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U.S. Citizenship and Immigration Services

[redacted]

Dg

FILE: WAC 07 082 50689 Office: CALIFORNIA SERVICE CENTER Date: MAR 11 2009

IN RE: Petitioner: [redacted]
Beneficiary

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

ON BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner states that it provides support personnel for the horse racing industry. It seeks to classify of the beneficiary under section 101(a)(15)(P)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P)(i), for a period of five years. The petitioner seeks to employ the beneficiary temporarily in the United States as a P-1 athlete to serve as a jockey in competitive horse races.

The director denied the petition, concluding that the petitioner had failed to submit sufficient evidence to establish that it is a bona fide U.S. agent authorized to file the petition.

On appeal, counsel for the petitioner asserts that the petitioner submitted sufficient evidence to establish that it is "a bona-fide U.S. entity." Counsel asserts that U.S. Citizenship and Immigration Services (USCIS) records should show that the petitioner has filed dozens of P-1 petitions, and suggests that the director's request for additional evidence of the petitioner's status was unwarranted.

Under section 101(a)(15)(P)(i) of the Act, an alien having a foreign residence which he or she has no intention of abandoning may be authorized to come to the United States temporarily to perform services for an employer or sponsor. Section 214(c)(4)(A)(i) of the Act, 8 U.S.C. § 1184(c)(4)(A)(i), provides that section 101(a)(15)(P)(i)(a) of the Act applies to an alien who:

> (I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;
>
> (II) is a professional athlete, as defined in section 1154(i)(2) of this title;
>
> (III) performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams, if
>
> > (aa) the foreign league or association is the highest level of amateur performance of that sport in the relevant country;
> > (bb) participation in such league or association renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship in, or participate in, that sport at a college or university in the United States under the rules of the National Collegiate Athletic Association; and
> > (cc) a significant number of the individuals who play in such league or association are drafted by a major sports league or a minor league affiliate of such a sports league; or
>
> (II) is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production . . .[.]

Section 214(c)(4)(A)(ii)(I) of the Act, 8 U.S.C. § 1184(c)(4)(A)(ii)(I) provides that the alien must seek to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition.

Title 8 C.F.R. § 214.2(p)(2)(iv)(E) addresses situations in which agents serve 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:
>
> (I) An agent performing the function of an employer must specify the wage offered and the other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
>
> (II) A person or company in the business as an agent may file the P 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 of engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, the names and addresses of the establishment, venues or locations where the services will be performed. In questionable cases, a contract between the employer(s) 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 primary issue in this matter is whether the petitioner satisfied the regulatory requirements applicable to U.S. agent petitioners and whether it is a bona fide U.S. agent for the purposes of this visa classification.

The petitioner filed the nonimmigrant petition on January 24, 2007. The petitioner indicated on Form I-129 that it is a provider of "support personnel for horse racing industry," and stated that it was established in 2004. The petitioner did not provide information regarding its current number of employees, or gross and net annual income where requested on Form I-129. The petitioner indicated that the beneficiary will receive annual wages of $35,000 or more.

In a letter dated January 22, 2007, counsel's office described the petitioner as a Florida-based company organized to act as an agent for trainers, owners, breeders and jockeys in the horse racing industry who require support personnel for their business.

In support of the petition, the petitioner submitted an employment agreement dated January 22, 2007 between the beneficiary and the petitioner, referred to in the agreement as "agent." The agreement indicates that the petitioner will secure horse races for the beneficiary for a period of two years, and in return receive 25% of all monies earned by the beneficiary for her services as a jockey. The agreement was signed by the beneficiary and by Alex Prado as agent.

In lieu of an itinerary, the petitioner provided a list of 2007 racing dates published by the Equibase Company, in which counsel's office highlighted the venues where the beneficiary would perform. The attached exhibit consists of a listing of racing venues with three venues highlighted: Gulfstream (1/3-4/22); Hastings (4/13 – 11/25) and Tampa Bay (1/2-5/6; 12/14-12/31).

On April 2, 2007, the director issued a request for additional evidence (RFE), in which she requested, *inter alia*, proof of business conducted by the petitioner, a valid Federal Employer Identification Number for the petitioner, a copy of the petitioner's current business license issued by a city or county, evidence of wages paid to employees, copies of federal income tax returns for the last two years, and the information that was missing from the Form I-129, namely the petitioning entity's annual income, and current number of employees. The director noted that the petitioner had filed a high number of I-129 petitions and requested current employment status information for previously approved nonimmigrant employees.

In a response dated June 25, 2007, counsel for the petitioner cited to the regulations governing agents as employers and stated the following:

> Your request for proof of business, business license, employer information, approval notices, Form 941, payroll summary, federal income taxes . . . are irrelevant for the Petitioner filed under the above provision of law: an agent petitioning for a jockey, who is traditionally self-employed, and signed a contract which specifies the terms and conditions of the employment relationship, including compensation.

The petitioner submitted a copy of its IRS Form SS-4 as evidence of its Federal Employer Identification Number. Counsel also submitted evidence that his law firm is incorporated in the State of Florida and is active.

