U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D4

FILE: EAC 07 046 51516 Office: VERMONT SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

for Michael T. Kelley
Robert P. Wiemann, 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 a show jumping training facility that seeks to employ the beneficiary as a trainee for a period of twenty-four 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 request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on three grounds: (1) that the petitioner had failed to submit copies of its training materials; (2) that the petitioner had failed to establish that the proposed training could not be obtained in South Africa, the beneficiary's home country; and (3) that the petitioner had failed to demonstrate that the proposed training would 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 November 27, 2006 letter of support, the petitioner stated the following:

> The Training Program provides trainees with two years of comprehensive training in equine management techniques and show horse training techniques, covering each major area of farm operation and providing a thorough and highly advanced education in the particular standards and practices employed at [the petitioner]. The intended period of training in the U.S. is twenty-four months.
>
> Established in 1993, [the petitioner] is a sport horse farm formed with the purpose of participating in national and international show jumping competitions . . . [The petitioner] is widely recognized for its reputation as a respected sport horse riding, training, and jumping competition operation. . . .

With regard to why it offers this program, the petitioner stated the following:

> In order to train and qualify [the beneficiary] to be [the petitioner's] agent, we have established a comprehensive show horse training program. The Training Program, once successfully completed, will ensure that [the beneficiary] is fully qualified and prepared to act as [the petitioner's] agent abroad. The training will require two years of comprehensive training[,] covering each major area of equine management and show horse training techniques.
>
> The Training Program is intended to provide trainees with a thorough knowledge of and experience with the particular standards and techniques that are employed by [the petitioner], including facilities layout and management; anatomy and physiology; nutrition and metabolism; conformation and locomotion; conditioning and training; advance competition training; medical and farrier care; and [sic] bloodstock and pedigree determinations; and sales and marketing. Upon completion of the Training Program, the trainee is expected to be fully qualified to follow the standards and practices established by [the petitioner] in all of the above-mentioned areas of emphasis. . . .

In the "Training Program Overview and Schedule" submitted with its letter of support, the petitioner provided extensive information regarding its proposed training program. According to the petitioner, the proposed training program would consist of eleven components.

The first component would consist of a four-week period of orientation, during which the beneficiary would receive an introduction to the concepts of the training program.

The second component of the proposed training program, entitled "Facilities Layout & Management," would last ten weeks. This component would be subdivided into two parts: (1) facilities layout; and (2) land management.

The third component of the proposed training program, entitled "Equine Anatomy & Physiology," would also last ten weeks. This component would also be subdivided into two parts: (1) anatomy; and (2) physiology.

The fourth component of the proposed training program, entitled '[redacted]' and [redacted] would also last ten weeks. This component would also be subdivided into two parts. During the first part, the beneficiary would study the digestive system of horses; the functions and properties of nutrients; the effects of proper nutrition on various horse activities at different stages of life; feeding for growth and performance; and avoidance of metabolic and nutritional disorders. During the second part of this component, the beneficiary would investigate the routes that nutrition passes within the body to its use at the cellular level.

The fifth component of the proposed training program, entitled "Equine Conformation and Locomotion," would also last ten weeks and be subdivided into two parts. During the first part of the fifth component, the beneficiary would participate in an in-depth study of the biodynamics, biomechanics, and biophysics of exercise; investigate the effect of conformation on use limitations, lameness potentiation, and irreparable breakdown. During the second part of this component the beneficiary would study therapeutic foot trimming and shoeing, and the roles those activities play in the maintenance of soundness and the treatment (or production) of lameness.

The sixth component of the proposed training program, entitled "Conditioning and Training Programs," would also last ten weeks and be subdivided into two parts. During the first part of this component, the beneficiary would study yearling conditioning and show jumping. During the second part, the beneficiary would study the petitioner's care and prevention of equine athletic injuries and the use of agents of physical rehabilitation, such as heat and cold, massage, electrical stimulation, therapeutic ultrasound, photon therapy, therapeutic laser, and magnetic fields.

The seventh component of the petitioner's proposed training program, entitled "Equine Training for Show Horse Competition," would last twelve weeks. It would be subdivided into five parts: (1) Advanced Instruction on Training for Competition; (2) Eventing Tools, Techniques, and Tricks for Jumping; (3) Eventing Tools, Techniques, and Tricks for Hunt Seat Riding; (4) Competition Aids; and (5) Competitive Judging.

