



U.S. Citizenship
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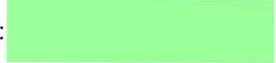
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DATE: JUN 19 2014

OFFICE: VERMONT SERVICE CENTER

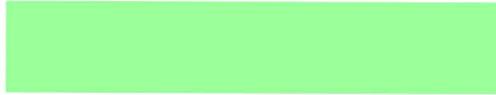
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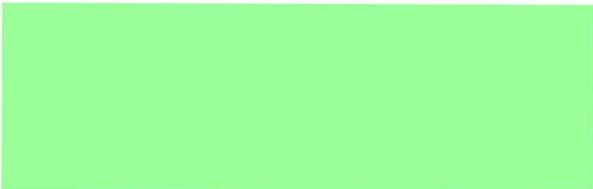
Petitioner:

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Michael T. Kelly
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

I. BACKGROUND

On the Form I-129 visa petition, the petitioner describes itself as a resort hotel. In order to employ the beneficiary in what it designates as an "International Resort Marketing/Advertising/PR Trainee" position for a period of 24 months, the petitioner seeks to classify her as a nonimmigrant 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 director denied the petition, concluding that the evidence of record: (1) does not establish that similar training is unavailable in the beneficiary's own country; (2) does not establish that the training will benefit the beneficiary in pursuing a career outside the United States; (3) does not establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training; and (4) does not establish that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, we find that the evidence of record overcomes the director's finding that the petitioner failed to establish that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training. Consequently, we withdraw that ground as a basis for denying this petition.

However, as will be discussed below, the evidence of record does not overcome the director's remaining three grounds for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, we find an additional aspect which, although not addressed in the director's decision, nevertheless also precludes approval of the petition, namely, the failure of the evidence of record to establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition.¹ For this additional reason, the petition must also be denied.

¹ The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that we identified this additional ground for denial.

II. THE LAW

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)(1)(ii)(E) states, in pertinent part, the following:

An H-3 classification applies to an alien who is coming temporarily to the United States:

- (1) As a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution. . . .

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.

III. THE PROPOSED TRAINING PROGRAM

In the undated "Syllabus and Outline" ("Outline") it submitted when it filed the instant petition, the petitioner stated the following with regard to its motivation for providing the training to the beneficiary:

The goal of our training program is to familiarize worldwide advertising, public relations and marketing professionals with our company and our techniques so that they may return to their countries to market our resorts to potential customers in other European countries, including Spain. . . .

[The beneficiary] will train with a group of expert marketers, advertisers and public relations specialists, and attend instructional meetings with all facets of the company. The opportunities to train with a group of experts with such innovative programs are specific to our company, and [are] not available to her in Spain. She will go to Spain with the tools and resources to run our advertising, marketing and public relations operations there and throughout Europe [as] well as represent our company in the media there. The trainee will travel extensively throughout these regions after this training, and possibly during the training.

The petitioner also explained that the training program would be broken into four sessions: (1) International Market Research; (2) International Marketing; (3) International Advertising; and (4) International Public Relations. The petitioner stated that each session would last six months.

IV. ANALYSIS

A. Preliminary Observations

Before addressing each of the bases of the director's May 17, 2013 decision denying the petition, we will first enter some initial observations regarding some inconsistent claims made by the petitioner. As we will now discuss, certain statements of fact are inconsistent with each other, and their inconsistencies undermine those statements' credibility and also the overall credibility of the petitioner's remaining assertions regarding its proposed training program.

The petitioner stated in the Outline and on the Form I-129, which it signed on February 3, 2013, that it has 14 employees. However, in its April 11, 2013 letter the petitioner stated that "we have a total of 60 employees." The petitioner's 2012 Form W-3 states that the petitioner filed 20 Forms W-2 in 2012. These employment figures are not consistent with one another.

