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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



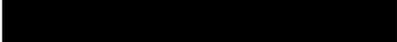
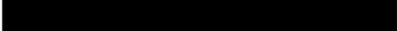
U.S. Citizenship
and Immigration
Services

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DATE: MAY 06 2011 OFFICE: CALIFORNIA 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:

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 engaged in the licensing and distribution of Precious Moments products and it seeks to employ the beneficiary as a trainee staff artist for a period of one year. 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.

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 failed to establish that it possesses sufficiently trained manpower to provide the training specified. 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 the attachment to the Form I-129, the petitioner stated that the beneficiary "must train as the understudy of [REDACTED] since [REDACTED] is the creator of all [the petitioner's] products. [REDACTED] lives and works in Carthage, Missouri and the beneficiary must come and train in the presence of the creator in order for him to return to the Philippines and become the Director of the Art and Product Development Department for [the petitioner] in the Philippines."

In addition, the petitioner stated that the beneficiary already has skills related to the training since the beneficiary has "trained as a staff artist and illustrator in the Philippines since January, 2009." He was employed by the petitioner in the Philippines and was "tasked to help in the drawing and illustrating [the petitioner's] products." The petitioner also stated that upon completion of the training program, the beneficiary will be employed in the Philippines as the "director of the Art and Product Development Department for [the petitioner] in the Philippines."

The petitioner submitted a training schedule which includes four phases of training: History of [the petitioner's] conception and success (3 months); Exposure to type of drawing and development (3 months); Creating of Drawings and [the petitioner's] figurines (3 months); and, Finalization of Development and Marketable Products (3 months).

In response to the director's request for evidence, counsel for the petitioner stated in a letter dated December 18, 2010 the reasons why the training is not available in the beneficiary's home country as follows:

It is necessary to highlight the one unique situation in this petition. The trainer, [REDACTED], has a unique individual responsibility to create an outline of all proposed figurines, dolls and accessories. He drafts the outline he described and all other staff can only abide exactly on what has already been created.

Since [REDACTED] lives and works in Carthage, Missouri it is impossible for trainee to acquire training in the Philippines since [REDACTED] is not available in that country. The beneficiary must train as the understudy of [REDACTED] since this will place him as a trainee in the presence of the original creator of [the petitioner's] products.

In addition, in response to the director's request for information regarding the career the beneficiary can find abroad, the petitioner stated the following:

This conclusion is corrected if it is understood that the beginning draft of the product is originated by [REDACTED], but the final product must be processed by other staff members. [The petitioner] in the Philippines employs six staff artists. However, these employees have not been trained by [REDACTED] so they are limited in their understanding of creation of bisque figurines. After [the beneficiary] has had one year of training from [REDACTED] he will be able to direct the work in [the petitioner] in the Philippines.

On appeal, the petitioner submitted a letter from [REDACTED] that stated the following:

[The beneficiary] worked under my tutelage for over four years in the Philippines and was the most successful of all of the students that I have had. Being the Artist of [the petitioner], I feel it is necessary to train new artists because I am now 72 and I want to continue [the petitioner's] line even after I am gone.

The basic work that [the beneficiary] did was in line drawing wherein he illustrated many stories that appear in coloring books, children's tracts as well as special gift items under the name of [the petitioner].

My reason for having [the beneficiary] come to Carthage, Missouri is because I want to give him further training, this time, in color which will be his first experience. As of now, we only have two artists in the states who work in color and one of them will not be staying with us for very long. Therefore, I feel that this not [sic] only necessary but even urgent because we need an illustrator who can draw as well as [the beneficiary], which at the same time, work in color.

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 the Philippines, 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.

As noted above, the petitioner stated that the beneficiary must complete the training program in the United States because the trainer, [REDACTED], is located in the United States and thus, it is impossible to receive training in the Philippines. However, this is not sufficient evidence to establish that this training is not available in the Philippines. The petitioner stated that it has an office in the Philippines with six staff artists but "these employees have not been trained by [REDACTED] so they are limited in their understanding of creation of bisque figurines." It is not clear why the petitioner has six staff artists in the Philippines if they were not trained on how to manufacture the petitioner's products. The petitioner does not explain how the office in the Philippines can continue the petitioner's operations if the staff does not know how to make the figurines. It is unreasonable to accept that the petitioner has an office with six staff artists in which none of them know how to design and manufacture the petitioner's products. The petitioner did not clearly explain why the beneficiary could not receive training in the office located in the Philippines. In addition, on appeal, the petitioner stated that the beneficiary was trained by [REDACTED] for four years in the Philippines. It is not clear why the beneficiary did not receive adequate training after four years under the tutelage of [REDACTED]. 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 second issue is that 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). The director noted that the petitioner failed to provide an organizational chart, training materials, and information about other training staff, thus, it has not established it has sufficient training staff for the program. In response to the director's request for evidence, the petitioner stated that the trainee will be "on duty in the work office of [REDACTED]" In addition, the training program submitted by the petitioner stated that "professional evaluation of beneficiary's creation of figurines will be conducted daily by [the petitioner's] staff artists." It is not clear how the president of the company and the only individual responsible for creating all proposed figurines, dolls and accessories for a \$2 million dollar company can train the beneficiary for one year while also performing all of his regular work duties that are necessary to keep running the business operations. 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 office. The photographs indicate three cubicles filled by current employees. The petitioner did not submit any photographs or documentation to evidence that it has an area where the beneficiary will complete his training program. The petitioner did not establish eligibility under 8 C.F.R. § 214.2(h)(7)(iii)(G).

Beyond the decision of the director, 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. 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 his 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 has an office in the Philippines with six employees and it wishes to employ the beneficiary as the Director of Art and Product Development Department. However, the petitioner did not present any evidence of the office in the Philippines such as an organizational chart, financial statements, office lease, photographs or documentation from the Philippines that the petitioner can run a business in the Philippines. 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 his skills would be for the petitioner in the Philippines, the petitioner must document that it actually has operations in the Philippines. 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.

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 twelve-month training program that is divided into four phases that are explained in a few sentences. In addition, much of the training is that the beneficiary will learn how to make the petitioner's figurines, but it does not specify how the beneficiary will be trained in the petitioner's business practices. 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. 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.

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.