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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

[Redacted]

FILE: [Redacted]

Office: [Redacted]

Date: **AUG 11 2010**

IN RE: Petitioner:
 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[Redacted]

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 the manufacture, supply and rental of inflatable play structures, and it seeks to employ the beneficiary as a cutting specialist trainee for a period of two years. 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 denial letter; and, (3) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On September 15, 2009, the director denied the petition on the ground 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. 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 the letter of support, dated July 15, 2009, counsel for the petitioner stated that the "primary emphasis of the training program is to educate the trainee and provide a deep understanding of all aspects of [the petitioner's] product lines as developed by [the petitioner]." Counsel further stated that as a cutting specialist, the trainee will be "working on the Digital Automated Cutting Tables and will be responsible for cutting vinyl as per data preparation, intelligent nesting of the actual shapes for better management of vinyl and reducing wastage, RIP and Print of the Vinyl and automated cutting on the prints." Counsel further stated that the trainee will not engage in productive employment, and that the trainee will receive "constant instruction and supervised training during the entire course of the training program."

The petitioner submitted a document with further information of the training program. In the document, the petitioner explained that the training was "designed with the purpose of preparing the trainee to establish a subsidiary of the company in the alien's home country." The petitioner also explained that there are "no full-time trainers" on staff; however, the company personnel will perform the training. The petitioner indicated that the trainers of the training program are the design engineer and the CEO. The petitioner also submitted a lesson plan for the first week of the training program. The petitioner stated that a list of reading materials was included; however, in reviewing the record, no such list was included.

The petitioner also submitted photographs of its office and factory. The pictures show a large room where the inflatables are manufactured, offices, and one room with chairs and tables.

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 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)(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)(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.

In reviewing the record, the petitioner provided a vague and generalized description of the training program contained in the record, particularly regarding the supervised work which will consist of 30 hours per week, for two years. The support letter briefly outlined the supervised work that will be performed by the trainee and the director noted that it appeared that the trainee will be performing productive work rather than training. On appeal, counsel for the petitioner states that since the type of training is to learn manual labor, the beneficiary has to be trained on how to properly cut the vinyl using specific tools and machines. Counsel further stated that it would be impossible to train in this area without hands-on training. Furthermore, counsel explained that the "the support letter does not state that the vinyl to be cut by the trainee will be eventually sold as a finished product," and the trainee "will not be working to provide an end product that will be sold to customers."

As further discussed below, given that the petitioner only provided an outline of one week of the training for a two-year training program, it is impossible to determine what exactly the trainee will do during his hands-on training. Without additional information regarding what the beneficiary will actually be doing while he is doing 30 hours per week of on-the-job training, the petitioner has not overcome the conclusion that he will 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 which is incidental and necessary to the training. The petitioner has not satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(2), 214.2(h)(7)(ii)(A)(3), or 214.2(h)(7)(iii)(E).

Beyond the decision of the director, the petitioner did not 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 his newfound knowledge would be for the petitioner. As the petitioner has no operations in India, 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).

In this particular case, since the proposed training is specific to the petitioner, and the only setting in which the beneficiary would utilize his skills would be for the petitioner in India, the petitioner must document that it actually has plans to commence operations in India upon completion of the training. The petitioner stated that it wishes to train the beneficiary so that he may open a subsidiary in India; however, the petitioner did not provide any corroborating evidence such as a business plan, a lease for a location in India, or financial statements to support the opening of a subsidiary. 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)(ii)(A)(4). For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner failed to submit evidence that the training program does not deal in 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.

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 two-year training program but the petitioner only provided an outline of the first week of the training. With only an explanation of one week of a two-year program, the petitioner failed to submit any information or outline for the entire training program. In addition, 75% of the training is on-the-job training but the petitioner does not explain in detail 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. In addition, the petitioner did not provide the syllabus that will be followed, 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. 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).

Beyond the decision of the director, the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified. 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 Form I-129 indicated that the petitioner employs 45 individuals and has a gross annual income of over \$4 million. In addition, the petitioner explained that it does not have full-time trainers but the training will be conducted by the design engineer and the CEO. The record of proceeding, as currently constituted, does not adequately explain who will perform the workload of the Design Engineer and the CEO while they are instructing the beneficiary for 40 hours per week for two years. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition. For this additional reason, the petition may not be approved.

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).

Counsel for the petitioner contends that the director did not provide the petitioner with an opportunity to address the director's concerns through a Request for Evidence or a Notice of Intent to Deny. The regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for such new evidence. In the present case, the evidence indicated that the petitioner did not establish that it qualifies for H-3 classification on behalf of the beneficiary. Accordingly, the denial was appropriate.

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.