Furthermore, as noted above, the petitioner stated in the Outline that the goal of the training program is to "familiarize worldwide advertising, public relations and marketing professionals with our company and our techniques so that they may return to their countries to market our resorts to potential customers in other European countries, including Spain." The petitioner claimed further that the beneficiary would be trained to "go to Spain with the tools and resources to run our advertising,

marketing and public relations operations there and throughout Europe [as] well as represent our company in the media there." The petitioner described how the beneficiary would be taught "how to hire a marketing team in Europe"; "determine how the company's website is functioning in various European Union countries"; and that she would "develop ad contracts for Spain." The petitioner stated that she would assume a position entitled "Director of Marketing, Advertising, and Public Relations – European Union."

However, in its April 11, 2013 letter the petitioner indicated that the beneficiary would instead relocate to Argentina upon the conclusion of the training program and "establish her own office." In that letter, the petitioner claimed that "we fully expect [the beneficiary] to utilize [her] knowledge of our company to establish her own office, with our possible financial assistance, once she returns to Argentina."²

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

These inconsistencies undermine the evidentiary weight of the petitioner's assertions made in support of this petition. As such, we hereby incorporate these comments and findings into each section of our analysis below.

We will now address the director's May 17, 2013 decision denying the petition.

B. Unavailability of Similar Training in the Beneficiary's Own Country

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) forbids approval of a petition in which the petitioner fails to establish that similar training is unavailable in the beneficiary's own country, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5) requires the petitioner to submit a statement which 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.

The director raised this issue in her February 28, 2013 RFE. In its April 11, 2013 response, the petitioner claimed that similar training is unavailable in the beneficiary's own country for three reasons: (1) because the training is company-specific; (2) because the training would utilize software that is not available in the beneficiary's own country; and (3) because the beneficiary would be trained using the

² Furthermore, given the petitioner's use of the phrases "her own office" and "*possible* financial assistance [emphasis added]," it is not clear whether or not the beneficiary would be an employee of the petitioner. The regulations do not require the beneficiary to be an employee of an H-3 petitioner upon conclusion of the training program. However, in this case, the petitioner's claim that the beneficiary would be obtaining knowledge that is specific to its organization is foundational. If the beneficiary would *not* be working for the petitioner upon conclusion of the training program, then it is not clear how that knowledge would be utilized.

[REDACTED] which, according to the petitioner, is not available in the beneficiary's own country. As will be explained below, we find none of these claims persuasive.

While training that is specific to a petitioner can, depending upon the circumstances of the particular case, satisfy 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(1) and 214.2(h)(7)(ii)(B)(5), in this case the petitioner has not explained with sufficient specificity how the methods, practices, use of software applications, or other business functions differ from those of other companies such that similar training cannot be obtained from a company similar to the petitioner in the beneficiary's home country. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Accordingly, the petitioner's claims that the training is company-specific are not persuasive.

Nor are we persuaded by the petitioner's claim that the software programs upon which the beneficiary would train are unavailable in the beneficiary's own country. According to the petitioner, "[t]his software is in English and not available at the present time in Spanish, and therefore it is not used" in the beneficiary's own country. This assertion is not sufficient. It is not clear why the software programs cannot be sent to the beneficiary's own country so that she may train on them there. The petitioner's claim that the beneficiary cannot be trained on the software in her own country because the software is in English is not persuasive.

Finally, we are not persuaded by the petitioner's claim that the beneficiary would be trained using the [REDACTED]. According to the petitioner, "[t]he concept of [REDACTED] has not reached the business community in Argentina and definitely [has not reached] the hotel marketing industry." The record also contains an undated letter from [REDACTED] who describes herself as "a [REDACTED] Trained/Senior Advisor." Ms. [REDACTED] claims that "[i]n my opinion, the training programs in [REDACTED] in Spain and Argentina are very limited."

