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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



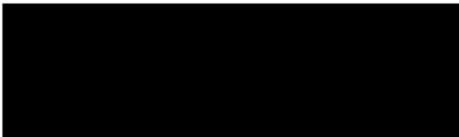
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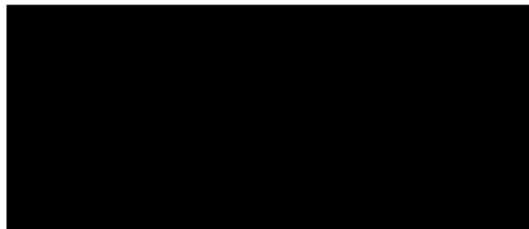
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DATE: **MAY 16 2012** OFFICE: VERMONT SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(iii)

ON BEHALF OF PETITIONER:

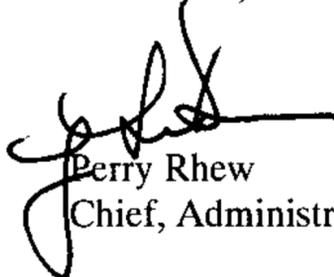


INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (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 petitioner represented itself on the Form I-129 as an "arts institute" with four employees. It seeks to employ the beneficiary as a trainee for a period of 24 months 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 on the basis of his determination that the petitioner failed to establish: (1) that similar training is unavailable in the beneficiary's home country; (2) that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; (3) that the beneficiary will not engage in productive employment beyond that which is incidental and necessary to the training; (4) that the training will benefit the beneficiary in pursuing a career outside the United States; (5) that the proposed training program is not designed to extend the total allowable period of practical training previously authorized a nonimmigrant student; and (6) that the beneficiary does not already possess substantial training and expertise in the proposed field of 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 letter denying the petition; and (5) the Form I-290B and supporting documentation.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review of the entire record, we find the petitioner has overcome the director's findings that similar training is unavailable in the beneficiary's home country; that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; that the beneficiary will not engage in productive employment beyond that which is incidental and necessary to the training; and that the beneficiary does not already possess substantial training and expertise in the proposed field of training. The petitioner has not overcome the director's finding that the proposed training would benefit the beneficiary in pursuing a career outside the United States. Beyond the decision of the director, we find additionally that the petitioner has failed to establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition; and that the proposed training program would be provided at, or by, an academic or vocational institution.

#### *Applicable 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.

#### *The Proposed Training Program*

In its June 9, 2010 letter of support, the petitioner explained that it is an "atelier," which is an art school modeling its form of instruction upon methods used by European arts studios between the Fifteenth and Nineteenth Centuries. The petitioner claimed that under this model, an artist works closely with a small group of students and trains them progressively. The petitioner stated that it teaches a form of realism based upon careful observations of nature through a series of tasks including cast drawing, cast painting, drawing and painting live models, and still life. The petitioner explained that it was organized as an educational institution as well as an artistic movement.

The petitioner claimed that if the petition is approved, the beneficiary would participate in its teacher education program. According to the petitioner, in order to demonstrate eligibility for this program a candidate must fulfill all requirements necessary for entry into its Level 3 program, show exemplary work, and be recommended by the petitioner's faculty. The petitioner stated that the beneficiary has been a student at its atelier for 18 months and made rapid progress, and implied that she satisfies the latter two entry requirements as well. The petitioner proclaimed its hope that the beneficiary will return to India after she completes the training program in order and use her newfound skills to train other Indian painters, and also made a general statement regarding its hope that its graduates will create similar atelier-types of programs in other cities.

In the syllabus submitted at the time the petition was filed the petitioner provided for 12 months of training divided into three components: (1) Summer Workshops for Nonprofessional and Amateur Painters; (2) Level 1 Professional Painter Education Program; and (3) Level 2 Professional Painter Education Program. The petitioner stated that the first component of the training program would last for three months, and that the second and third components would each last 4.5 months.

While participating in the first component of the training program, the beneficiary would observe the work of the petitioner's teachers, assistants, and administrative staff; attend all planning meetings; attend individual artist evaluation sessions; sit in on workshops in order to observe teachers' activities; review the petitioner's historical documents, class curricula, teaching materials, student statements, evaluations, and teacher biographies; design and develop two new workshops to be offered by the petitioner; and attend art history lectures and visit museums, art openings, and master classes with the petitioner's founder. The petitioner claimed that during this three-month period of time the beneficiary would spend 70 percent of her time shadowing instructors and assistants; 20 percent of her time engaging in self-study; and ten percent of her time performing specific tasks assigned by, and under the supervision of, her teacher.

