

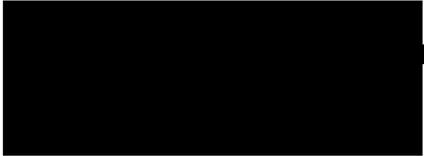
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D5



DATE: FEB 13 2012 OFFICE: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiaries: [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:

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, 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 “network marketing company” that seeks to employ the beneficiary as a 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 September 13, 2011, 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 would benefit the beneficiary in pursuing a career abroad; 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.

Section 101(a)(15)(H)(iii) of the Act, 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part, the following:

- (ii) Evidence required for petition involving alien trainee—
 - (A) Conditions. The petitioner is required to demonstrate that:
 - (1) The proposed training is not available in the alien’s own country;
 - (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
 - (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

- (4) The training will benefit the beneficiary in pursuing a career outside the United States.
- (B) Description of training program. Each petition for a trainee must include a statement which:
 - (1) Describes the type of training and supervision to be given, and the structure of the training program;
 - (2) Sets forth the proportion of time that will be devoted to productive employment;
 - (3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;
 - (4) Describes the career abroad for which the training will prepare the alien;
 - (5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and
 - (6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.
- (iii) Restrictions on training program for alien trainee. A training program may not be approved which:
 - (A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;
 - (B) Is incompatible with the nature of the petitioner's business or enterprise;
 - (C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;
 - (D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;
 - (E) Will result in productive employment beyond that which is incidental and necessary to the training;

- (F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;
- (G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or
- (H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

In the supporting documentation, the petitioner provided the following statement about the training program:

Please be advised that in order for the trainee to learn how to start and/or operate a successful honest and legal network marketing company in Ukraine, as part of, or as Independent network marketing distributor of [the petitioner], [the beneficiary] will need to become knowledgeable in every aspect of operation of this particular type of unique business. Her previous education degree in logistics will be very useful in becoming a successful independent business owner (distributor) or manager for [the petitioner] in Ukraine.

On March 16, 2011, the director requested further information and evidence on the petitioner's H-3 training program.

In response, the petitioner provided the following information about the training program:

- a. To learn how to operate Independent company in Ukraine as the owner of that company. To learn and participate in everything about every product that the company is marketing to understand all the benefits of the product and to know how to market it in different economic situations.
- b. To be able to choose the right products for the market and to be able [to] make successful decisions in operating her own business.
- c. To be able to choose the right prices for the products as the business owner, to make sure that the prices of the product will include all of the potential expenses of the business and provide profit for the company and anybody involved in doing business with the company, and integrate this prices with special custom made computer program that will generate bonuses, commissions for multilevel marketing company with unique marketing plan that does not exist anywhere in the world and unique commission structure for the distributors, that is different to any other company in US or Ukraine.
- d. To learn and participate in everything about multilevel marketing in general as well as custom made, unique marketing plan of [the petitioner] not as employee or the computer operator, not as a manager but as the owner to be able to participate in creation of unique marketing plan, computer program, commissions structure information, percentages of the commissions paid to the distributors on different levels of the marketing plan, please see attached marketing plan brochure (exhibit

- A). To be able to train and teach anybody involved in business to do their job without giving out privileged business, commercial secrets of doing business. To be fluent in understanding how the computer program is built as creator of that program, and to be able to explain and to make any necessary changes to the program and the marketing plan and the prices of the products to adjust to ever changing market conditions without jeopardizing the profitability and survive ability of the company.
- e. To learn and participate in marketing strategy of the company: such as advertisement, word of mouth advertisement, printing press, magazines, radio commercials, TV adds [sic] and talk shows, advertisements on world wide web.
 - f. Creation of the web-sites, integrations of the web-sites with custom made marketing system and computer program to generate real time information to each customer, distributor, dealer or employee of the company. It is very sophisticated multi step system with different authorization levels of excess.
 - g. To learn and participate in providing training in all different aspects of doing business with customers (customer service), distributors (sales and marketing strategies and techniques), job skills and hands on training for employees or hired contractors.
 - h. To learn and participate in training sessions, work shops, [sic] seminars for others and to be able to organize and teach others how to create successful sales organization (compensations, bonuses, commissions, promotions, gifts, etc).
 - i. To learn and participate in creation of marketing materials such as training videos, audio tapes, brochures, catalogues, fliers, etc.
 - j. To learn and participate and to be able to speak in front of the large audiences, to be able to inspire and to become a motivational speaker, to provide leadership for the people involved in doing business with the company and to inspire others to join and to duplicate the business to be independent distributors, brand name store owners (franchisees), wholesale dealers, or any other independent business owner or contractor involved in distribution of the products marketed by the company.
 - k. To learn and participate in creation of direct sales to the customers, commercial accounts, wholesale dealers, distributors, medical supplies stores, brand name stores (franchisees), show rooms, in order to generate sales for the company as an Independent business owner, so she can teach others how to do the same.

