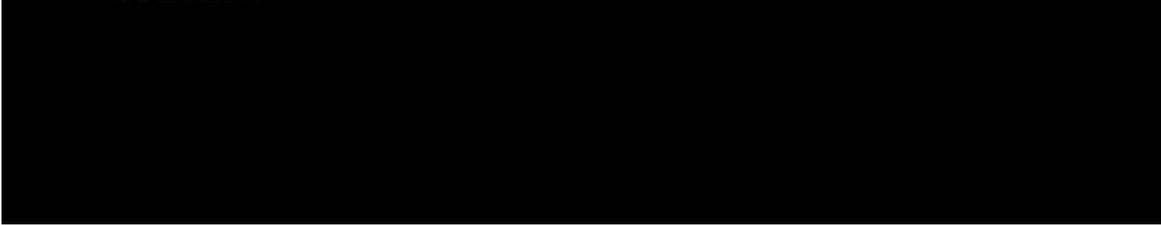




U.S. Citizenship  
and Immigration  
Services

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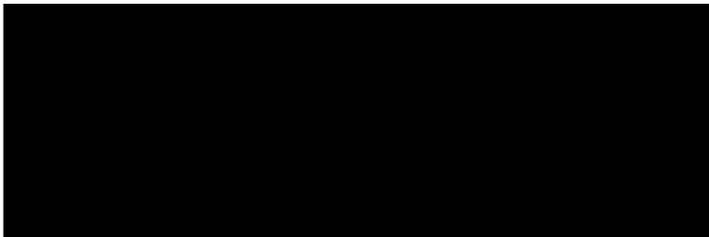
IN RE: Petitioner:

Beneficiaries



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:



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 nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the petition will be denied.

The petitioner engages in the business of thoroughbred horse racing. It desires to employ the beneficiaries as thoroughbred racehorse grooms pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) for ten months. The Department of Labor (DOL) determined that a temporary certification by the Secretary of Labor could be made. The director determined that the petitioner had not established that the temporary labor certification submitted for 39 workers had not previously been used in another proceeding. The director also determined that the petitioner had not established itself as the actual employer or agent.

Counsel submits a brief in support of the appeal. In his brief, counsel states that the petitioner established that the total number of workers on the labor certifications had not previously been used by Citizenship and Immigration Services (CIS). Counsel also states that the petitioner established the required agency relationship between itself and the persons named on the temporary labor certifications as required under the law. Counsel would like to present oral argument in order to fully explain the dire need for the temporary workers listed on the petition, as well as fully explain the [REDACTED] role in the petition.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. Moreover, the written record of proceedings fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

The AAO disagrees with the director's decision in part. Upon careful review of the entire record of proceeding, the director's decision that the temporary labor certification submitted for 39 workers had previously been used in a previous proceeding is not substantiated by the record. The director also found that the petitioner did not establish itself as the actual employer or agent. The AAO finds that the petitioner established itself as an agent but did not submit all documentation required of an agent for multiple employers. The AAO will dismiss this appeal.

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

an alien having 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 regulations stipulate that an H-2B petition for temporary employment in the United States shall 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. 8 C.F.R. § 214.2(h)(6)(iv)(A).

On January 9, 2006, the petitioner, [REDACTED] filed the instant petition for 248 thoroughbred racehorse grooms for the prime recurring racing season of February 1 through November 25, 2006. Seven temporary labor certifications certified by the DOL accompanied the instant petition for a total of 299 workers.<sup>1</sup> The petitioner submitted six original temporary labor certifications certified by the DOL for a total of 260 temporary workers and a copy of a seventh temporary labor certification certified by the DOL for the remaining 39 workers.

On February 2, 2006, the director issued a notice of intent to deny requesting the petitioner to provide the original temporary labor certification for the 39 temporary workers. The petitioner responded by stating it was unable to provide the original temporary labor certification because it was never received by the petitioner. On February 21, 2006, the petitioner submitted a final determination notice and a letter from the DOL confirming the issuance of an H-2B non-agricultural temporary labor certification for the employer, [REDACTED] a member, for 39 stable attendants from February 1, 2006 until November 25, 2006.

