

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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

[Redacted]

FILE: [Redacted] Office: [Redacted] Date: MAR 02 2011

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is engaged in the production and distribution of yoga content and it seeks to employ the beneficiary as a trainee for a period of sixteen 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 two requests for evidence (RFE); (3) the petitioner's response to both of the director's RFE; (4) the director's denial letter; and, (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on two grounds: (1) the petitioner failed to establish that the proposed training is unavailable in the beneficiary's home country; and, (2) the petitioner had failed to establish that the proposed training will benefit the beneficiary in pursuing a career outside the United States. 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 March 19, 2009, the petitioner stated that it is "one of the leading distributors of yoga-related media and products." The petitioner also stated that the training is to provide the beneficiary a "comprehensive training to develop the skills necessary to become a [petitioner] Production Animator," and also stated that the petitioner is offering this training to staff "to open a satellite art department in [redacted]." The petitioner further stated that this training is not available in the beneficiary's home country since the petitioner's "training facility in [redacted] is the only training facility in the world with the necessary equipment and expertise available to complete the specified training program in preparing the trainee for employment at [the petitioner]." Moreover, the petitioner stated that the beneficiary will be trained on "[the petitioner's] production animation in order to implement use of such technology in other [petitioner] offices around the world and pass o[n] her knowledge of [the petitioner's] practices and operations."

The petitioner also stated that the training program will last 16 months and it will consist of 30% formal classroom training and 70% supervised on-the-job training. According to the training outline submitted by the petitioner, the training program will consist of the following courses: Drawing (1 month); Acting (1 month); Beginner Animation (3 months); Intermediate Animation (4 months); Advanced Animation (5 months); Story-boarding (1 month); and, Working in the Pipeline (1 month). The outline stated that [redacted], the petitioner's [redacted] [redacted] "will be evaluating, training and oversee all aspects of the Training Program."

The petitioner submitted a letter, dated March 17, 2009, from [redacted], the Director for [redacted] [redacted], a registered limited liability company in [redacted]. [redacted] stated in the letter that the company currently employs three employees and "will be expanding its responsibility in the area of graphic content production and animation production." The letter also stated that it wishes to employ the beneficiary for the role of Animation Director after her successful completion of her training program.

In response to the director's request for evidence, counsel for the petitioner stated in a letter dated October 28, 2009 the reasons why the training is not available in the beneficiary's home country as follows:

[The petitioner] uses a specific 3D animation software program called [redacted] with a unique style of design, modeling, rigging, animation and rendering. The look and feel of [the petitioner's] animations are very different compared to any existing animation in the marketplace. The company has developed a style using

computer animation to render images that look hand drawn. This style has taken the team a very long time to perfect because there is really only one way to learn this style and that is by exploring numerous options and making gradual changes through trial and error. The program [REDACTED] is extremely complex with thousands of production studios using it in different ways. Through this training program, the Beneficiary will learn how to use [REDACTED] in [the petitioner's] style.

The Beneficiary will learn the principles of animation and then apply those principles in unique acting performances to [the petitioner's] characters as part of different story lines. The principles of animation are like the spelling and grammar of the English language. In the same way that a writer starts by understanding the rules and structure of a language, an animator learns the principles of animation. Once [the beneficiary] understands the principles, then she can learn how [the petitioner] Animation uses this language in its own unique way.

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

The director noted that the petitioner failed to establish that the proposed training could not be obtained in Poland, the beneficiaries' 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 the letter of support, the petitioner stated that this training is not available in the beneficiary's home country since the petitioner's "training facility in [REDACTED] is the only training facility in the world with the necessary equipment and expertise available to complete the specified training program in preparing the trainee for employment at [the petitioner]." In addition, in response to the director's request for evidence, counsel for the petitioner explained that the beneficiary will be trained on 3D Animation as specifically used by the petitioner and thus, the beneficiary can only learn the petitioner's unique practices by this training program.

In addition, the petitioner submits a letter from [REDACTED], a "producer and president of the leading post production studio in Poland." The author stated that in his opinion, "there are no sufficient cartoon character animation training in [REDACTED] in Poland. Even if there were some good

character animation schools in Poland, which we are still very short in, each production has very specific needs that can only be learned by working directly under the supervising animators of the production.” The petitioner also submitted a letter from [REDACTED], founder and director of the game company, [REDACTED]. The author of this letter stated that “even if people attend schools in Poland, they often lack in ability to animate characters and usually they have very little experience in working in professional companies.”

