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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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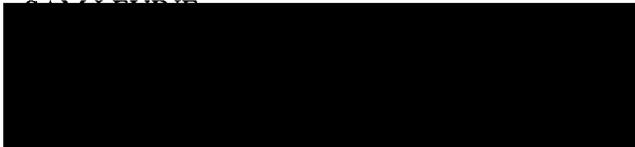
FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

NOV 18 2010

IN RE: Petitioner: EUROPE RACING, LLC
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed the nonimmigrant visa petition seeking classification of the beneficiary under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in athletics. The petitioner, a horse racing business, seeks to employ the beneficiary as a horse trainer for a period of three years.

The director denied the petition on September 9, 2009, concluding that the petitioner did not establish the beneficiary's eligibility as an alien who has a demonstrated record of extraordinary ability or achievement in the sciences, arts, education, business or athletics. In denying the petition, the director emphasized that the petitioner failed to submit any of the required initial evidence in support of its petition, which was filed using the U.S. Citizenship and Immigration Services (USCIS) Electronic Filing (e-Filing) system.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner states:

We have been having trouble getting supporting documents from the governing bodies, but now have the documents in hand. In fact, we had sent a copy in, but it must have crossed in the mail. Please be advised that we now have all the supporting documentation, and are filing to re-open [the beneficiary's] case.

The petitioner submits additional evidence in support of the appeal.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, or, with regard to motion picture and television productions, a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of his field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii).

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The evidentiary criteria for aliens of extraordinary ability in the fields of science, education, business or athletics are set forth at 8 C.F.R. § 214.2(o)(3)(iii). In addition, all O nonimmigrant petitions must be accompanied by the evidence set forth at 8 C.F.R. § 214.2(o)(2)(ii).

The issue in this matter is whether the director appropriately denied the petition based on the petitioner's failure to submit the required initial evidence for the visa classification in support of its electronically filed petition.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, using the USCIS e-Filing system on [REDACTED]. The form instructions for Form I-129 advise that if a petition is filed without the required initial evidence, the petitioner will not establish a basis for eligibility and USCIS may deny the petition. The instructions for electronic filing further instruct the petitioner that the required initial evidence must be received by the Service Center within seven business days of filing the form electronically.

Pursuant to 8 C.F.R. § 103.2(a)(1), the instructions contained on a petition are to be given the force and effect of a regulation:

Every application, petition, appeal, motion, request or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission....

The regulation at 8 C.F.R. § 103.2(b)(1) states:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

Finally, the regulation at 8 C.F.R. § 103.2(b)(8)(ii) states, in pertinent part:

Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or ineligibility. . . .

The director denied the petition on September 9, 2009, after waiting more than 40 days for the petitioner to submit the required initial evidence. While the regulations at 8 C.F.R. § 214.2(o)(11) provide that no supporting documents are required when a petitioner seeks to extend the validity of a beneficiary's original O-1 petition unless requested by the director, the instant petition was for new employment. Therefore, the AAO concludes that the director's decision to deny the petition based on lack of initial evidence was proper.

On appeal, counsel asserts that it did submit the required supporting documentation. The AAO notes that documents were mailed to the USCIS Vermont Service Center and received on September 10, 2009. The Vermont Service Center then had to forward the documentation to the responsible office, the California Service Center, which received the submission on September 21, 2010, 11 days after issuance of the adverse decision.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, counsel does not identify an erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. Rather, counsel concedes that the petitioner did not submit the required initial evidence within the prescribed seven-day timeframe, or even prior to the director's issuance of the notice of denial.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

ORDER: The appeal is summarily dismissed.