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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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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER

Date:

DEC 27 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:

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 \$630. 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,

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 [REDACTED] and it seeks to employ the beneficiary as a tour operator management trainee for a period of twenty-two 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.

The director denied the petition on multiple grounds: (1) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; (2) the petitioner failed to establish that the beneficiary would not engage in productive employment unless such employment is incidental and necessary to the training; (3) the petitioner failed to establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and, (4) the petitioner failed to establish that it possesses physical plant space and sufficiently trained manpower to provide the training specified. 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 September 21, 2009, the petitioner explained that it is “engaged in [redacted] or specialized interest to the tour members, both in the United States and abroad.” The petitioner also stated that it is looking to expand its business and has “decided to open a branch [redacted] and chose [redacted].” In addition, the petitioner stated that the training program is “simply unavailable elsewhere, as we wish to train [the beneficiary] in our specific, confidential and proprietary ways in which we run our specific business, not the general aspects of being a tour guide or travel agent.”

The petitioner submitted a two-page training schedule for the first year. The schedule indicated that the beneficiary will receive training from 10:00 a.m. until 6:00 p.m. with a one hour break. The trainers of the program will be the president and the vice-president.

In response to the director’s request for evidence, the petitioner submitted a 5-page training syllabus. The syllabus outlines the following objectives of the training program: Introduction and day to day operations (Months 1 and 2); Research at office and in field work (Months 3 and 4); Planning and Organizing the group tour (Months 5 and 6); Advertising (Months 7, 8 and 9); Deposit and Final Payment for tour (Month 10); Participation for local tours and conduct (Months 11, 12, and 13); Cancellation Policy (Month 14); International Tours and Escorting (Months 14 and 15); Medical Insurance and Visa Issues (Months 16 and 17); Annual Budgeting (Months 18 and 19); Privacy and Confidentiality (Month 20); and, Follow up Contacts and Tour Guide Training (Months 21 and 22).

The petitioner also submitted an organizational chart that shows one president and one vice president and the management trainee position “to be filled.”

Upon review, the AAO agrees with the director’s finding that the petitioner’s proposed training program does not meet the regulatory requirements to establish eligibility for the nonimmigrant visa.

The director noted that the petitioner failed to establish that the proposed training could not be obtained in Armenia, 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 several occasions, the petitioner stated that the training program is "simply unavailable elsewhere, as we wish to train [the beneficiary] in our specific, confidential and proprietary ways in which we run our specific business, not the general aspects of being a tour guide or travel agent." However, the petitioner did not explain how the training is specific and proprietary to the petitioner. Rather, the topics to be trained are general issues that occur in any tour operating group and are not proprietary to the petitioner. 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)).

On appeal, the petitioner submitted a letter from the [REDACTED]. The author states that he is an [REDACTED] and contends that the training program offered by the petitioner "is not available in any country outside the U.S. and is specifically unavailable in his native country of Armenia." The author does not note the location of the petitioner, nor indicate whether he reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor does he describe the training program in any meaningful fashion. The extent of his knowledge of the proposed training program is, therefore, questionable. Thus, the petitioner has not established the reliability and accuracy of his pronouncement 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 his 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).

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. The training outline 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 twenty-two month training program but the petitioner's outline of the program consists of five pages outlining the main objectives and a short description for each objective. Some of these objectives will last for more than two months but the description is a short paragraph with a general idea of what will be taught. The petitioner's training outline is not sufficient to understand what the trainee will do for seven hours of instruction and practice. In addition, the petitioner did not explain what percentage of the training will be classroom instruction and what percentage will be on-the-job instruction. 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 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. As such, it has failed to establish that its proposed training program does not deal in generalities. For the reasons discussed above, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

The director also 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 AAO agrees. 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.

The AAO incorporates its previous discussion regarding the vague and generalized description of the training program contained in the record, particularly regarding the rotational assignment portions of the training. In reviewing the training syllabus, it appears that the trainee will be

performing work duties such as “assist with daily filing”; “take personal visits to those hotels to check room conditions and amenities of a specific location”; “call vendors, suppliers or Tour operators”; and, “compose practical letters and reply to emails properly.” It appears that the trainee will receive training but he will also be engaged in productive employment. Furthermore, without additional information regarding what the beneficiary will actually be doing on a day-to-day basis, the AAO concludes 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 she will engage in productive employment beyond that 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).

The director 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). The organizational chart submitted by the petitioner indicated that it currently employs two individuals, the president and the vice president. The training syllabus indicates that the president and vice president will supervise and train the beneficiary. It is not clear how the president and vice president can perform their workload while they are instructing the beneficiary during the 22 months of the training program. It is not clear how the president and vice president can continue to operate the business when they need to each assist with the training program that consists of seven hour days for 22 months. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of this petition.

In addition, the director stated that the petitioner provided insufficient evidence to establish that it has the physical plant to provide the training program. The petitioner submitted a lease agreement and photographs of the office space. The photographs indicate two rooms that have desks for the president, the vice president and the trainee. However, the rooms are also where the clients come in to discuss the possible tours, and where the employees answer phone calls. It is not clear how the trainers can train for seven hours for 22 months in the main area of the store where clients are received and not affect business operations, or affect the ability to provide the classroom instruction. For this additional reason, the petition may not be approved.

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 pursuant to the regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(4).

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 Armenia, 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 Armenia, the petitioner must document that it actually has plans to commence

operations in Armenia upon completion of the training. The petitioner stated that it wishes to expand the business and open a branch office in Armenia. However, the petitioner did not provide any corroborating evidence such as a business plan, a lease for a location in Armenia, 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.

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.