U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: WAC 07 800 05726 Office: CALIFORNIA SERVICE CENTER Date: MAR 31 2008

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. Kelly
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 The director's decision will be withdrawn and the matter remanded to the service center for issuance of a new decision.

The petitioner is an equine operation 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 two grounds: (1) that the petitioner had failed to demonstrate that the proposed training cannot be obtained in the Netherlands, the beneficiary's home country; and (2) that the petitioner had failed to demonstrate that it has the physical plant and 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 its February 27, 2007 letter of support, the petitioner stated the following:

> [The petitioner] wishes to enroll and train [the beneficiary] in its International Equine Management [IEM] Training Program at its facility in New Jersey. Thereafter, once [the

> beneficiary] has completed his training, he will return to Europe to continue his career with our organization in the equine genetics industry.

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

> The purpose of this training program will be to prepare such individuals to return to our operations in Germany and to advance our business activities in that country and other parts of Europe.
>
> * * *
>
> In response to the extremely competitive and increasingly international scope of the equine industry, [the petitioner] has undertaken to establish a comprehensive management training program. . . .
>
> The IEM Training Program is intended to provide trainees with a thorough knowledge of and experience with the particular standards and practices that are employed in the U.S. by [the petitioner] . . . Upon completion of the IEM Training Program, the trainees are expected to be fully qualified to manage and/or expand [the petitioner's] international operations. . . .

The petitioner provided extensive information regarding its proposed training program. According to the petitioner, the proposed training program would provide a total of 4160 total hours of instruction. The beneficiary would spend 1300 hours in classroom instruction, and the petitioner submitted a detailed breakdown of how those 1300 hours would be spent. The remainder of the beneficiary's time would be spent in group and individual field instruction. The petitioner explained that any productive labor would be incidental to the training program, and that it would constitute no more than five percent of the beneficiary's time.

The director found that the petitioner had failed to establish that the proposed training could not be obtained in the Netherlands, the beneficiary's home country. The AAO disagrees. 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 her request for additional evidence. In its response, the petitioner outlined the unique qualifications of one of the individuals who would assist in the training, and also stated the following:

> The opportunity to train alongside [the trainer] and learn about [the petitioner's] and [the trainer's] specific style of operations and training techniques is only available in the United States . . . this training is so specific to our farm . . . that it would not be available to the beneficiary anywhere else in the world.
>
> Our program is carefully tailored to teach the trainee advanced medical and managerial concepts employed specifically at [the petitioner's farm]. Further, given our unique position in the genetic seed stock industry, our focus on genetic improvement has resulted in a nucleus of animals that consistently ranks among the highest quality in the nation. No other training could ever teach someone how we conduct business or care for and

> train our horses as we do not teach this anywhere other than on our farm nor are our approaches adopted by other operations. . . .

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, the primary reason for creation of the training program is to train the beneficiary on the petitioner's particular business practices. 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 equine facility. The AAO finds that, in this particular case, the petitioner has established that the proposed training is not available in the Netherlands, 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.

The director also found that the petitioner had failed to establish that it has the physical plant and sufficiently trained manpower to provide the training specified. The AAO disagrees. The regulation at 8 C.F.R. § 214.2(h)(7)(iii)(G) precludes approval of a petition in which the petitioner has not established that it has the physical plant and sufficiently trained manpower to provide the training specified.

In her denial, the director stated that the petitioner had not explained how the petitioner's managerial and medical staff would be able to train the beneficiary and still perform their job duties.

The AAO disagrees with the director's finding. The petitioner has submitted detailed information regarding the identities of the individuals who will provide the training, as well as their professional qualifications.

On appeal, counsel states the following:

> The petitioner also provided evidence relating to its training personnel, who include internationally renowned competitors, seasoned farm managers, accomplished veterinarians, etc. In addition, it explained how the beneficiary would proceed through rotations, gaining training in specific areas under the guidance and expertise of the training professionals and freeing up these professional[s] after such training has been provided.

The AAO agrees with counsel—in this case, the petitioner has demonstrated, via the detailed information contained in the record, how its staff will be able to manage the beneficiary's training and still manage the petitioner's operations. Moreover, the AAO notes that, although the petitioner stated on the Form I-129 that it has 12 employees, the petitioner's organizational chart indicates that it utilizes the services of many subcontractors, which would lessen the overall impact on its operations of the time spent by the trainers with the beneficiary. The AAO finds the petitioner's explanation reasonable.

For all of these reasons, the petitioner has overcome the grounds of the director's denial, and the director's decision is withdrawn.

However, the petition as presently constituted may not be approved. 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. As noted above, the reason for creation of the training program at issue here 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 his newfound knowledge 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 that, upon completion of the training program, the beneficiary will "return to our operations in Germany and to advance our business activities in that country and other parts of Europe." 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 Europe, the petitioner must document that it actually has plans to commence operations in Europe upon completion of the training. Although counsel asserts on appeal that the petitioner "already has an established facility in Germany," the record, as presently constituted, contains no information or evidence regarding the petitioner's established facility in Germany, or of any European expansion plans, beyond training the beneficiary. Nor has the petitioner submitted any evidence, beyond the assertions of record, to demonstrate that it is in the process of setting up operations, or that it is currently operating, in Europe. 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 not satisfied 8 C.F.R. § 214.2(h)(7)(2)(A)(*4*). Therefore, the petition may not be approved at this time.

However, the director did not address this issue. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the petitioner has established that the proposed training would benefit the beneficiary in pursuing a career outside the United States. Specifically, the petitioner must submit documentary evidence to establish that it is currently operating in, or that it has specific plans for expansion into, in Europe. Absent such information, the record does not establish that the proposed training would benefit the beneficiary in pursuing a career outside the United States, since the proposed training is specific to the petitioner and the only setting in which he would utilize these skills would be for the petitioner. 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 rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's May 16, 2007 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.