This claim is not persuasive for several reasons. We first note that neither counsel nor the petitioner raised the [REDACTED] until after the director issued his RFE. The petitioner's initial filing included, *inter alia*, the seven-page Outline; evaluation materials; and four separate letters from the petitioner, one of which specifically addressed the issue of why the training must take place in the United States. None of those materials referenced the [REDACTED] USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 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. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

Nor are the petitioner's claims with regard to the [REDACTED] Approach persuasive. The letter from Ms. [REDACTED] was not prepared on any sort of letterhead, lacks an original signature, and is not dated. For these reasons alone, the letter contains little probative value. With regard to the content of that letter, we note that the record contains no evidence supporting any of Ms. [REDACTED] assertions. Accordingly, we are not persuaded by the assertions of Ms. [REDACTED]. 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'r 1988). Nor does the record contain any documentary evidence to support the assertions by the petitioner that training on the [REDACTED] is not available in the beneficiary's own country. 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. For all of these reasons, we do not find persuasive the petitioner's claims that training on the [REDACTED] is unavailable in the beneficiary's home country.³

The petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(1) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(5). Accordingly, the appeal will be dismissed and the petition denied on this basis.

C. Pursuit of Career Abroad

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) requires the petitioner to demonstrate that the training will benefit the beneficiary in pursuing a career outside the United States; the provision at 8 C.F.R. § 214.2(h)(7)(ii)(B)(4) requires the petitioner to describe the career abroad for which the training will prepare the alien; and the provision at 8 C.F.R. § 214.2(h)(7)(iii)(D) precludes approval of a petition for a training program "in a field in which it is unlikely that the knowledge or skill will be used outside the United States."

As discussed above, the petitioner has provided conflicting evidence as to what the beneficiary would actually be doing, and where she would be doing it, after she finishes the proposed training. Again, 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. at 591-92.

The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(4), 8 C.F.R. § 214.2(h)(7)(ii)(B)(4), or 8 C.F.R. § 214.2(h)(7)(iii)(D). Accordingly, the appeal will be dismissed and the petition denied on this basis.

³ Furthermore, a simple "google search" indicates that online training on the [REDACTED] is widely available.

D. Substantial Training and Expertise in the Proposed Field of Training

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(C) forbids approval of an H-3 petition filed on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training. In its February 12, 2013 letter the petitioner stated that the beneficiary possesses a bachelor's degree in International Business and indicated that she has experience in international marketing, sales, website design, and in opening offshore companies.

The petitioner has not adequately explained why – in light of the record's information about the beneficiary's background – the beneficiary should not be regarded as a person for whom the proposed H-3 training may not be approved, pursuant to the restriction at 8 C.F.R. § 214.2(h)(7)(iii)(C) against approval of a training program offered "on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training."

E. Productive Employment Beyond That Incidental and Necessary to the Training

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(3) requires the petitioner to demonstrate that “[t]he beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and as a corollary, 8 C.F.R. § 214.2(h)(7)(iii)(E) forbids approval of a training program which “[w]ill result in productive employment beyond that which is incidental and necessary to the training.”

The director did not explain the basis of this finding, and we find no support for it in the record of proceeding.

As such, this portion of the director's May 17, 2013 decision is hereby withdrawn.

F. Sufficiently Trained Manpower to Provide the Training Specified in the Petition

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) forbids approval of a petition where the petitioner fails to establish that it has sufficiently trained manpower to provide the training specified in the petition.

As noted above, the petitioner has made differing claims regarding the size of its workforce. Specifically, the petitioner has claimed both that it has fourteen employees and that it has sixty employees. Again, 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. at 591-92. The petitioner's conflicting claims preclude a finding by the AAO with regard to 8 C.F.R. § 214.2(h)(7)(iii)(G).

Thus, even if it were determined that the petitioner had overcome each of the director's grounds for denying this petition (which it has not), the petition could still not be approved.

G. Prior Approvals

The petitioner claims that it has received H-3 approval for the instant training program in the past. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

V. CONCLUSION

On appeal, the evidence of record overcomes the director's finding that the petitioner failed to establish that the beneficiary would not engage in productive employment beyond that incidental and necessary to the training. However, the evidence of record does not overcome the director's remaining grounds for denying this petition.

Beyond the decision of the director, the AAO finds additionally that the evidence of record fails to establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition.

Consequently, the appeal will be dismissed and the petition will be denied.

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 conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.