The eighth component of the petitioner's proposed training program, entitled "Advanced Instruction on Medical and Farrier Needs of Show Horses," would last eight weeks. It would be subdivided into two parts: (1) farrier care; and (2) tack.

The ninth component of the petitioner's proposed training program, entitled "Bloodstock and Pedigree Determination," would last ten weeks. It would also be subdivided into two parts: (1) anatomy and conformation; and (2) pedigree selection.

The tenth component of the petitioner's proposed training program, entitled "Medical, Technical, and Veterinary Care," would last ten weeks. It would be subdivided into two parts: (1) veterinary care; and (2) farrier care.

The eleventh component of the petitioner's proposed training program, entitle "Sales and Marketing," would last ten weeks. It would be subdivided into two parts: (1) sales; and (2) marketing.

In his January 17, 2007 denial, the director found the petitioner's submission of a list of reference materials insufficient, as he had requested copies of the training materials themselves. He also found that the petitioner had failed to establish that the training is unavailable in South Africa, stating that the petitioner had not submitted evidence that the training program is so specialized that it cannot be received

in that country. Regarding the ability of the beneficiary to utilize his training abroad, the director stated the following:

> Despite the petitioner's claim that the beneficiary would enable the petitioner to expand sales and result in business relationships, the petitioner has yet to establish operations in South Africa . . . It is not sufficient that the employer's basis for the training program is based on their intent to establish an overseas operation in South Africa once the alien is trained in the business's specific practices and operational way of doing business.
>
> . . .
>
> Given the non-existence of the petitioner's business operations in South Africa, a training program geared toward the petitioner's specific practices and operational way of doing business with the intent to establish an overseas business upon the completion of the alien[s] training, has no merit. Having the intent to commence overseas business operations upon the beneficiary's successful completion of the U.S. training is not a valid basis for seeking an H3 alien trainee. . . .

On appeal, counsel states that the director erred in denying the petition, that he abused his discretion, and that he refused to follow the applicable regulations and agency precedent.

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

The AAO turns first to the director's finding that the petitioner had failed to submit copies of its training materials. Although the director requested copies of reference materials to be used throughout the training program in his December 13, 2006 request for additional evidence, the petitioner did not comply. Rather, it submitted a list of "Training Materials." In his denial, the director stated that, since the proposed training program is designed to train the beneficiary on the petitioner's specific practices and business operations, the petitioner would "clearly have to use training materials developed by the petitioner specifically for the training program."

On appeal, counsel offers the following explanation:

> [T]he fact that the petitioner does not have materials specifically created for its training program in no way leads to the conclusion that the training proposed by the petitioner for the beneficiary is not specific to [the petitioner's] specific practices and business operations . . . The petitioner is not in the business of creating such materials, nor would it make sense for the petitioner to use its resources to do so when there is an abundance of published materials that the petitioner can use for its classroom training. . . .
>
> The classroom forum is used primarily to introduce theoretical concepts and to provide advanced instruction in scientific and technical subject matters, which we believe are best taught in a traditional academic environment. The list of training and reference materials that was provided in response to the RFE are used during this component of the training program. Because the training materials are used to introduce theoretical concepts and provide advanced instruction on scientific and technical subjects, there is no need for the training materials to be specific to the petitioner.

The petitioner also submits copies of some of the reference materials on appeal. The AAO finds this submission, as well as counsel's explanation of the petitioner's failure to provide actual copies of the training materials rather than a list of materials to be used, reasonable. Similarly, the AAO also finds reasonable counsel's explanation as to why the training materials are not specific to the petitioner. Therefore, it withdraws this portion of the director's denial.

The director also found that the petitioner had failed to establish that the proposed training could not be obtained in South Africa, the beneficiary's home country. The AAO disagrees with the director's finding on this matter as well. 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 director raised this issue in his request for additional evidence. In its response, the petitioner stated the following:

> Because we provide advanced training which covers [the petitioner's] specific business practices and procedures, this training is only available in the United States.
>
> We do not have operations in South Africa. . . .
>
> We believe South Africa is the next major player in the show jumping world. We hope to prepare a key person to assist us in our activities in South Africa. . . .
>
> Although there are show jumping/hunter operations in South Africa, [the beneficiary] would not be able to obtain training in [the petitioner's] specific practices and business operations anywhere else in the world. . . .
>
> Given that [the petitioner] is home to some of the best trainers in the show jumping industry, we welcome the opportunity to train jumper/hunter riders – including those who demonstrate the potential to be elite equestrians – from around the world. . . .

