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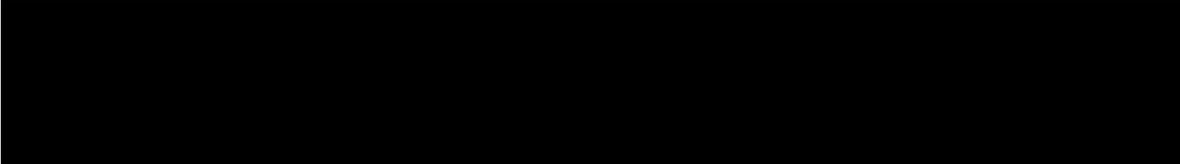
U.S. Department of Homeland Security
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**U.S. Citizenship
and Immigration
Services**

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FILE: EAC 07 152 51416 Office: VERMONT SERVICE CENTER Date: **AUG 01 2007**

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The decision of the director will be withdrawn and the petition will be denied.

The petitioner is a benevolent and protective association whose members include owners and trainers of thoroughbred horses. The association has filed a single H-2B petition on behalf of 29 employers who belong to the association. Through this petition, each of these employers seeks to employ a distinct group of named workers as thoroughbred racehorse grooms, pursuant to the provisions at section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b), for temporary nonagricultural workers. The petition identifies the period of intended employment as April 23, 2007 to December 5, 2007.

The record of proceeding includes temporary labor certification applications filed by 29 association members. The Department of Labor (DOL) declined to award a temporary labor certification to only one of these employers, a trainer named [REDACTED]

The director determined that sufficient countervailing evidence has been submitted to show that qualified persons in the United States are not available, that the employment policies of the Department of Labor have been observed and that the need for the services to be performed is temporary.

The AAO disagrees with the director's decision. As discussed below, the petitioner has not established that it is eligible for the benefit sought.

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 April 30, 2007, the petitioner, [REDACTED] filed the instant petition for 134 thoroughbred racehorse grooms for the prime recurring racing season of April 23, 2007 to December 5, 2007.

It is clear that the petitioner is not filing as an employer: the record does not include a temporary labor certification application filed by [REDACTED] and approved or denied by DOL for the 134 jobs that are the

subject of the petition; the record includes temporary labor certification applications submitted by 29 entities as employers, each for a portion of the 134 workers named as beneficiaries; each of those 29 entities has submitted a document attesting that it will be the employer of a specific set of workers, specifically named in that document, that is part of the total of 134 workers on whose behalf this petition was filed; and there is no evidence of record, that the petitioner has guaranteed the wages and other terms and conditions of employment by contractual agreement with the beneficiaries of the petition, as 8 C.F.R. § 214.2(h)(2)(i)(F)(1) requires of agents who are employers.

In light of the controlling regulations, discussed below, the AAO finds invalid the petitioner's attempt to use a single petition for multiple employers each of whom will be the sole employer of separate groups of beneficiaries.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) states the general rule that the entity filing an H-2B petition must be the "United States employer" that seeks to classify the alien. In the present case there are 29 distinct employers.

As discussed above, because the petitioner is not itself the employer, it must be filing the petition as an agent of the 29 employers. The regulation at 8 C.F.R. § 214.2(h)(2)(i)(C) allows an agent to file one petition that involves more than one employer in only one situation, namely, where the beneficiary or beneficiaries of the petition will each work for several employers during the period of intended employment. Such is not the case here. This regulation states:

Services or training for more than one employer. If the beneficiary will perform nonagricultural services for . . . more than one employer, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform services or receive training, unless an established agent files the petition.

The pertinent sections of the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F) on agents state:¹

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 it agent. A petition filed by a United States agent is subject to the following conditions;

(1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

¹ Section 38 C.F.R. § 214.2(h)(2)(i)(F)(3) is not relevant, as it addresses foreign employers.

(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.

The AAO notes that 8 C.F.R. § 214.2(h)(2)(i)(F)(1), above, is not relevant because, as noted earlier in this decision, the petitioner is not “performing the function of an employer.”

The limitation at 8 C.F.R. § 214.2(h)(2)(i)(C) - that an agent may file as the H-2B petitioner for multiple employers only when a beneficiary or beneficiaries will be working for multiple employers – applies also to situations addressed by 8 C.F.R. § 214.2(h)(2)(i)(F). Relevant regulations are to be read as a whole. Neither 8 C.F.R. § 214.2(h)(2)(i)(F) nor any other regulatory provision exempts that regulation from the limitation of 8 C.F.R. § 214.2(h)(2)(i)(C). Accordingly, read in conjunction with the limitation on the use of agents as petitioners at 8 C.F.R. § 214.2(h)(2)(i)(C), “the H petition involving multiple employers” addressed at 8 C.F.R. § 214.2(h)(2)(i)(F) means the H petition involving multiple employers as addressed at 8 C.F.R. § 214.2(h)(2)(i)(C), that is, where “the [petition’s] beneficiary will perform nonagricultural services for . . . more than one employer.”

Because each beneficiary in the instant petition will work for only one employer, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(F)(2) is not relevant to the present petition. Consequently, the relevant regulations foreclose the agent’s attempt in the instant case to file as the petitioner for multiple employers each of which seeks to hire a distinct group of beneficiaries that would work for that employer alone.

Further, the petitioner has not established that the petition involves the type of workers addressed by 8 C.F.R. § 214.2(h)(2)(i)(F), whose introductory paragraph directs this regulation to “workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers.” There is no evidence that the type of workers sought in this petition are traditionally self-employed; and the evidence of record establishes that the beneficiaries are not here seeking employment by multiple employers.

The petition must also be denied on this separate and independent basis: the petitioner had not filed a temporary labor certification application. The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) states:

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.

For the reasons discussed above, the director’s decision will be withdrawn, and the petition will be denied.

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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 decision of the director is withdrawn and the petition is denied.