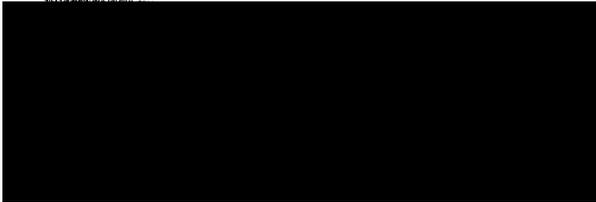


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FILE: WAC 03 247 52307 Office: CALIFORNIA SERVICE CENTER Date: JUN 15 2005

IN RE: Petitioner:  
Beneficiary:



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 the beneficiary as a groom for an unspecified period of time, the petitioner, a horse racing stable, endeavors to classify the beneficiary as a temporary nonagricultural 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).

The director denied the petition on the basis that the petitioner had failed to obtain a temporary labor certification from the Department of Labor (DOL), or a notice stating that such certification could not be made, prior to filing the H-2B petition.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states the following:

The petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a labor certification determination as required by paragraph (h)(6)(iv) of this section.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(E) states the following:

After obtaining a determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I-129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

The regulation at 8 C.F.R. § 214.2(h)(6)(iv)(A) stipulates that an H-2B petition for temporary employment in the United States be accompanied by a labor certification determination that is either: (1) a certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or (2) a notice detailing the reasons why such certification cannot be made.

The instant H-2B petition was received at the service center on September 2, 2003 without a temporary labor certification or notice detailing the reasons such a certification could not be made. Absent such evidence, the petition cannot be approved, as noted above, and the director properly denied the petition.

On appeal, the petitioner asserts that it has obtained the requisite temporary labor certification and submits a copy of a certified Form ETA 9035E. However, the Form ETA 9035E is not a temporary labor certification; it is a labor condition application (LCA), which is not a component of an H-2B petition. This LCA is therefore irrelevant to this proceeding, and the AAO will disregard it.

The petitioner also submits a copy of the labor certification it submitted when the H-2B petition was initially filed. However, it is still not certified by the Department of Labor (DOL).

The petitioner also submits a letter from Nor-Cal Racing Consultation, dated May 3, 2004, and asserts that this letter qualifies as a notice detailing the reasons why the DOL cannot certify the temporary labor certification. However, a "notice detailing the reasons why such certification cannot be made" as described in 8 C.F.R. § 214.2(h)(6)(iv)(A) comes from the DOL, not from any organization that a petitioner chooses.

As such, the record still lacks either a temporary labor certification or a notice detailing the reasons such a certification could not be made. Moreover, even if the petitioner were to now obtain either of these documents, the failure to procure one of them prior to filing the H-2B petition now precludes the petition's approval. Neither the statute nor the regulations cited above allow for the acceptance of a temporary labor certification obtained subsequent to the filing of an H-2B petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A nonimmigrant visa petition may not be approved at a future date 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).

Finally, the AAO notes that the writer of the letter from Nor-Cal Racing Consultation asserts that an immigration attorney practicing in the area of horseracing has acted inappropriately. However, there has been no showing that this particular attorney played any role in the instant case. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has supplied none of this.

Accordingly, 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.