In reviewing the letters, an adequate factual foundation to support these opinions has not been established. The authors do not indicate whether they reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor do the authors describe the training program in any meaningful fashion. The extent of their knowledge of the proposed training program is, therefore, questionable. Thus, the petitioner has not established the reliability and accuracy of their pronouncements and this evidence is therefore not probative of any of the criteria at issue here. Nor have the authors submitted any industry data or other information to support their opinion. Moreover, the authors are working in animation in Poland and both state that there is animation training in Poland. The petitioner did not submit sufficient evidence to corroborate its claim that the training program is not available in Poland. The petitioner has not established that its business practices are so unique and specialized that such knowledge could not be obtained from similar companies. The 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).

In addition, the petitioner provided a vague training program that lacks specific details of the training program. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has 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 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 in animation. 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. Since the newfound knowledge will be specific to the petitioner, an operation run by the petitioner would be the only setting in which the beneficiary would be able to use the knowledge.

The petitioner asserted that it is offering the training to staff “a satellite art department in Australia.” The petitioner asserted that it has an office in Australia with three employees and it

wishes to expand and open an art department. However, the petitioner did not present sufficient evidence to demonstrate that the petitioner is capable of expanding the [REDACTED] office at this time. As evidence of the petitioner's business operations in [REDACTED], the petitioner submitted a balance sheet for 2007 that stated that it had a gross profit of \$11,503.00. In addition, the petitioner submitted notes to the financial statements that stated the petitioner's office in [REDACTED] is a "non-profit organization." The notes also stated that "there is no property, plant or equipment to report on." Given that the [REDACTED] office has a gross profit of \$11,503.00; it is not clear how it plans to hire the beneficiary as an Animation Director. Also, it is not clear that this organization has an office staff that would support an animation director. In this particular case, since the proposed training is stated to be specific to the petitioner, and the only setting in which the beneficiary can utilize her skills would be for the petitioner in [REDACTED], the petitioner must document that it actually has plans to commence operations in [REDACTED]. The record, as presently constituted, contains insufficient evidence of the petitioner's expansion plans, beyond training 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. at 165.

In addition, the petitioner submitted inconsistent evidence about the office in [REDACTED]. In a letter of support, the petitioner stated that the office in [REDACTED] employs three individuals and it wishes to start an art department. However, the petitioner submitted an organizational chart of the [REDACTED] office and it indicated many more positions than three, not including the art department. Furthermore, the petitioner submitted two different organizational charts for the Australian office. 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).

As noted above, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(4). Therefore, 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 sixteen-month training program that is divided into seven phases that are explained in a few sentences. The petitioner also provided a short lesson plan for each phase that again, is very vague in detail and does not explain what the beneficiary will be doing in detail for months at a time. In addition, much of the training is general to animation and the outline does not specify how the beneficiary will be trained in the petitioner's business practices with animation. The vague, generalized description of the training program does not explain what the beneficiary

would actually be doing on a day-to-day basis. The petitioner is not required to provide an exhaustive account of how the beneficiary is to spend every minute of the training program, but the description provided is inadequate. Again, the petitioner has failed to provide a meaningful description, beyond generalities, of what the beneficiary would actually be doing, on a day-to-day basis, for much of the proposed training program. It has failed to establish that its proposed training program does not deal in generalities. It has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A).

In addition, the petitioner did not provide a clear explanation of how the beneficiary will be evaluated throughout the training program. The petitioner stated that the beneficiary will take exams but it is not clear on what the beneficiary will be tested since the training program outline only provides a general explanation of topics to be discussed but does not provide the syllabus that will be followed, information on how the material will be taught, information on the assignments that will be assigned to the beneficiary, or materials that the beneficiary will use in order to learn the topics to be discussed.

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 explained that [REDACTED] the petitioner's Animation Productions Manager, "will be evaluating, training and oversee all aspects of the Training Program." It is not clear how one person can provide 30 percent of classroom instruction and 70 percent of on-the-job training while also performing all of his regular work duties that are necessary to keep running the operations in the art department. Furthermore, according to the organizational chart submitted by the petitioner, the position of animation productions manager does not even exist. 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. 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.*

In addition, the petitioner stated that it provided sufficient evidence to establish that it has the physical plant to provide the training program by submitting photographs of the offices and floor plans. The photographs indicate an office which consists of one big open area. The photographs also show an office in a residence which is a large room that is used as an animation and art department classroom /office. It is not clear how the trainer can train in a home residence and be away from the main office for 16 months where he would need to perform his regular work duties. For this additional reason, the petition may not be approved.

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.