The petitioner also stated that "most things that [the beneficiary] will be learning will take considerable amount of time and unfortunately can not [sic] be taught in college or some course, it has to be given from one business owner to the other." The petitioner also stated that the beneficiary "will not be involved in productive employment but she will be actively involved in training or real sales presentations and establishments of commercial accounts," and the beneficiary will "be entitled to receive partial referral sales commissions as Independent business owner." The petitioner also states that the beneficiary will "participate in creation of new accounts and will be compensated in form of referral fee according to the agreement signed by both sides." The petitioner further stated that he will "administer [the beneficiary's] training personally so no other employee who receives W2 forms will be involved in her training."

In addition, the petitioner provided information as to why this training program is not available in the Ukraine for the following reasons:

[The beneficiary] will not be a distributor or sales person in Ukraine in which case she could be trained by others [sic] distributors in Ukraine. Even for position of regular sales person or distributor involved in development of multilevel (network, marketing) business, this is no courses or schools where she could be attended in Ukraine to learn those skills, but [the beneficiary] is not trying to be sales person or a distributor, she will be involved in training program in United States that is not available in Ukraine, how to be come [sic] a founder, the owner of a multilevel marketing company, which involves creating of unique product line, which will be exclusively represented by her in Ukraine. She will be learning and involved in international trade, international bookkeeping, learn about processes and obey the rules of customs services of different countries importing products. She will be actively involved in creation of custom made computer program made for her unique marketing plan and compensation schedule, that does not exist in Ukraine. She will be involved and actively participating, as the business owner in creating her companies [sic] website, which will be integrated with a custom made computer program and special multi authorization commission structure, bookkeeping program, that will be designed with her participation and will involve her complete understanding of many different aspects of creating, building, managing, controlling and running a successful business in Ukraine, with full support and guidance of my company in United States. All of that knowledge and unique know-how can not [sic] be taught or developed in Ukraine. The only way [the beneficiary] can receive all necessary knowledge to become a business owner, founder of multi level [sic] marketing company with unique marketing plan, custom made computer program, exclusive commission structure for the distributor force, integrated real time website, creation of the continues education system of tapes, audio disks, video materials, books and seminars as well as involvement in TV, radio, internet commercials, talk shows as the motivational speaker, she will learn and participate in creation of all these materials. All of these necessary skills can be taught by me, [REDACTED], personally, because I am a founder of such company in United States and only I can provide all knowledge, connections and referrals needed for successful training of [the beneficiary] in United States. Training of [the beneficiary] in Ukraine would be very expensive, time consuming and impossible for me to do.

On appeal, the owner of the petitioner states that he rented office space in Ukraine and submitted a lease agreement for an office space commencing on October 28, 2011 until October 28, 2012. The petitioner also submitted several job applications from individuals in Ukraine that are interested in working for the office abroad.

The petitioner also submits a breakdown of hours spent on "seminars in classroom," "practice in classroom," "on-the-job training," and "tests." Moreover, the petitioner submits a training

outline that consists of the following main topics: (1) Personal development, personal growth training, leadership; (2) Seminars, sales training; (3) Courses, seminars, marketing training; (4) Seminars, training advertising and PR; (5) Financial courses, seminars on economics and finance; (6) Courses, workshops accounting and taxation; (7) Seminars, training courses on quality; (8) Seminars on Safety; (9) Seminars on logistics, supply procurement; (10) Training program for information technology; and, (11) The overall course of leadership. The petitioner also submits an example of a one week schedule of the training program.

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 is unavailable in Ukraine, 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.

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 itself 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.

