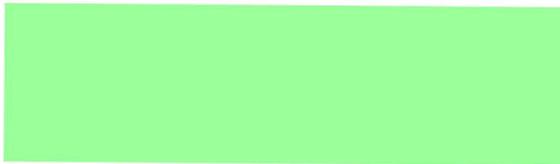




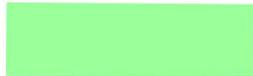
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAY 01 2014**

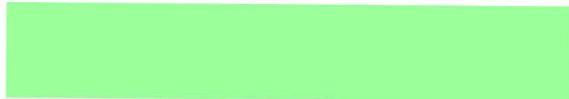
OFFICE: VERMONT SERVICE CENTER

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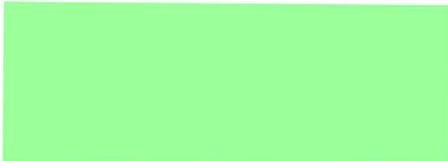
Petitioner:

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

*for Michael T. Kelly*  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director (the director) denied the nonimmigrant visa petition and then affirmed his decision in response to a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a 40-employee thoroughbred horse training operation established in 2007. In order to temporarily employ the beneficiary in what it designates as a "Groom" position, the petitioner seeks to classify him as temporary nonagricultural workers pursuant to 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).

The director denied the petition because the employment start date provided in the petition did not match the date of need stated on the approved temporary labor certification, as required by 8 C.F.R. § 214.2(h)(6)(iv)(D).

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's decision denying the petition; (3) the Form I-290B and supporting documentation relating to the petitioner's motion to reconsider the director's decision; (4) the director's letter affirming his decision denying the petition; and (5) the Form I-290B and supporting documentation relating to the appeal.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

#### I. ANALYSIS

As noted by the director, the temporary labor certification (TLC) was approved for a period of certification lasting from February 1, 2013 until November 30, 2013. Although the petitioner did not provide dates of intended employment on the Form I-129, the beneficiary's prior H-2B status expired on November 30, 2012, and the petitioner marked the boxes at page 2 of the Form I-129 to indicate it was seeking an extension of that status. Furthermore, counsel argues throughout the petition that 8 C.F.R. § 274a.12(b)(20), which pertains to extension petitions, permits approval of its petition as an extension petition. Because the requested employment start date is not clear, the AAO will conduct its review under two scenarios: (1) as a request for an employment start date of December 1, 2012; and (2) as a request for an employment start date of February 1, 2013. As will be discussed below, 8 C.F.R. § 274a.12(b)(20) affords no relief under either scenario.

#### Employment Start Date of December 1, 2012

If the petitioner is requesting an employment start date of December 1, 2012, then the petition must be denied under 8 C.F.R. § 214.2(h)(6)(iv)(D), as found by the director. That regulation states, in pertinent part, the following:

*Employment start date.* Beginning with petitions filed for workers for fiscal year 2010, an H-2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification.

As an employment start date of December 1, 2012 is obviously not "the same" as an employment start date of February 1, 2013 (the date of need stated on the approved temporary labor certification), as mandated by 8 C.F.R. § 214.2(h)(6)(iv)(D), the petition would have to be denied under this scenario.

Nor would 8 C.F.R. § 274a.12(b)(20) afford any relief under this scenario, as argued by counsel. The regulation at 8 C.F.R. § 274a.12(b) states the following:

*Aliens authorized for employment with a specific employer incident to status.* The following classes of nonimmigrant aliens are authorized to be employed in the United States by the specific employer and subject to the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification. An alien in one of these classes is not issued an employment authorization document by the Service:

\* \* \*

- (9) A temporary worker or trainee (H-1, H-2A, H-2B, or H-3), pursuant to § 214.2(h) of this chapter. An alien in this status may be employed only by the petitioner through whom the status was obtained . . . If the new petition is denied, employment authorization will cease;

\* \* \*

- (20) A nonimmigrant alien within the class of aliens described in paragraphs . . . (b)(9) . . . of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§ 214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision[.]

The language of 8 C.F.R. § 274a.12(b) specifically limits application of its provisions to "the restrictions described in the section(s) of this chapter indicated as a condition of their admission in, or subsequent change to, such classification." Again, 8 C.F.R. § 214.2(h)(6)(iv)(D) specifically requires that the start date requested in the H-2B petition be "the same" as the date of need stated on

the temporary labor certification.<sup>1</sup> An employment start date of December 1, 2012 would not meet this requirement. The regulation at 8 C.F.R. § 274a.12(b) would also provide no relief under this scenario because the language of that regulation limits application of its provisions to extension petitions that were filed timely, and such was not the case here: although the beneficiary's status expired on November 30, 2012, the petitioner did not file the instant petition until December 11, 2012. Furthermore, the regulation at 8 C.F.R. § 214.2(h)(14) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired.

Moreover, if the beneficiary were granted H-2B status beginning on December 1, 2012, he would have H-2B status, and therefore also H-2B work authorization, for a period of time not covered by a temporary labor certification issued by the U.S. Department of Labor, which is not permitted under 8 C.F.R. § 214.2(h)(15)(ii)(C).

#### Employment Start Date of February 1, 2013

If the petitioner is requesting an employment start date of February 1, 2013, the regulation at 8 C.F.R. § 214.2(h)(6)(iv)(D) would not preclude approval of the petition. However, the petition could still not be approved. The regulation at 8 C.F.R. § 274a.12(b) would not provide any relief for two reasons. First, the applicability of that regulation is limited to extension petitions. Again, the beneficiary's prior H-2B status expired on November 30, 2012, and an employment start date of February 1, 2013 would mean that this is not an extension petition.

As was the case above, the regulation at 8 C.F.R. § 274a.12(b) would also provide no relief under this scenario because the language of that regulation limits application of its provisions to extension petitions that were filed timely, and such was not the case here: although the beneficiary's status expired on November 30, 2012, the petitioner did not file the instant petition until December 11, 2012. Furthermore, the regulation at 8 C.F.R. § 214.2(h)(14) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired.

## II. CONCLUSION AND ORDER

The deficiencies identified and discussed above preclude approval of this petition. Accordingly, the appeal will be dismissed and the petition will be denied on those bases.<sup>2</sup>

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<sup>1</sup> For substantive discussions by USCIS discussing the rationale underlying the regulation at 8 C.F.R. § 214.2(h)(6)(iv)(D) and indicating that compliance with that provision is a material precondition for approval of an H-2B petition filed for workers for fiscal year 2010 and beyond, *see* 73 Fed. Reg. 49109-01 (Aug. 20, 2008) (proposed rule) and 73 Fed. Reg. 78104-01 (Dec. 19, 2008) (final rule).

<sup>2</sup> Because the petitioner's failure to comply with the authorities discussed above alone precludes approval of this petition, the AAO will not discuss any additional deficiencies it has observed in the record of proceeding.

(b)(6)

*NON-PRECEDENT DECISION*

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In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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