Upon review of the petitioner's response, the director issued a second RFE on July 17, 2007. The director instructed the petitioner to provide: (1) evidence that the agent is a permanent resident or citizen of the United States; (2) an affidavit by the agent that he/she has been in the business of working as an agent in the United States, which states when he/she started working as an agent; and (3) evidence of income as an agent (tax returns, pay statements, etc.). The director also requested a business license or other evidence establishing that the petitioner has been an authorized agent for at least one year.

The petitioner, through counsel, submitted a letter dated September 19, 2007, which was again signed by [redacted]. Ms. [redacted] stated: "Your request for income as an agent and business license is not relevant since the Petitioner acts as an agent only in securing proper representation for the jockey and is compensated by the jockey as a result."

The petitioner's response included the following documentation: (1) a copy of the petitioner's articles of incorporation filed with the State of Florida on August 3, 2004; and (2) a notarized letter on the petitioner's letterhead, dated September 19, 2007. The letter is signed by [redacted], who states that the petitioner has been acting as an agent for jockeys, trainers, owners and breeders in the horse racing industry since 2004. The AAO notes that [redacted] is petitioner's counsel. At the time the petition was filed in January 2007, [redacted] signed the Form I-129 and Form G-28 on behalf of the petitioner.

The director denied the petition on January 15, 2008, concluding that the petitioner failed to establish that it is an established United States agent that has been working as an agent in the business for a period of time prior to filing the instant petition. The director noted that the petitioning individual or company must be an established entity or "else any U.S. immigrant or citizen can petition for a nonimmigrant worker by just identifying himself or herself as a U.S. agent." The director noted that in most cases, one year of experience in the profession is sufficient to be considered an established agent.

The director emphasized that the petitioner was not able to submit tax returns or pay statements to show an active U.S. business and did not adequately explain why it was unable to comply with the requests for evidence. The director, therefore, concluded that no affirmative determination could be made regarding the status of the petitioner.

The petitioner subsequently filed a motion to re-open on February 12, 2008. On motion, counsel for the petitioner asserted that the petitioner is an agent and not a direct employer. Counsel asserted that the petitioner provided evidence that it is "a bona-fide U.S. entity" and therefore a qualifying petitioner for this nonimmigrant visa classification. Finally counsel re-asserted that the evidence requested from the petitioner, such as tax returns, was not relevant "since the petitioner acts as an agent only in securing proper presentation for the jockey and is compensated by the jockey as a result."

On March 3, 2008, the director determined that the petitioner had not met the requirements of a motion to re-open or reconsider, and dismissed the motion without disturbing the initial decision.

On appeal, counsel for the petitioner asserts that the director "incorrectly analyzed the supporting documentation and facts as to proper presentation, petitioner's existence, activities and previous petitions filed by petitioner." In a one-page letter dated April 8, 2008, counsel repeats the arguments made on motion. Counsel adds the following:

> Perhaps if the Examiner had a better understanding of the thoroughbred racing industry, we would not have spent several months dealing with minutiae. The Petitioner in this matter has filed dozens of petitions identical to this one without these questions being raised. A simple check of the CIS database would verify this.

Counsel repeats that the assertion that the petitioner "is acting as agent only in securing proper representation for the jockey and is compensated by the jockey as a result."

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted sufficient

documentation to establish that it is a bona-fide United States agent authorized to file the instant petition. As noted above, the regulation at 8 C.F.R. § 214.2(p)(2)(iv)(E)(II) provides:

> A person or company in the business as an agent may file the P 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, the names and addresses of the establishment, venues or locations where the services will be performed. In questionable cases, a contract between the employer(s) 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*.

(Emphasis added.)

The petitioner has continually emphasized that it is a "bona fide U.S. entity." The AAO acknowledges that the petitioner is corporation that has been registered in the State of Florida and the record shows its status as "active," meaning it has met its annual report filing requirements and has not been voluntarily or administratively dissolved.

However, the director has specifically and repeatedly requested documentary evidence to establish that the petitioner in this matter is actively doing business *as an agent*, not merely evidence that the petitioner is a legal entity. The fact that the petitioner failed to provide any information on the Form I-129 with respect to its number of employees or gross and net annual income figures gave the director sufficient reason to make further inquiries into this issue.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As noted by the director, it is simply insufficient for the petitioner to identify itself as an agent and then be unwilling or unable to provide any documentary evidence to corroborate its statements.

Furthermore, although the AAO acknowledges that petitioner has filed P-1 petitions in the past, 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, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of separate nonimmigrant petitions filed by the same petitioner are not combined.

The director provided the petitioner with two separate opportunities to provide evidence that it is doing business as an agent, and such evidence should have been readily available for submission. Counsel's

repeated assertions that such evidence is irrelevant or that this issue is mere "minutiae" are not persuasive. Based on the petitioner's assertions, the beneficiary will only work in the United States as a jockey if the petitioner is able to arrange races for him. There is no "employer" *per se*, the beneficiary has no guaranteed salary, and instead is required to give a significant share of his earnings to the petitioner under the terms of the agreement. There is also no planned itinerary of events beyond a general racing schedule that the petitioner printed from the Internet. Given the paucity of the evidence in the record, it was perfectly reasonable for the petitioner to provide evidence that it is actually doing business as an agent and that it has previously arranged events for the athletes it has sponsored. The petitioner's assertions that it is compensated by jockeys in exchange for its services has not been supported by specific documentary evidence.

Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Moreover, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As noted above, the petitioner has not submitted any evidence on appeal to overcome the grounds for denial of the petition. Accordingly, the petition will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary is a qualifying athlete as described at Section 214(c)(4)(A)(i) of the Act, 8 U.S.C. § 1184(c)(4)(A)(i). In a letter dated January 22, 2007, counsel for the petitioner stated the following regarding the beneficiary's qualifications:

> In view of the newly enacted Compete Act of 2006 which passed the Senate on December 6, 2006 and amended Section (c)(4)(A) of the INA (8 U.S.C. 184(c)(4)(A), the prerequisite that the beneficiary has achieved international recognition is no longer required, and for the purposes of the P-1 visa an individual that "performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance" falls under the P-1 nonimmigrant visa classification."

Counsel stated that in view of the COMPETE Act, the petitioner was submitting: (1) the beneficiary's racing records as a jockey issued by the [redacted] and (2) "evidence that horseracing activities conducted at [redacted]k is listed by the International Cataloguing Standards published by the Jockey Club Information Systems." Counsel also noted that Panama has been a "leading producer of the world's most famous thoroughbred jockeys."

The submitted evidence included a letter from the '[redacted]' which provided a summary of the beneficiary's results as an apprentice jockey at the '[redacted]," where she made her debut in December 2004, and has since started 220 races. No other evidence of the beneficiary's achievement as a jockey was submitted.

In the RFE issued on April 2, 2007, the director instructed that the petitioner submit documentation to satisfy at least two of the evidentiary criteria for internationally recognized athletes outlined at 8 C.F.R. § 214.2(p)(4)(ii)(B)(*2*).

In response to the director's request, counsel for the petitioner once again asserted that the COMPETE Act provides that "the prerequisite that the beneficiary has achieved international recognition is no longer required." The petitioner did not provide any of the requested documentation.

Upon review, the record does not contain evidence that the beneficiary falls under any of the four classes of alien athletes authorized for admission under the P-1 nonimmigrant classification.

Public Law 109-463, Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006 (COMPETE Act of 2006), amended Section 214(c)(4)(A) of the Act, and authorizes certain athletes to be admitted temporarily into the United States to compete or perform in an athletic league, competition, or performance. The COMPETE Act, passed by the United States Senate on December 6, 2006, expands the P-1 nonimmigrant visa classification to include certain athletes who were formerly admitted to the United States as H-2B nonimmigrants. Under the current statute, the P-1 nonimmigrant classification includes athletes who perform at an internationally recognized level of performance, individually or as part of a team; professional athletes as defined in section 204(i)(2) of the Act; athletes and coaches who participate in certain qualifying amateur sports leagues or associations; and professional and amateur athletes who perform in theatrical ice skating productions.

Counsel's assertion that the petitioner no longer has to establish that the alien has achieved international recognition reflects an incorrect interpretation of the COMPETE Act. While the COMPETE Act did expand the reach of the P-1 classification, it is evident that the petitioner seeks to classify the beneficiary under Section 214(c)(4)(A)(i)(I) of the Act as an alien who "performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance." The language of this provision was not amended in any way by the COMPETE Act.

Therefore, while it is correct to say that not all P-1 athletes are required to be internationally recognized athletes under the current statute, the statute clearly identifies which other classes of athlete may qualify. As stated above, these classes include certain professional athletes, participants in certain amateur sports leagues, and professional and amateur athletes who perform in theatrical ice skating productions. The COMPETE Act did broaden the scope of the P-1 classification to include every amateur athlete who has competed in his or her sport at any level outside the United States. *See also* USCIS Memorandum, Michael Aytes, "'Creating Opportunities for Minor League Professional Entertainers, and Teams through Legal Entry Act of 2006 (COMPETE Act of 2006)' – Admission as P-1 Nonimmigrant" (December 28, 2006).

Therefore, in order for the beneficiary to qualify for this classification under Section 214(c)(4)(A)(i)(I) of the Act, the petitioner must still establish that she performs "at an internationally recognized level of performance." The fact that the beneficiary has raced horses in her home country at a track that is recognized by the international racing community is not sufficient to meet the standard of "internationally recognized."

The regulation at 8 C.F.R. §214.2(p)(3) provides, in relevant part, the following:

> *Internationally recognized* means having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country.

The petitioner has not established that the beneficiary's achievements as an apprentice jockey are renowned, leading or well-known such that she is recognized for such achievements in more than one country. To the contrary, counsel appears to concede that the beneficiary's is not an internationally recognized athlete, and rather relies on a misguided claim that the petitioner is not obligated to meet such requirement under 214(c)(4)(A)(i)(I) of the Act. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.