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U.S. Citizenship
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FILE: WAC 03 262 53934 Office: CALIFORNIA SERVICE CENTER Date: **AUG 16 2005**

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

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In order to employ twelve beneficiaries as exercise riders for a period of eight months, the petitioner, a thoroughbred and quarter horse racing business, endeavors to classify them as temporary nonagricultural workers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

The director denied the petition, stating the following:

After a thorough review of the Service record, the petitioner has not met the burden of proof required to establish that the position offered is to meet a temporary need due to a seasonal need and [is not] unpredictable.

On appeal, the petitioner contends that the director erred in denying the petition.

The statute at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(ii)(b), defines an H-2B temporary worker as an alien:

[H]aving a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country

The test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is seasonal.

In order to establish that the nature of its need is "seasonal," the petitioner must demonstrate that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(2).

The petitioner will not employ the beneficiaries directly. Rather, individual trainers at the Turf Paradise Racetrack will employ the beneficiaries. The Turf Paradise Racetrack is open from October until May; it is closed June through September. The petitioner contends that this period of closure (June through September) establishes that its need for the beneficiaries' services is seasonal.

However, the petitioner's contention fails. In its response to the director's notice of intent to deny the petition, the petitioner stated that "[s]o far as Turf Paradise is concerned, it is closed from June through

September and there is no need for any exercise riders.” While Turf Paradise may be closed from June through September, the petitioner concedes, and submits evidence to verify, that other trainers, at other racetracks, utilize the beneficiaries’ services during this time. The petitioner submits H-2B approval notices covering the period June through September, during which it sponsored the beneficiaries to work in the same occupation at the Yavapai Downs Racetrack, also located in Arizona. On the Form I-290B, the petitioner stated that “the beneficiaries work for totally different trainers at Turf Paradise than at Yavapai Downs, as evidenced by the labor certifications submitted with each petition.”

The director was correct to deny the petition.

The record demonstrates that the beneficiaries will work at one racetrack during one part of the year and another racetrack at another part of the year. This need cannot be considered “temporary” and “seasonal.” As noted above, the test for determining whether an alien is coming “temporarily” to the United States to “perform temporary services or labor” is whether the need of the petitioner for the duties to be performed is temporary. Clearly, need here is not temporary, and the petitioner requires their services throughout the entire year.

If the petitioner is experiencing a severe labor shortage, that shortage may be alleviated through the issuance of immigrant visas. The services to be performed by the beneficiaries are ongoing and the petitioner’s need to have workers perform these services is not seasonal and temporary.

The petitioner asserts that Citizenship and Immigration Services (CIS) has approved identical petitions in the past, both for the petitioner and for other, similar organizations. However, 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 instant case or were approved in error, no such determination may be made without review of the original records in their entirety. If the previous nonimmigrant petitions were in fact approved based upon the same evidence contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO’s authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *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 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.