the beneficiary in pursuing a career abroad; (3) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country (3); and, (4) the petitioner failed to establish that the beneficiary would not engage in productive employment unless such employment is incidental and necessary to the training. 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 July 21, 2008, the petitioner stated that it has "established a structured in house training program to provide any trainee with knowledge of company's policies and the overall operations of the business including all relevant procedures and processes." The petitioner also explained that the training program will consist of classroom instruction whereby the trainee will attend classroom lectures and is "responsible for reviewing and assimilating extensive course materials," and practical training with "on going projects to allow for on the scene observation and question periods." The petitioner also stated that the training program will last 21 months and the trainee will receive approximately 75% of academic practical training and 25% of on-the-job training. The petitioner stated that the training will last 20 hours per week and "supplemented by additional external training." The supervised training will be conducted by the vice president/general manager and training unit head, and he will be assisted by seven other individuals as they will participate in certain segments of the training. In addition, the petitioner explained that the trainee will be evaluated throughout the training program with exams and practical instructions.

In addition, the petitioner submitted a training manual. The training program will consist of the following topics: Introduction to the Company and Durable Medical Equipment; Management Level Exposure; Introduction to DME Equipment; Disposable Medical Supplies; Durable Medical Equipment; Incontinence Supplies; Diabetic Supplies; The Order Intake Process; Maintaining Customer Satisfaction; Equipment Training and Delivery; Marketing for Pharmacy and DME Providers; Sales Management for Pharmacy and DME Providers; Operations Management and Processes; Supply Chain Management; Inventory Management; Human Resources and Organization Management; Introduction to Health Insurance; Life Cycle of an Insurance Claim; Legal and Regulatory Considerations; Medical Coding; CMS Reimbursement Methodologies; Coding for Medical Necessity; Insurance Providers; Financial Management in the DME Environment; Information Systems and Security, Relevant Laws, Ethics and Regulations; DME Software and Records Management; HIPAA; and Business Planning and Implementation.

In response to the director's request for evidence, the petitioner reiterated the same information submitted with the initial filing, but provided additional letters from companies in the Philippines indicating that the training provided by the petitioner is not available in the Philippines. In

addition, the petitioner explained the reasons for providing the training to the beneficiary as follows:

Petitioner chose [the beneficiary] from the Philippines not only to prepare her future professional advancement and growth but more so to benefit it because of the company's vision to explore business opportunities in the Philippines. This training will provide invaluable knowledge to her to allow her to make sound and informed business decisions in future position in companies dealing on DMEs. This will inure direct benefit to the company's future business opportunities in the Philippines. It would be easier for the company to explore business opportunities therein with beneficiary at the helm. It is the intention of this organization to have the trainee, [the beneficiary], to return to her home country and serve as an envoy for the company in the country.

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 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 a 20-month training program but the training outline describes each section in 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. In addition, two months of the training program will focus on issues such as insurance claims, legal and regulatory considerations, medical coding, and insurance providers, which are all issues that are specific to the United States and are not the same in the Philippines. In addition, the training program will only consist of 20 hours per week so it is not clear why the petitioner does not provide full-time training for fewer months. Furthermore, 25% 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 material 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 such training is not available in the Philippines since durable medical equipment and pharmacy business operations is a "new phenomenon in the Philippines setting." The petitioner did not submit sufficient corroborating evidence to support the claim that the trainee cannot find training in durable medical equipment and pharmacy business 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 letter from the Technical Education and Skills Development Authority in the Philippines and a letter from the Hospital, Medical Laboratory Equipment and Supplies Importers Association of the Philippines. The authors of each letter state that training in durable medical equipment and pharmacy business operations is not available in the Philippines. In reviewing the letters, an adequate factual foundation to support these opinions has not been established. The authors do not note the location of the petitioner, nor indicate whether they reviewed the training program or company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor do they describe the training program in any meaningful fashion. The extent of their knowledge of the proposed training program is, therefore, questionable. Thus, the petitioner has not established the reliability and accuracy of their pronouncements and this submission is therefore not probative of any of the criteria at issue here. Nor have the authors submitted any industry data or other information to support any of

their 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 opinions 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).

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 branch office. In addition, the petitioner indicated that the beneficiary will return to the Philippines and help find opportunities for the petitioner's growth abroad but it did not state that it will employ the beneficiary once she has completed the training program. 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 branch office. 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). For this additional reason, the petition may not be approved.

The director also noted that 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. Without additional information regarding what the beneficiary will actually be doing while she is receiving practical on-the-job training, it appears that the beneficiary will 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 she 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).

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(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.