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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
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 29 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:

SELF-REPRESENTED

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 pediatric dental clinic that seeks to employ the beneficiary as a dental pediatrics trainee for a period of 24 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 February 1, 2010, the director denied the petition on multiple grounds: (1) the petitioner failed to demonstrate that it has sufficiently trained manpower to provide the training specified; (2) the petitioner failed to establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training; and, (3) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country. 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 3, 2009, the petitioner stated that it is engaged in pediatric dentistry that "provides both primary and comprehensive preventive and therapeutic oral health care for infants and children through adolescence, including those with special health care needs." The petitioner also stated that during the training program, the "trainees will be given instruction on diagnosing and treating children while providing concise explanation on how treatment should be done in a pediatric standpoint." Further, the beneficiary will be trained by [REDACTED] and "[the beneficiary's] performance will be based on attendance, active participation and examination results and reports."

The petitioner also explained that upon completion of the training program, the beneficiary will be employed in a branch office in the Philippines. The petitioner stated that "with first-hand knowledge and experience, she will ultimately enhance our clinic's standing by establishing new and better ways of treating very young children in the practice of pediatric dentistry and marketing our services, and providing support to our future patients in Asia."

In addition, the petitioner noted that the beneficiary obtained a Doctorate Degree in Dentistry from [REDACTED] in the [REDACTED] and has several years of experience working in the field but "requires training particularly on Pediatric Dentistry concepts involving very young patients." In addition, the training program will teach the beneficiary the petitioner's "own dental techniques and administrative programs and the strategies [the petitioner] enforce."

The petitioner submitted an organizational chart which indicated [REDACTED] as the president who supervises one employee that acts as the chief executive officer and the secretary. The petitioner also submitted two manuals for the training program: "Nitrous Oxide Sedation" and "Pediatric Emergencies," both prepared by [REDACTED].

In addition, the petitioner submitted a business plan for 2009 – 2011. The business plan states a need of \$75,000 investment for a start-up sole proprietorship in the Philippines. The plan states that the owner of the petitioner will provide a minimum of \$25,000 in initial equity.

On December 30, 2009, the director sent a request for further evidence to support the petition for H-3 classification.

In the response letter, dated January 12, 2010, the petitioner explained that this type of training is not available in the Philippines because the "Philippines Dental School currently does not have the training courses in Pediatric Dentistry specifically in Oral Sedation for children and young

adults.” The petitioner submitted a list of courses available in two universities in the Philippines and noted that they do not offer any courses covering Pediatric Dentistry and Oral Sedation “since it is a post graduate training course.”

The petitioner also stated that “at all times the trainee will be supervised by our resident Dentist, [REDACTED]” The petitioner further stated that “our clinic has other associates who may be assigned to perform [REDACTED]’s day to day duties as our Head Dentist.” The classroom instruction will consist of 30 hours per week and on-the-job training will be 8 hours per week. The petitioner also stated that the beneficiary will be trained with a training module, visual aides, computer programs, dental equipment, laboratory equipment, sample cases and testing materials. In addition, the petitioner submitted a second organizational chart that indicates an additional five positions: two general dentists, one back office position that assists the general dentist, a front office position for scheduling appointments and insurance eligibility and a position in the billing department. The petitioner also submitted photographs of its office and it appears that the instruction will take place in an office.

Upon review, the petitioner’s proposed training program does not meet the regulatory requirements to establish eligibility for approval of the nonimmigrant visa petition.

The director found that the petitioner did not establish that it has the physical plant and sufficiently trained manpower to provide the training specified.

The Form I-129 submitted by the petitioner indicated that it currently employs eight individuals. The petitioner submitted an organizational chart that indicated the president and one individual that fills the position of chief executive officer and secretary. In response to the director’s request for evidence, the petitioner submitted a second organizational chart that shows the petitioner employs seven individuals. In addition, the chart indicated the president as the trainer. It is not clear why the petitioner submitted two different organizational charts with the petition, or why the first one only had two employees and the second had seven employees. 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).

