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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



05

DATE: **JUN 17 2011** OFFICE: VERMONT SERVICE CENTER FILE:

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:

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 liquidation outlet that seeks to employ the beneficiary as an operations manager 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 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 November 24, 2010, the director denied the petition on three independent 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 proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and, (3) 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 February 25, 2010, counsel for the petitioner explained that the petitioner is a “merchandise liquidation company that specialized in liquidated, damaged and unwanted consumer goods.” Counsel explained that upon completion of the training program, the beneficiary will return abroad and work with the petitioner as the trainee will incorporate an office in Turkey that he will manage. Counsel also stated that the training offered to the beneficiary is unavailable in Turkey as the trainee will “gain experience in an exclusive field and his career will benefit tremendously by being virtually the only importer and exporter of liquidated goods in Turkey.” Counsel further stated that “by studying and observing the formation and day to day operations of a liquidated good business, at [the petitioner’s], the Beneficiary will be well positioned to introduce a cheaper (and more profitable) method of selling desirable goods to the local populations at a low price, as well as maximizing profits to the parent company as well.”

In addition, counsel explained that a “minimal portion of the training” is productive employment since this is an “essential part of the training in the field” whereby in this case, the beneficiary “will be handling every aspect of the business in Turkey and working in the international partnership.”

The petitioner submitted a training program outline that is broken down into the following phases: Processing and Warehouse Operations (6 months); Sales Indoctrination/Customer Relations/Sales Floor Operations (6 months); Office Operation/Management Theory and Application (6 months); and Import/Export Theory and Application (6 months). The outline also included a daily/weekly schedule breakdown that indicated the beneficiary will receive classroom instruction for three hours a day; studying, writing reports and on-site training for three hours a day; and shadowing, on-the-job training, observe consultations, research, discussion with Trainer for three hours a day. The outline indicated that the training program will consist of 50% classroom instruction, 35-45% of on-the-job training, and 5-15% of incidental productive employment. The trainer of the program will be the Managing Partner who “oversees [the petitioner] from start to finish.”

The petitioner submitted a letter from [redacted] regarding the “non-availability of training for manager position in liquidation outlet” in Turkey. The author is a “businessman and Turkish citizen.”

On April 6, 2010, the director requested further detail on the petitioner's H-3 training program. In response, the petitioner explained in an affidavit that the president of the company can provide the training and continue his daily work activities for the following reason:

As the President of the company, I am at the office approximately 25 hours per week; and on occasion a maximum of 35-40. It should be noted that as the President, I have no daily responsibilities, but merely oversee the company overall. As such, I am free to do as I wish and have the time to train [the beneficiary] full-time.

The petitioner also explained the reason the training program must be completed in the United States, as follows:

The training must be wherever I am, as I am both the President AND the heart of the company. Delegating this training to another person would be both cost-prohibitive and would not contain my zeal and creative energy I have behind this plan. As the owner – operator I am extremely excited to be able to use my 18 years of experience in international trade to benefit not only [the beneficiary] by the people of Turkey. I have taught hundreds of people over the years in HazMat, weight and balance, and operational safety. With all my years as an Operations manager and trainer I am the only one within my organization that has the time, skill and ability to train [the beneficiary] in an appropriate manner with a strong program in Management, Management theory and Management application. I look forward to the next 2 years here with [the beneficiary] and the opportunity to implement my 10 year business plan in Turkey.

In addition, the petitioner explained that the “on the job training does not result in productive employment as the Trainer must accompany the Trainee, explain and demonstrate the task, discuss the task afterwards, and answer questions along the way.” The petitioner also submitted a list of textbooks and industry publications that will be utilized as classroom materials during the training program.

In the request for evidence, the director noted that “the training program you submitted has been found to be broad and general.” The director requested additional evidence to establish that the petitioner has an actual, well-structured training program. In response to the director's RFE, however, the petitioner re-submitted the same training outline. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner submitted a letter from [REDACTED] discussing the unavailability of the training program in Turkey.

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 establish that the proposed training could not be obtained in Turkey, 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.

The petitioner submitted a letter from [REDACTED], a "businessman and Turkish citizen." The author stated that he has been in the "business industry in Istanbul for 15 years selling appliances such as refrigerators, dryers, and computers." The author also stated that in Turkey, there is not "formal method of liquidating merchandise in this manner," and that "although the large chain stores must dispose of their damaged merchandise in some manner, to my knowledge there is no niche industry currently in existence which capitalizes on these damaged goods." In reviewing the letter, it does not appear that the author has the necessary knowledge in the liquidation business in Turkey since he specializes in selling appliances which is a completely different industry. In addition, an adequate factual foundation to support the author's opinion that the petitioner's training program is not available in Turkey has not been established. The author does not note the location of the petitioner, nor indicate whether he reviewed the 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.