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. 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 present case, however, the entire reason for creation of the training program is to train the beneficiary on the petitioner's own business practices. Moreover, the petitioner in this particular case has submitted sufficient evidence to demonstrate that its business practices are sufficiently unique that such knowledge could not be obtained at another show jumping training facility. The AAO finds that, in this case, the petitioner has established that the proposed training is not available in South Africa, and finds that the petitioner has satisfied 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*). Accordingly, the AAO withdraws that portion of the director's decision stating the contrary.

Finally, the AAO turns to the director's finding that the petitioner had failed to demonstrate that the proposed training would benefit the beneficiary in pursuing a career outside the United States. The AAO agrees. The regulation at 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States.

In his denial, the director stated the following:

> Given the non-existence of the petitioner's business operations in South Africa, a training program geared toward the petitioner's specific practices and operational way of doing business with the intent to establish an overseas business upon the completion of the alien's training, has no merit. Having the intent to commence overseas business operations upon the beneficiary's successful completion of the U.S. training is not a valid basis for seeking an H3 trainee. . . .

Counsel states the following on appeal:

> [T]here is no requirement in the applicable regulations that the petitioner have facilities in the beneficiary's home country in order to have a valid H-3 program. It is clear that in this case the officer created a new legal standard and then employed it to the detriment of the petitioner in violation of Due Process.
>
> [T]he officer ignored the petitioner's discussion of its expansion efforts overseas and its intent to employ the beneficiary abroad to serve as an agent to facilitate the company's expansion activities. While it is true that the petitioner does not currently have facilities in South Africa . . . the petitioner provided uncontroverted evidence that the training it was providing to the beneficiary was specifically designed to prepare the beneficiary to serve as its agent overseas. Indeed, the entire focus of the training program is to prepare the beneficiary to fill such a position.
>
> . . .
>
> The officer's decision to ignore the supporting evidence and create a new legal standard in this case reveals a clear disregard for the law and for the petitioner's right (and extensive effort) to be heard. As stated above, requiring that the petitioner have established business operations in the beneficiary's home country, the officer appears to have created out of thin air a new legal standard for a petitioner seeking an H-3 nonimmigrant classification . . . No where in the applicable regulations is there a requirement that a petitioner have overseas offices or facilities in order to have a valid H3 program. . . .
>
> . . .
>
> [I]t is clear from the officer's conclusion that he or she completely disregarded the petitioner's submitted evidence regarding future expansion plans and the fact that the training program was specifically designed to prepare the beneficiary to serve as its agent overseas. . . .

The AAO disagrees with counsel's analysis. The director did not create a new legal standard or disregard the law. As noted previously, 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*) requires the petitioner to demonstrate that the proposed training will benefit the beneficiary in pursuing a career outside the United States. In this case, the petitioner has demonstrated that the purpose of its proposed training program is to educate the beneficiary on the petitioner's specific business practices and operations so that the beneficiary may act as its agent in establishing operations in South Africa upon completion of the program. As noted previously, the AAO has accepted this proposition, and has found the petitioner in compliance with 8 C.F.R. §§ 214.2(h)(7)(ii)(A)(*1*) and 214.2(h)(7)(ii)(B)(*5*).

Having made such a demonstration, however, compels the petitioner to further demonstrate that there is a setting in which the beneficiary will be able to use his newfound knowledge. Since the beneficiary's training will be specific to the petitioner, an operation run by the petitioner would be the only setting in which he would be able to use the knowledge.

The petitioner has asserted, as has counsel, that the beneficiary will aid it in establishing operations in South Africa. However, the question is not whether CIS or the AAO believes the petitioner, it is whether the petitioner has met the regulatory requirements. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). In this particular case, since the proposed training is specific to the petitioner, and the only setting in which the beneficiary would utilize his skills would be for the petitioner in South Africa, the petitioner must document that it actually has plans to commence operations in South Africa upon completion of the training. The record, as presently constituted, contains no information or evidence of the petitioner's expansion plans, beyond training the beneficiary. The petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*).

Accordingly, the petition may not be approved, and the AAO will not disturb the director's denial of the petition.

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.