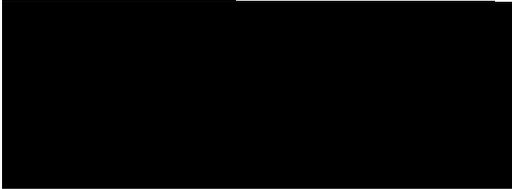


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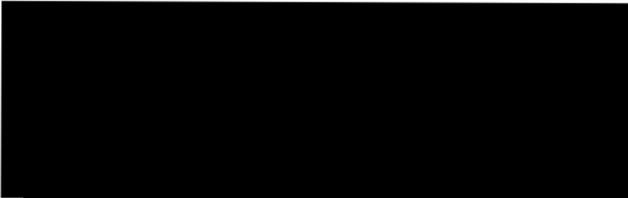
D4

FILE: SRC 04 133 50744 Office: TEXAS SERVICE CENTER Date: **JUL 27 2006**

IN RE: Petitioner: [Redacted]
Beneficiary: [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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter was appealed to the Administrative Appeals Office (AAO). The AAO issued a dismissal based on the petitioner's failure to file a brief in support of its appeal. The petitioner filed a motion to reopen. The motion will be granted. The director's decision will be withdrawn. The petition will be remanded.

The petitioner is a horse breeding and training facility that seeks to employ the beneficiary as a trainee. The director determined that the proposed training deals in generalities with no fixed schedule, objectives or means of evaluation and that it involves productive employment beyond that which is incidental to the training.

On appeal, counsel submits a statement asserting that the 12-page training program previously submitted establishes that a structured training program exists, and that it does not include any significant productive employment.

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:

(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;
 - (5) Describes the career abroad for which the training will prepare the alien;
 - (6) 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
 - (7) 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 record of proceeding before the AAO contains: (1) Form I-129; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) Form I-290B; (6) the AAO's dismissal decision; and (7) the petitioner's motion to reopen and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director found that the proposed training deals in generalities with no fixed schedule, objectives or means of evaluation. The petitioner intends to train the beneficiary in its practices in order to employ the beneficiary

as its agent in Europe for the breeding and sale of cutting horses. The petitioner submitted an extensive training schedule, which the AAO finds meets the terms of the regulations.

The director also found that the training involved productive employment beyond that which is incidental to the training. Counsel and the petitioner assert that only five percent of the training would include productive employment. While there is little in the training schedule to indicate that the beneficiary would be engaged in productive employment, the beneficiary will “receive room and board,” as well as \$30,000 in remuneration that the petitioner describes in its March 8, 2004 letter of support as a “small stipend for personal expenses and recreation.” This is a substantial salary for an individual in training, however, the petitioner has established that the beneficiary would not be engaged in productive employment.

On appeal, counsel asserts that CIS, and previously the Immigration and Naturalization Service, “have repeatedly approved virtually identical H-3 petitions. Such inconsistent treatment flies in the face of established principles of fundamental fairness and represents an inexplicable departure from established procedures.” This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the AAO is not able to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve 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. 1988). Neither CIS nor any other 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). The AAO is never bound by a decision of a service center or district director. *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).

The petition still may not be approved, however. The AAO notes that the beneficiary has been working with the petitioner in J-1 status for 12 months or more, which presents the question of whether the beneficiary possesses substantial training and expertise in the field of proposed training. In addition, while the petitioner provided evidence to establish that it has sold horses in Europe, there is no evidence in the record to establish a business plan to expand into Europe. Without this evidence, it is not clear that the training would benefit the beneficiary in pursuing a career outside the United States.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the beneficiary possesses substantial training and expertise in the field of proposed training and whether the training would benefit the beneficiary in pursuing a career outside the United States, and any other evidence

the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 31, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.