In response to the director's request for evidence, the petitioner submitted a letter from [REDACTED]. The letter is almost entirely identical to the letter submitted by [REDACTED]. Again, the author has not submitted sufficient evidence that he has sufficient knowledge of the petitioner's training program to determine whether such training is available in Turkey. In addition, the author failed to submit any industry data or other information to support the claim that training in liquidation is not available in Turkey.

Finally, the petitioner submitted a letter and an affidavit from [REDACTED] the president of the petitioner. The letter dated February 23, 2010 stated that [REDACTED] was a Station Manager in Turkey for three years working with the U.S. military. According to [REDACTED], when he lived

and worked in Incirlik and Adana, he could not find “any real merchandise liquidation operations in that area.” The petitioner further stated that “since I am married to a Turkish woman from Adana, she and I and her family have searched for similar businesses without any success.” The petitioner submitted an affidavit that stated that the training program must take place in the United States because the President is the “heart of the company” and is located in the United States.

The petitioner’s president did not submit any documentation or evidence to corroborate his claim that training in liquidation does not exist in Turkey. The president did not submit any data of its search for similar training programs in Turkey and his findings. 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, since the president was working in Turkey, it is not clear how he had the time to search the entire country for similar training programs.

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 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)(I) or 214.2(h)(7)(ii)(B)(5).

The director also found that 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 that is divided into four phases. On appeal, counsel for the petitioner contends that the training outline adequately explains each phase; outlines a breakdown of the daily and weekly schedule; and, explains exactly how the beneficiary will be evaluated. Upon review of the training outline, each phase lasts 6 months and the description of the phase consists of a few sentences. The outline provides a general outline of the topics to be discussed. In addition, the petitioner provided a typical daily schedule which is broken down into classroom instruction, studying, and shadowing and on-the-job training but the petitioner did not provide

any specific detail of what will consist of the on-the-job training and shadowing. In addition, although the petitioner submitted a training outline with topics to be discussed in each phase, 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, and a general overview of the topic.

Moreover, the petitioner indicated the topics to be discussed and provided a list of materials that will be utilized for the classroom instruction but it did not provide the syllabus that will be followed, information on how the materials will be taught, or information on the assignments that will be assigned to the beneficiary. Furthermore, the director noted in the request for evidence that the training outline is vague and he requested additional information of the training program, but the petitioner submitted the same training outline as previously submitted.

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. The petitioner 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).

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 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 response to the director's request for evidence, the petitioner explained that the "total amount of productive employment will be from 5 – 15%." The petitioner also stated that "on the job training does not result in productive employment as the Trainer must accompany the Trainee, explain and demonstrate the task, discuss the task afterwards, and answer questions along the way."

Without additional information regarding what the beneficiary will actually be doing on a day-to-day basis, the AAO concludes that the petitioner did not provide sufficient evidence to establish that the beneficiary will not 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 not 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).

Beyond the decision of the director, the petitioner failed to establish that it has 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 the training program outline, the petitioner stated that the President of the company will be the trainer for the training program. In response to the director's request for evidence, the petitioner stated that, "it should be noted that as the President, I have no daily responsibilities, but merely oversee the company overall. As such, I am free to do as I wish and have the time to train [the beneficiary] full-time." However, the training program outline stated that the trainer is the petitioner's managing partner and he "oversees [the petitioner] from start to finish." The petitioner employs 14 individuals and has a gross annual income of \$907,000.00. It is not clear how the president of the company that "oversees [the petitioner] from start to finish," can continue normal operations for two years and provide two years of full-time training to the beneficiary with classroom instruction and on-the-job training. 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 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.

In the training offer letter, dated February 25, 2010, the petitioner stated that it is "our intention to establish an international partnership with [the beneficiary] in Turkey – appointing [the beneficiary] as the manager responsible for operating the overseas activities, especially in the European theatre." As the claimed purpose of the proposed training program is to train the beneficiary on the petitioner's unique business practices, and if the AAO were to take this assertion as true, the only setting in which the beneficiary would be able to utilize his newfound knowledge would be in working for the petitioner. As the petitioner has no current operations in Turkey, 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).

The petitioner has not documented that it actually has set plans to commence operations in Turkey upon completion of the training. The petitioner did not submit any corroborating evidence to establish that it has a branch office or will open one soon, such as a lease agreement, a business plan, financial records, or stock certificates. The evidence submitted is insufficient to establish that the petitioner will have an office abroad in which 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.

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 add the additional grounds of denial discussed herein.

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.