As stated above, the petitioner contends that there are no training programs in Ukraine that encompass the training that the beneficiary will receive in the United States by the petitioner. Specifically, the petitioner notes that the beneficiary will learn "how to be come [sic] a founder, the owner of a multilevel marketing company, which involves creating of unique product line, which will be exclusively represented by her in Ukraine;" and "will be actively involved in creation of custom made computer program made for her unique marketing plan and compensation schedule, that does not exist in Ukraine;" and will "receive all necessary knowledge to become a business owner, founder of multi level [sic] marketing company with unique marketing plan, custom made computer program, exclusive commission structure for the distributor force, integrated real time website, creation of the continues education system of tapes, audio disks, video materials, books and seminars as well as involvement in TV, radio, internet commercials, talk shows as the motivational speaker, she will learn and participate in creation of all these materials." However, the petitioner did not provide any corroborating evidence to support this claim. The petitioner failed to provide any evidence that the business operations of the petitioner is so unique or different that it is impossible to receive training in opening a new business in Ukraine. In addition, the petitioner contends that the beneficiary will learn a "unique marketing plan," and "custom make computer program," but the petitioner failed to provide any evidence describing these programs and establishing that they are in fact unique. Furthermore, the petitioner did not even explain what marketing the petitioner does and what services or products it distributes. 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)).

Moreover, the training outline provided by the petitioner is made up of general business concepts that are not specific to the petitioner. It appears that these general business concepts such as marketing, sales, public relations, finance, accounting and advertising can be taught in a university or company in Ukraine. The topics covered in the training program are not specific to the petitioner and does not support the petitioner's claim that this training program is not available in Ukraine.

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. 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 director also found that the petitioner had not established that the beneficiary would not engage in productive employment. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(2) requires the petitioner to establish that the beneficiary would 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 the regulation at 8 C.F.R. § 214.2(h)(7)(iii)(E) precludes approval of a petition in which the beneficiary would perform productive employment beyond that which is incidental and necessary to the training.

In response to the director's RFE, the petitioner stated that the beneficiary "will not be involved in productive employment but she will be actively involved in training or real sales presentations and establishments of commercial accounts," and the beneficiary will "be entitled to receive partial referral sales commissions as Independent business owner." The petitioner also stated that the beneficiary will "participate in creation of new accounts and will be compensated in form of referral fee according to the agreement signed by both sides." It is not clear how the beneficiary will not perform productive employment if she will participate in "real sales presentations and establishment of commercial accounts," and will receive a referral fee for all new accounts. These activities are productive employment and without information of the amount of time spent on productive employment, it is impossible to determine if the productive employment is incidental and necessary to the training, and thus, it appears that the productive employment goes beyond that. 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).

The director also noted that 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)(ii)(A)(4).

As noted by the petitioner, the reason for creation of the training program is to train the beneficiary on the petitioner's own business practices so that the beneficiary can become an owner of a business in Ukraine. 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 when she returns to Ukraine. On appeal, the owner of the petitioner explains that he went to Ukraine in October 2011, nearly 10 months after the initial petition was filed, and obtained a lease for an office space. The petitioner also submits several applications from residents of Ukraine for different positions. The applications were also signed in October 2011, nearly 10 months after the current petition was filed. In addition, the job applications do not indicate the company for which they are applying for a job. In addition, the applications do not state that the job will commence two years later when the beneficiary has completed her training program and has returned to Ukraine. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date 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 satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4).

Beyond the decision of the director, 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 petitioner stated that the trainer of the program will be the company owner. On the Form I-129, the petitioner claimed that it employed 23 contractors and had a gross annual income of approximately \$980,000. It is not clear how the owner of a company that needs to supervise 23 independent contractors can perform his workload while instructing the beneficiary during the two-year training program that consists of 2355 hours of training. 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)).

Furthermore, the petitioner did not provide any documentation of its business operations such as financial documents, a lease for an office space, photographs of the office space, paystubs, tax returns, invoices, and/or articles of incorporation. Without these documents, it is impossible to determine if the petitioner has the physical plant and sufficiently trained manpower to provide the training to the beneficiary. 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 will be denied.

Beyond the decision of the director, the petitioner failed to establish that the proposed 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 that deals in generalities with no fixed schedule, objectives, or means of evaluation.

Much of the information submitted by the petitioner is vague in nature and leaves the AAO with very little idea of what the beneficiary would actually be doing on a day-to-day basis. The

program is a two-year training program, but the petitioner's outline of the program describes each phase in only a few sentences. In addition, the petitioner did not explain what the beneficiary will do during the on-the-job training. Also, the petitioner did not provide any information of reading materials or a syllabus that will be followed during the program, or information on how the trainee will be tested and evaluated throughout the program. 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).

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 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.