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**U.S. Citizenship
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IN RE: Petitioner:

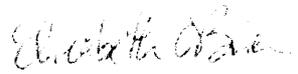
Beneficiaries:

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 director of the service center issued a decision recommending approval of this H-2B nonimmigrant visa petition, and he certified the decision to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(2)(ii). The AAO withdrew the director's decision and denied the nonimmigrant visa petition. The matter is now before the AAO on a motion to reopen its previous decision. The motion will be dismissed, although the petition is moot due to the passage of time.

The petitioner is a benevolent and protective association whose members include owners and trainers of thoroughbred horses. The association filed a single H-2B petition on behalf of 29 employers who belong to the association. Through this petition, each of these employers sought 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 (the 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. As that period has expired, the petition is moot.

The record of proceeding includes temporary labor certification applications filed by 29 association members. The Department of Labor (DOL) awarded a temporary labor certification to all but one of these employers. All of the DOL determinations on the 29 labor certification applications were filed with the Form I-129 (Petition for Nonimmigrant Worker).

The AAO withdrew the director's decision and denied the petition because it found that the petitioner had not established that it is eligible for the benefit sought.

The AAO's Prior Decision

The petitioner, [REDACTED], filed the instant petition for 130 thoroughbred racehorse grooms for the prime recurring racing season of April 23, 2007 to December 5, 2007. The AAO determined that the petitioner was filing not as the employer of the 29 groups of grooms, but rather as an agent of the 29 employers that seek to hire them. The AAO determined that the Citizenship and Immigration Services (CIS) regulations on H petitions do not allow an agent to file such a petition. The AAO evaluated the issue as follows:

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. . . .

. . .

[T]here 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 AAO found that the petitioner did not qualify as an agent under the regulations. The AAO also denied the petition because the entity that filed it had not filed an application for temporary labor certification as required by the regulation at 8 C.F.R. § 214.2(h)(6)(iii), which 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 determination as required by (h)(6)(iv) or (h)(6)(v) of this section.

Analysis of the Motion for Reconsideration

To merit reversal of the decision which it addresses, a motion for reconsideration must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. See 8 C.F.R. § 103.5(a)(3). For the reasons discussed below, the AAO finds that the petitioner has not satisfied these standards. Accordingly, although the petition is moot due to the passage of time, the motion shall be dismissed, and the AAO's previous decision shall be affirmed.

On motion counsel asserts that the AAO's decision should be overturned on the grounds that the AAO decision (1) misinterprets the relevant regulations, and (2) conflicts with "precedent established by USCIS in routinely, consistently granting such petitions in years past." Counsel also appears to assert that there is a conflict between CIS regulations and the DOL policy that precludes the filing of H-2B temporary labor certification applications by an association or organization on behalf of its members.

In light of the motion's assertions about the misinterpretation of regulations, the AAO reconsidered the application of the following provisions at 8 C.F.R. § 214.2(h)(2)(i) to the facts in this proceeding:

(A) *General.* A United States employer seeking to classify an alien as an H-1B, H-2A, H-2B, or H-3, temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, only with the USCIS Service Center which has jurisdiction in the area where the alien will perform services, or receive training, even in emergent situations, except as

provided in this section or as specifically designated by USCIS via notice in the Federal Register.

(B) *Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

(C) *Services or training for more than one employer.* If the beneficiary will perform nonagricultural services for, or receive training from, 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.

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay shall conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.

...

(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[:]

(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.

(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.

...

On motion, counsel asserts that the AAO misinterpreted the regulations at 8 C.F.R §§ 214.2(h)(2)(i)(C) and (h)(2)(i)(F). Counsel states that KYHBPA “clearly acts as an agent for the members who are the individual employers [of the horse groomers],” and that the regulation at 8 C.F.R § 214.2(h)(2)(i)(F)(2) authorizes it to file the present petition. Counsel further contends that the AAO decision conflicts with the regulations at 8 C.F.R §§ 214.2(h)(2)(i)(C) and (F) by stating that an agent may file a petition for multiple employers only if the beneficiaries work for multiple employers.

The AAO acknowledges that the language at 8 C.F.R § 214.2(h)(2)(i)(F)(2) upon which counsel relies states that 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.” However, counsel overlooks the fact that this language is qualified by the main paragraph at 8 C.F.R § 214.2(h)(2)(i)(F). This paragraph limits the H petitions which such agents may file to “petitions involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, or in cases where a foreign employer authorizes the agent to act on its behalf.” As the record of proceedings does not establish that the petition falls within any of these categories, counsel’s arguments fail.

Lack of a Labor Certification Application Filed with DOL by the Petitioner

Counsel correctly notes that the fact that the petitioner had not filed an application for labor certification was a separate and independent basis of the AAO’s decision. The regulation at 8 C.F.R. § 214.2(h)(6)(iii)(C) requires that an H-2B petitioner file with DOL an application for labor certification prior to filing the petition:

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 (h)(6)(iv) or (h)(6)(v) of this section.