While participating in the second component of the training program, the beneficiary would observe the work of the petitioner's teachers, assistants, and administrative staff; attend all planning meetings; attend individual artist evaluation sessions; sit in on all Level 1 classes offered by the petitioner in order to observe teachers' activities; review the petitioner's historical documents, class curricula, teaching materials, student statements, evaluations, and teacher biographies; and attend art history lectures and visit museums, art openings, and master classes with the petitioner's founder. The petitioner claimed that during this three-month period of time the beneficiary would spend 50 percent of her time shadowing instructors and assistants; 30 percent of her time performing specific tasks assigned by, and under the supervision of, her teacher; and 20 percent of her time engaging in self-study.

While participating in the third component of the training program, the beneficiary would observe the work of the petitioner's teachers, assistants, and administrative staff; attend all planning meetings; attend individual artist evaluation sessions; sit in on all Level 2 classes offered by the petitioner in order to observe teachers' activities; review the petitioner's historical documents, class curricula, teaching materials, student statements, evaluations, and teacher biographies; and attend art history lectures and visit museums, art openings, and master classes with the petitioner's founder. The petitioner claimed that during this three-month period of time the beneficiary would spend 50 percent

of her time shadowing instructors and assistants; 40 percent of her time performing specific tasks assigned by, and under the supervision of, her teacher; and ten percent of her time engaging in self-study.

*Unavailability of Similar Training in the Beneficiary's Home Country*

The proposed training program satisfies 8 C.F.R. § 214.2(h)(7)(ii)(A)(1), which forbids approval of a petition when the petitioner fails to establish that similar training is unavailable in India, the beneficiary's home country. In its August 28, 2010 letter the petitioner claimed that "[t]here is a huge need for the type of teacher training" provided by its training program because the study of classical realism has "waned" in traditional college and university programs, and claimed further that classical realism as a style of painting originated in Western Europe and is not practiced or well-known in India, the beneficiary's home country. With regard to demonstrating the lack of similar training in India, the petitioner noted the difficulty in proving a negative, but claimed it had nonetheless contacted The Art Renewal Center, which accredits ateliers, and was told their records indicated no such programs in India. The petitioner also claimed it had found no evidence of similar programs in India itself.

On appeal, counsel claims the proposed training program was designed and developed by the petitioner's founder, that it follows his own personal philosophies, and that he owns no other ateliers anywhere in the world. The claims made by the petitioner and the arguments made by counsel are reasonable and establish that similar training is unavailable in India.

The petitioner has established that similar training is unavailable in the beneficiary's home country, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(1), and the director's contrary determination is hereby withdrawn.

*Placement into a Position which is in the Normal Operation of the Business and in which Citizen and Resident Workers are Regularly Employed and Productive Employment Beyond that which is Incidental and Necessary to the Training*

The director found that because the beneficiary received a prior grant of M-1 visa status to receive training at the beneficiary's institution, it was not clear that the beneficiary would not be placed into a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed or that she would not engage in productive employment beyond that incidental and necessary to the training. We do not agree. The instructor training program into which the petitioner seeks to place the beneficiary differs from its regular art instruction program. The beneficiary would not be taking painting classes as she did before but would rather be learning to become an instructor.

The petitioner has established 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, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(2). It has also established that the petitioner would not engage in productive employment beyond that which is incidental and necessary to the training, as required by 8 C.F.R. § 214.2(h)(7)(ii)(A)(3). Accordingly, the director's contrary determinations

are hereby withdrawn.

*Benefit to the Beneficiary in Pursuing a Career Outside the United States*

The director also concluded that the petitioner did not establish the training program would benefit the beneficiary in pursuing a career abroad. The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States, and 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.

In his decision denying the petition the director stated that it was “not clear” how the proposed training program would benefit the beneficiary in pursuing a career outside the United States. On appeal, counsel argues that participation in the proposed training program would continue the beneficiary’s previous education and provide her with the opportunity to bring a new method of teaching to India, and to eventually open her own atelier there.

Upon review, the petitioner has satisfied neither 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) nor 8 C.F.R. § 214.2(h)(7)(ii)(B)(4). The generalized statement that the beneficiary would bring a new method of teaching to India is too vague to satisfy either regulation, as the record contains no testimonial or documentary evidence regarding any demand for such teaching in India. Nor does the fact that the beneficiary could “eventually” open her own atelier in India satisfy either regulation either, as the record contains no evidence the beneficiary had any actual plans to do so as of the date the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). For all of these reasons, the petitioner has failed to satisfy 8 C.F.R. § 214.2(h)(7)(ii)(A)(4) and 8 C.F.R. § 214.2(h)(7)(ii)(B)(4).

