

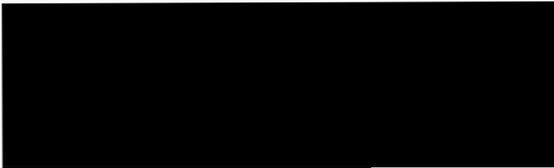
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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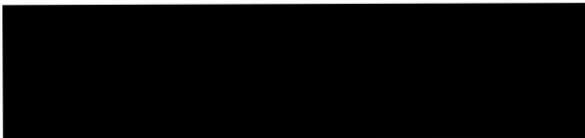


FILE: SRC 05 800 32163 Office: TEXAS SERVICE CENTER Date: **APR 28 2009**

IN RE: Petitioner:
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:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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, a professional horse trainer, seeks to classify 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 three years. The petitioner seeks to employ the beneficiary temporarily in the United States as a P-1 athlete to serve as a jockey of thoroughbred horses.

The director denied the petition, concluding that the petitioner had failed to submit an adequate itinerary for the beneficiary, as required by 8 C.F.R. § 214.2(p)(2)(ii)(C).

On appeal, counsel for the petitioner asserts that the petitioner submitted a schedule of events for 2005, and that schedules for upcoming racing seasons are not yet available.

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) of the Act, 8 U.S.C. § 1184(c)(4)(A) (2006), provides that section 101(a)(15)(P)(i) of the Act applies to an alien who:¹

- (i) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, and
- (ii) seeks to enter the United States temporarily and solely for the purpose of performing as such an athlete with respect to a specific athletic competition.

The regulation at 8 C.F.R. § 214.2(p)(4)(i)(A) states:

P-1 classification as an athlete in an individual capacity. A P-1 classification may be granted to an alien who is an internationally recognized athlete based on his or her own reputation and achievements as an individual. The alien must be coming to the United States to perform services which require an internationally recognized athlete.

¹ The instant petition was filed on August 1, 2005, prior to the passage of Public Law 109-463, Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry Act of 2006 (COMPETE Act of 2006), which 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.

The regulation at 8 C.F.R. § 214.2(p)(3) further states, in pertinent part:

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 regulation at 8 C.F.R. § 214.2(p)(2)(ii) states that all petitions for P classification shall be accompanied by:

- (A) The evidence specified in the specific section of this part for the classification;
- (B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien(s) will be employed;
- (C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and
- (D) A written consultation from a labor organization.

Specific evidentiary requirements for P-1 athletes are set forth at 8 C.F.R. § 214.2(p)(4)(ii).

The sole issue addressed by the director is whether the petitioner submitted an adequate itinerary in compliance with the regulation at 8 C.F.R. § 214.2(p)(2)(ii)(C).

The petitioner filed the Form I-129 petition electronically on August 1, 2005. On the O and P Classification Supplement to Form I-129, the petitioner stated that the beneficiary will "Race thoroughbred horses throughout the United States in races and stakes events."

The director issued a request for additional evidence on September 19, 2005, in which she requested, *inter alia*, "an itinerary for coming events and all supporting documents."

In a response received on October 13, 2005, the petitioner submitted a copy of a "Condition Book" for Retama Park racetrack, which provides a thoroughbred racing schedule for the period August 5 through October 16, 2005. The beneficiary is listed among the thoroughbred jockeys competing in the events. The petitioner also submitted evidence that the beneficiary won a race at this venue, on August 12, 2005 riding a horse owned and trained by the petitioner.

The director denied the petition on November 7, 2005, concluding that the petitioner failed to submit an adequate itinerary of coming events.² The director acknowledged the petitioner's submission of the Retama Park racing schedule, but observed that it did not list any scheduled events beyond 2005. The director found

² The AAO notes that the notice of decision was erroneously dated November 7, 2004.

the evidence insufficient to support an extension of the beneficiary's P-1 status through July 31, 2008.

On appeal, counsel asserts the following:

[A]n employment contract was submitted for a term of three (3) years. The petitioner is requesting the extension until 2008. The Service also erred in stating that it was not clear in what events the beneficiary will participate beyond 2005. The Thoroughbred Meet Schedule [sic] for 2005 wa[s] submitted with the request for additional evidence. As in all professional sports, the play schedule for the team or track is not made or released years in advance. The race tracks release their schedule at the beginning of each racing season/year. Likewise, as in other sports, the play schedule is released at the beginning of each playing season.

The petitioner resubmits the Retama Park 2005 Thoroughbred Meet Stakes Schedule for August through October 2005.

Upon review, counsel's assertions are not persuasive. The petitioner specifically indicated that the beneficiary would be competing in races and stakes events "throughout the United States" over a three-year period. Its inability to document any planned events beyond October 2005, and any events outside of a single venue, have not been adequately explained. At the time the petitioner responded to the request for evidence, there were only two days remaining on the Retama Park racing schedule.

While the AAO will grant that race courses will not publish their schedules years in advance, the fact remains that the petitioner provided essentially a two-day schedule in support of its request for a three-year extension of status. The petitioner did not indicate the other venues at which the beneficiary would race or provide any evidence documenting the typical racing schedule in the sport, such as prior years' schedules for the events in which the beneficiary is expected to compete during the next three years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO will not accept the beneficiary's contract with the petitioner in lieu of the itinerary, as these two types of evidence are separate regulatory requirements. See 8 C.F.R. §§ 214.2(p)(2)(ii)(B) and (C). Furthermore, the contract, although dated June 6, 2005, appears to have been signed and notarized on October 1, 2005, two months subsequent to the filing petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Based on the foregoing, the petitioner has not satisfied the regulatory requirement at 8 C.F.R. 214.2(p)(2)(ii)(C). Accordingly, the appeal will be dismissed.

Beyond the decision of the director, and for the reasons discussed above, the AAO finds that the petitioner has failed to submit an adequate written contract between the petitioner and beneficiary, and therefore has failed to

satisfy the regulatory requirement at 8 C.F.R. § 214.2(p)(2)(ii)(C). For this additional reason, the petition cannot be approved.

Furthermore, the AAO notes that it appears the beneficiary in this matter has been and will be providing services for more than one employer, notwithstanding the exclusivity clause in his contract with the petitioner. The petitioner submitted evidence that the beneficiary has competed as a jockey for at least five different owners and trainers since 2003. In addition, the 2005 Retama Park schedule shows that the beneficiary will be riding [REDACTED] owned by [REDACTED] and trained by [REDACTED], owned and trained by [REDACTED], owned and trained by [REDACTED] and Trained by [REDACTED]

The regulation at 8 C.F.R. 214.2(p)(2)(iv)(B) states that if the beneficiary will work for more than one employer within the same time period, each employer must file a separate petition with the service center that has jurisdiction, unless an agent files the petition pursuant to 8 C.F.R. § 214.2(p)(2)(iv)(E). The petitioner in this matter filed as an employer, not as an agent. It appears based on the evidence in the record that the beneficiary has been working for several employers without first obtaining the required authorization from USCIS.

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 AAO acknowledges that that the previously been granted P-1 status to work for the petitioner. It must be emphasized that 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 that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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 USCIS 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approvals by denying the instant petition

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 its 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.