Counsel also correctly notes that DOL does not allow associations of employers to file a labor certification application in situations like the one in this petition. Counsel quotes the following provision of the DOL

Employment and Training Administration's Training and Employment Guidance Letter (TEGL) 21-06, Procedures for H-2B Temporary Labor Certification in Non-Agricultural Occupations (April 4, 2007):¹

An association or other organization of employers is not permitted to file master applications on behalf of its membership under the H-2B program.

Counsel summarizes the interplay between 8 C.F.R. § 214.2(h)(6)(iii)(C) and the policy of TEGL 21-06 as follows:

Simply stated, as the Temporary Labor Certification is required to be employer specific, that certification would be impossible to obtain in the scenario indicated by the AAO requiring the employee to work for multiple employers.

The AAO first notes that the acceptability of applicants for labor certification is solely a matter for DOL's determination in the exercise of its responsibilities with regard to the protection of U.S. workers' access to jobs, and wages and working conditions. Thus, the CIS regulation at 8 C.F.R. § 214.2(h)(6)(iii)(D) states:

The Secretary of Labor and the Governor of Guam shall separately establish procedures for administering the temporary labor certification program under his or her jurisdiction.

That DOL does not allow associations/organizations of employers to apply for labor certification does not conflict with CIS regulations, as 8 C.F.R. § 214.2(h)(6)(iii)(C) automatically integrates into the H-2B regulations acceptance of DOL's labor certification process.

Counsel's summary statement of the interplay between 8 C.F.R. § 214.2(h)(6)(iii)(C) and TEGL 21-06 misconstrues the TEGL 21-06 policy as being a general prohibition against the filing of a labor certification application that involves an employee working for more than one employer. In fact, the policy addresses only one category of labor certification applicants, namely, an employers' association or organization that seeks to file "master applications" on behalf of its membership. Neither the TEGL policy nor its interplay with 8 C.F.R. § 214.2(h)(6)(iii)(C) prohibit the employers involved in this petition from using the H-2B process to petition for the temporary workers that they desire.

Also, the AAO is not a proper venue for a collateral attack against a DOL policy on the management of its labor certification program.

The regulation at 8 C.F.R. § 214.2(h)(6)(iii) proscribes filing an H-2B petition if the petitioner has not first applied for labor certification and received a determination on the application. The AAO found that the petitioner had not complied with this regulation.

¹ This paragraph remains intact in Change 1 to (TEGL) 21-06, which was issued on June 25, 2007.

The “Precedent *Sub Silentio*” Argument

Under the heading “Precedent Sub Silentio” counsel relies upon what he describes as a history of routine approvals of H-2B petitions filed by “associations such as [the petitioner], who file said petition on behalf of members.” Counsel includes “copies of 120 nonimmigrant visas previously issued by foreign consulates as a result of those H-2B approvals,” and counsel states that the visas indicate that “each case was approved by Service Center Directors for associations such as the Florida Horseman’s Benevolent Association and the New York Thoroughbred Association.”

Counsel argues as follows, verbatim and italicized as in the original:

Each of the herein-referenced cases [that is, those to which the visa copies relate] was filed exactly the same as the instant case, with an I-129 petition submitted by an association. Between the time of the herein-referenced approvals and the reversal of the approval in the instant case, there has been no change to CIS regulations of filing requirements. Moreover, and more importantly, as a result of the past approvals USCIS has created a *precedent sub silentio*, a uniform, previously uninterrupted course of practice, by recognizing that an association may indeed act as a petitioning agent for its members. Courts routinely rule that such precedent creates an established pattern and practice upon which future applicants justifiably come to rely – as in the instant case – it must out of fairness, justice and principles of equity apply to subsequent applicants as well. CIS has not changed its regulations on this matter and, as such, must be held to its established pattern and practice of business, deviation from which will greatly and irreparably harm the petitioner and its members.

[DOL] did recently change its regulations to proscribe associations from filing Temporary Labor Certifications on behalf of members. However, USCIS has promulgated no such regulation barring associations from filing on behalf of members and/or operating as an agent on their behalves.

The record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. It must be emphasized 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 that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record presently before the AAO, including the visa copies, does not establish that AAO erred in its decision to deny the present petition.

If the previous petitions to which the visa copies relate were filed by employer associations or employer organizations on behalf of member employers seeking to employ H-2B workers as in the present petition, the approvals were erroneous, for the reasons discussed in this decision. 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). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Further, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel cites no precedent decision for the proposition that past practices involving the type of petition now before the AAO binds the AAO as a “precedent *sub silentio*.”

For the reasons discussed presented in this decision, the evidence of record fails to establish that the decision that is the subject of this motion is incorrect.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated August 1, 2007, is affirmed. The petition is denied, although the petition is moot due to the passage of time.