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FILE: WAC 08 175 50800 Office: CALIFORNIA SERVICE CENTER Date: **FEB 01 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 engaged in home care services and it seeks to employ the beneficiary as a trainee for a period of 15 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 two grounds: (1) that the petitioner had failed to demonstrate that similar training is unavailable in the Philippines, the beneficiary's home country; and, (2) that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the proposed 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 May 7, 2008 letter of support, the petitioner stated that the training program is “designed to develop highly qualified individuals for key positions of responsibility intended for our company’s branches, partners and future affiliates abroad.” The petitioner explained the purpose of the training program as follows:

By the end of the 15-month the trainee would have gained knowledge in staffing operations which may include but is not limited to overseas recruitment, placement, training, case management and logistics. Aside from the in-depth instruction and exposure on Overseas Recruitment, trainee will be educated on the logistics required for conducting recruitment overseas. We delve into recruitment, testing, training, housing, personnel management, benefits, transportation and employer relations. It is the goal of this training for participants to have a clear understanding of the important role of logistics in the overseas staffing.

The petitioner also explained that the training program is unavailable outside of the U.S. because the program was “designed to provide trainees with a working knowledge of the structure of a U.S. based home care staffing company.” The petitioner further stated that it intends to employ the beneficiary abroad in the Philippines after the completion of the training program.

In addition, the petitioner submitted a training program outline. The outline indicated that the training program will consist of 40 hours per week, which will include 75% of academic instruction and 25% of practical training. The program will consist of four modules: (1) Corporation Orientation (3 months); (2) Overseas Recruitment (6 months); (3) Logistics (5 months); and, (4) 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 further elaborated details about the training program in its response letter dated, November 25, 2008. Counsel stated that “most of the instructional materials to be used as well as the equipment for training and demonstrations are only available in the United States.” In addition, counsel asserts that the training is not available in the beneficiary’s home country because the program “shall specifically deal with the complex issues, and strategic analysis and implementation which are all intrinsically connected with the nature of Petitioner’s business.” Counsel also explained that upon completion of the

training program, the beneficiary will be “appointed as the strategic business operations manager” in the Philippines and will be “required to submit a thesis/business review on how the company can maximize resources and profit in its planned operations in the Philippines.”

The director found that the petitioner had failed to establish that the proposed training is unavailable in the Philippines, the beneficiary’s home country. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) requires a demonstration that the proposed training is not available in the alien’s own country, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which indicates the reasons why the training cannot be obtained in the alien’s country and why it is necessary for the alien to be trained in the United States. In response to the director’s RFE, in a letter dated, November 25, 2008, counsel for the petitioner stated that the training program is designed to provide the trainee with “expertise in all the critical areas of our operation, sales, advertising, marketing and promotion of our services and products.” Counsel further stated that the training “shall specifically deal with the complex issues, and strategic analysis and implementation which are all intrinsically connected with the nature of Petitioner’s business.”

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. 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.

In the present case, however, the reason for creation of the training program is to train the beneficiary on the petitioner’s own business practices. In this particular case, the petitioner has established that the proposed training is not available in the Philippines, and the AAO finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). The AAO, therefore, withdraws that portion of the director’s decision finding otherwise.

However, the petitioner has not established 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)(ii)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States, and the regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to describe the career abroad for which the training will prepare the alien.

With regard to the beneficiary’s career abroad, the petitioner stated the following in its May 7, 2008 letter of support that after participating in the training program, the beneficiary will be an “asset to our company when we begin our international operations – through branches or affiliates, beginning in the Philippines.”

As discussed previously, the petitioner is in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5). Again, the question to be addressed when attempting to satisfy these two criteria is not whether the petitioner offers this training in the alien’s home country. 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.

In the present case, as noted previously, the basis of the AAO's determination that the proposed training is unavailable in the beneficiary's home country is its focus on the petitioner's specific business practices, as discussed by the petitioner.

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 (the knowledge that cannot be obtained in the Philippines) will be specific to the petitioner, an operation run by the petitioner would appear to be the only setting in which she would be able to use the knowledge. Otherwise, if the knowledge can be used at employment other than for the petitioner, it would not be wholly specific to the petitioner's business, and therefore could be obtained in the Philippines.

The petitioner has failed to establish that there in fact exists a career abroad in which the beneficiary could utilize the training to be imparted via the proposed training program. 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 abroad would be for the petitioner.

However, the record does not indicate that the petitioner has any business 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 setting in which the beneficiary would utilize her skills would be for the petitioner in the Philippines, the petitioner must document that, at the time the petition was filed, it actually had plans to commence operations in the Philippines upon completion of the training. The record, as presently constituted, contains no documentary evidence of the petitioner's expansion plans at the time the petition was filed, beyond training the beneficiary. Nor has the petitioner submitted any documentary evidence, beyond its own assertions, 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).

The director also found that the petitioner had 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 regards to the physical location of the training program, the petitioner submitted two different sets of photographs of the office, and two different plans of the office space. In the initial

petition, the petitioner submitted photographs which indicated that the office was in suite 226. The petitioner also submitted a layout of the office space. In response to the director's RFE, the petitioner submitted new photographs of the office space which was indicated as suite 212, and a new layout of the office space. The photographs and the layouts submitted by the petitioner are of two different offices. The petitioner also submitted a lease agreement that was signed after the petition was filed. While the petitioner may have moved to a new office, it did not provide any explanation for the different office space. 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).

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 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 assertions that the petitioner has sufficient manpower to conduct the training, after being placed on notice of the director's concerns via the denial letter, are insufficient. 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)). 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 petitioner failed to indicate who the senior managers are that will provide the training. According to the organizational chart submitted by the petitioner, it appears that it employs six managerial positions. However, the petitioner claimed on the Form I-129 to only employ three people. Moreover, while the company claims to have a gross annual income of over one million dollars and several independent contractors to organize, 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.

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 program is allegedly a fifteen-month training program that is divided into four modules. Although the petitioner submitted a training outline with topics to be discussed in each module, much of the training is general to all business operations and not specific to the petitioner's business activities. In addition, 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 and therefore fails to satisfy 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, 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.

For all of these reasons, 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.