In addition, the supporting documentation states that the president/general dentist will supervise the beneficiary at all times. In response to the request for evidence, the petitioner stated that other employees will be able to take over the duties of the president/general dentist during the training program. However, it is not clear how the president/general dentist can take over the duties of trainer that will include 30 hours of classroom instruction per week for 24 months and still perform the regular operations of the business. It is not clear how the other employees can take over the duties of the president who is essential in running the business. 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. 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)).

In addition, the petitioner submitted a floor plan and photographs of the petitioner's offices. According to the floor plan, the office does not have a training room. On appeal, the petitioner stated that "our floor plan has not been changed since the training is temporary in nature so it is not affixed to appear in it." From the photographs, it also appears that the training will occur in a small office, possibly the doctor's office as stated in the floor plan. This does not appear to be sufficient physical space for a two-year training program when the doctor will need an office to run the operations of the dental practice. 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.

The director found that the petitioner failed to establish that the beneficiary does not already possess substantial knowledge and skills in the proposed field of training. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) precludes approval of a training program which is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

The petitioner submitted the beneficiary's resume that indicated she received a doctorate of dental medicine. According to the beneficiary's school transcripts, she enrolled in several courses on oral surgery. The petitioner has not shown that these courses did not include education on sedation. Although the courses are not specific to pediatric dentistry, the petitioner did not submit sufficient information to explain how the education and experience the beneficiary has already obtained differs from the petitioner's training program on pediatric dentistry and oral sedation. Thus, it appears that the beneficiary has substantial knowledge in dentistry and the petitioner did not submit any evidence to establish otherwise, and the petition must be denied on this basis.

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.

In response to the director's request for evidence, the petitioner submitted a list of courses offered by two universities in the Philippines and stated that the schools do not offer any courses in Pediatric Dentistry and Oral Sedation "since it is a post graduate training course." Although the course listings do not specifically specify a course on Pediatric Dentistry and Oral Sedation, another University may provide that training, or a private office, or a graduate program, as suggested by the petitioner. Moreover, a University's course listings detailing its educational coursework is not wholly relevant or is at least an incomplete picture of the existence or non-existence of training programs that exist in a particular country. The petitioner submitted a course list for a graduate program in orthodontics at the [REDACTED]. In that course list, there are courses on pediatric dentistry such as: "Psychology of the Child Dental Patient"; and, "Orthodontics in the Juvenile and Adult Patient." 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)).

In reviewing the petition, the description of the training program is vague and general in nature. It appears that the trainee will learn general concepts of pediatric oral sedation. The petitioner has not submitted any industry data or other information in support of the assertion that the training program must occur in the United States. 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 in the beneficiary's home country. Therefore, 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).

Beyond the decision of the director, the petitioner did not establish 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.

As the claimed 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. 8 C.F.R. § 103.2(b)(1). 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 allegedly 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 business plan for 2009 – 2011 that stated it will open a branch office in the Philippines. However, the business plan requires a \$75,000 investment of which \$25,000 will be paid by the petitioner's president; however, the petitioner did not submit evidence that it can obtain this kind of investment or that

the petitioner has the ability to pay the initial \$25,000. The petitioner did not submit any corroborating evidence to establish that it has a branch office or will be able to open one soon, such as a lease agreement, financial records or stock certificates. The evidence is not sufficient to establish that the petitioner will have an office abroad to employ the beneficiary upon completion of the training program. 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. 158 at 165. 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.

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 two-year training program but the petitioner only submitted two manuals that were prepared by another company. The petitioner did not submit a syllabus, reading materials to be utilized, or a breakdown of the on-the-job training and the classroom 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. As such, 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 petitioner did not provide a training program outline of topics to be discussed and 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.

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 except to enter additional grounds for denial.

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.