On March 6, 2006, the director denied the petition stating that the petitioner had not established that the certified temporary labor certification was not previously used for the 39 temporary workers. The AAO disagrees with the director's reasoning. As stated in the director's decision, if the temporary labor certification was utilized by the petitioner for the 39 temporary workers, the other temporary labor certifications certified and submitted with the petition authorized the temporary employment of 260 workers. Therefore, there were enough visa allocations available for the 248 temporary workers named in the instant petition without even utilizing the 39 visa allocations named on the temporary labor certification in question. It is worth emphasizing that each petition filing 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).

The director also determined that that the petitioner had not established itself as the actual employer or agent.

The regulation at 8 C.F.R. § 214.2(h)(2)(i) states in pertinent part:

*(F) Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

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<sup>1</sup> Another petition, SRC-06-076-51657, was simultaneously filed for 51 workers. The director states in her decision that the petitioner requested that the two petitions be adjudicated together by stating "Please note that all supporting documents are included in the petition for 248 returning workers included alongside this petition for 51 new workers."

(2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

Counsel states in his brief that the petitioner [REDACTED] filed the instant petition on behalf of its members who are the actual employers. Counsel states that under the pertinent law at both 8 C.F.R. § 214.2 and 20 C.F.R. § 655, an association of employers is allowed to be a petitioner for the H-2B classification. Counsel states that KY HBPA filed the petition as an agent, which is defined by 8 C.F.R. § 214.2(h)(2)(i)(F) as “a person or entity authorized by the employer to act for, or in place of, the employer as it[s] agent.”

The Form I-129, Petition for a Nonimmigrant Worker, indicates at question two that the beneficiaries will be employed by individual [REDACTED] members. All seven of the Forms ETA 750 have listed as the name of the employer a [REDACTED] member, and then the member's name. Also, on the Forms ETA 750, each member has signed his name as the employer and [REDACTED] is listed as the agent. Each Form ETA 750 has a different name as the employer. Counsel states in the aforementioned brief that the members are the actual employers. The AAO agrees and finds that the petitioner [REDACTED] is the agent and the members listed on the Forms ETA 750 will be the employers.

The AAO notes that the beneficiaries will not be working at one location throughout the intended employment period. The Forms ETA 750 state that the beneficiaries will work at affiliated racetracks. The affiliated racetracks are listed in the record of proceeding as Turfway Park, Florence, KY; Keeneland Race Course, Lexington, Ky; Churchill Downs, Louisville, Ky; Ellis Park, Henderson, KY, and other affiliated racetracks/stables as needed by [REDACTED] trainers/employers for events/races. Therefore, the petition involves multiple employers, and multiple work locations, and the conditions specified in the above regulation have not been followed. The agent in the instant petition has not submitted an itinerary specifying the dates of each service or engagement, the names and addresses of the employers, and the names and addresses of all the establishments, venues, or locations where the services will be performed. As no specific itinerary listing the dates and places of the proposed employment have been provided, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established the temporary nature of the employment.

The petitioner seeks approval of the proffered position as a peakload need. To establish that the nature of the need is “peakload,” the petitioner must demonstrate that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation. 8 C.F.R. § 214.2(h)(6)(ii)(B)(3). In this instance, the employers have not shown that they are experiencing an unusual increase in the demand for their services that is different from their ordinary workload. The employers have not carefully documented the

peakload situation through data on its usual workload and staffing needs, and the special needs created by the current situation or contracts. The employers have not demonstrated that the additional personnel needed to fill the peakload positions will be engaged in different duties or have different specialty skills than the workers currently employed by the employer. The employers have not provided evidence of their permanent staff and the contract(s) showing a clear termination date. For this additional reason, the petition may not be approved.

Counsel states this is the same H-2B petition that has been approved by CIS since the year 2000. However, each nonimmigrant proceeding is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same assertions that are contained in the current record, the approval 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 (6<sup>th</sup> 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 beneficiary, 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 (5<sup>th</sup> 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. Here, the petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The petition is denied.