*Extension of the Total Allowable Period of Practical Training Previously Authorized*

The director found the beneficiary’s previous grant of M-1 visa status to receive training at the beneficiary’s institution evidence that the training program is designed to extend her total allowable period of practical training, which is forbidden by 8 C.F.R. § 214.2(h)(7)(iii)(H). However, a grant of nonimmigrant status pursuant to section 101(a)(15)(M)(i) of the Act, 8 U.S.C. § 1101(a)(15)(M)(i), does not allow for the period of practical training referenced at 8 C.F.R. § 214.2(h)(7)(iii)(H). As the record does not indicate the beneficiary was ever granted status as a nonimmigrant student under section 101(a)(15)(F)(i) of the Act, 8 U.S.C. § 1101 (a)(15)(F)(i) or a period of optional practical training pursuant to such grant of status, 8 C.F.R. § 214.2(h)(7)(iii)(H) does not bar approval of this petition and the director’s contrary determination is withdrawn.

*Substantial Training and Expertise in the Proposed Field of Training*

Finally, the director found the beneficiary’s previous grant of M-1 visa status to receive training at the beneficiary’s institution and educational background in the art field evidence that she already possesses substantial training and expertise in the proposed field of training. We disagree. As we explained previously, the instructor training program into which the petitioner seeks to place the beneficiary

differs from its art instruction program. The beneficiary would not be taking painting classes but would instead learn to become an instructor. The petitioner has satisfied 8 C.F.R. § 214.2(h)(7)(iii)(C) and has established that its proposed training program is not on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training.

*Generalities with no Fixed Schedule, Objectives, or Means of Evaluation*

Beyond the decision of the director, we find that the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A), which forbids approval of a training program dealing in generalities with no fixed schedules, objectives, or means of evaluation. The petitioner stated on the Form I-129 that the training program would last 24 months. However, in the materials it submitted in support of the petition it described only 12 months of training. The petitioner also stated in its August 18, 2010 letter that the beneficiary would receive 27 hours of classroom instruction each week and spend three hours each week shadowing an art instructor teaching a class and assisting the instructor with the class. However, this is not consistent with the training plan submitted at the time the petitioner filed the petition, which stated that the beneficiary would spend 70 percent of her time shadowing instructors during the first component of the training program and 50 percent of her time shadowing instructors during the second and third components. These disparities are not indicative of a program with fixed schedules and objectives. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(A) and the petition must be denied for this additional reason.

*Physical Plant and Sufficiently Trained Manpower to Provide the Training Specified in the Petition*

The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) requires the petitioner to establish that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition. As discussed above, in its August 18, 2010 letter the petitioner stated that it would provide the beneficiary with 27 hours of classroom instruction per week. However, that assertion is not consistent with the training plan submitted at the time the petitioner filed the petition, and the record does not indicate who would provide this amount of classroom instruction to the beneficiary. Given that the petitioner employs only four individuals, it is not clear it has the manpower to provide 27 hours of classroom instruction to the beneficiary each week. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(iii)(G) and the petition must be denied for this additional reason.

*The Proposed Training Program Would be Provided Primarily At, or By, An Academic or Vocational Institution*

The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E)(I) precludes approval of a petition in which the proposed training program would be provided at, or by, an academic or vocational institution. The record is clear the beneficiary would be a student in an academic or vocational program. The petitioner stated explicitly in its June 9, 2010 letter that it was founded as an educational institution and throughout the filing referred to itself as a school and the beneficiary as a student. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(1)(ii)(E)(I) and the petition must be denied for this additional reason.

*Conclusion*

On appeal the petitioner has overcome the director's findings that similar training is unavailable in the beneficiary's home country; that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; that the beneficiary will not engage in productive employment beyond that which is incidental and necessary to the training; and that the beneficiary does not already possess substantial training and expertise in the proposed field of training. However, it has not overcome the director's finding that the proposed training would benefit the beneficiary in pursuing a career outside the United States. Beyond the decision of the director, the petitioner has also failed to establish that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; that it has the physical plant and sufficiently trained manpower to provide the training specified in the petition; and that the proposed training program would be provided at, or by, an academic or vocational institution.<sup>1</sup> Accordingly, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(H)(iii) of the Act and this petition must remain denied.

In these proceedings, the petitioner bears the burden of proof to establish eligibility by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). It has not met that burden and the appeal will be dismissed.

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

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<sup>1</sup> 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 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).