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U.S. Citizenship
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Services

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FILE: SRC 06 086 51969 Office: TEXAS SERVICE CENTER Date:

MAR 11 2009

IN RE: Petitioner:
Beneficiary:



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

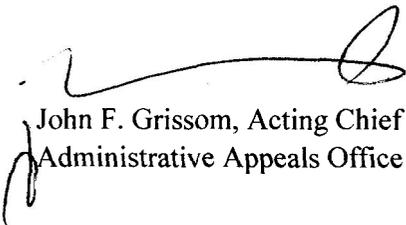
ON BEHALF OF PETITIONER:



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.

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 nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking P-1S classification of the beneficiary as essential support personnel pursuant to section 101(a)(15)(P)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(P). The petitioner is self-described as a provider of support personnel for the horse racing industry. It seeks to temporarily employ the beneficiary as a jockey valet for a period of three years.¹

The director denied the petition on September 8, 2006, concluding that the beneficiary does not qualify as an essential support alien in accordance with the regulations at 8 C.F.R. § 214.2(p)(3). Specifically, the director determined that the petitioner failed to establish: (1) that the beneficiary is highly skilled, has a working relationship with the P-1 jockey, and is integral to the performance of the P-1 jockey; (2) that the beneficiary's services could not be readily performed by a United States worker; or (3) that the beneficiary's services have been secured through the means of an executed contractual agreement. The director further concluded that the petitioner failed to submit a consultation from an appropriate labor organization.

On appeal, counsel for the petitioner refutes the director's findings noting that the director's decision was based, in part, on the petitioner's failure to submit documentation that was not specifically requested in the request for evidence. Counsel asserts that the director fails to understand the nature of horse racing activities and the independent nature of jockeys and jockey valets. Finally, counsel contends that the petitioner submitted clear and irrefutable evidence to establish that there are no labor organizations governing jockeys or jockey valets. Counsel submits a brief and additional evidence in support of the appeal.

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

Essential support alien means a highly skilled, essential person determined by the Director to be an integral part of the performance of a P-1, P-2, or P-3 alien because he or she performs support services which cannot be readily performed by a United States worker and which are essential to the successful performance of services by the P-1, P-2, [or P-3] alien. Such alien must have appropriate qualifications to perform the services critical knowledge of the specific services to be performed, and experience in providing such support to the P-1, P-2, or P-3 alien.

Accordingly, the petitioner must establish that the support alien will provide support to a P alien and is essential to the success of the P alien. The petitioner must also establish that beneficiary is qualified to perform the services and the services cannot be readily performed by United States workers.

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

¹ At the time of filing, the beneficiary was in the United States in P-1 nonimmigrant status pursuant to a petition approved in 2003 and valid until January 24, 2006 (SRC 03 190 50700).

- (A) *General.* An essential support alien as defined [above] may be granted P-1 classification based on a support relationship with an individual P-1 athlete, P-1 athletic team, or a P-1 entertainment group.
- (B) *Evidentiary criteria for a P-1 essential support petition.* A petition for P-1 essential support personnel must be accompanied by:
 - (1) A consultation for a labor organization with expertise in the area of the alien's skill;
 - (2) A statement describing the alien(s) prior essentiality, critical skills, and experience with the principal alien(s); and
 - (3) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

The first issues to be addressed in this proceeding are: (1) whether the petitioner established that the beneficiary will be performing services that cannot be performed by a United States worker and that are essential to the successful performance of services by the principal P-1 athlete; and (2) whether the beneficiary has the requisite prior relationship providing such services to the principal athlete.

The petitioner filed the nonimmigrant petition on January 23, 2006. The petitioner stated that the beneficiary, who was in P-1 status at the time of filing, would serve as a jockey valet under the P-1S petition. On Form I-129 Supplement O/P, the petitioner was instructed to indicate the dates of the alien's prior experience with the P-1 alien. The petitioner did not complete this information on the form.

In a letter dated January 19, 2006, counsel for the petitioner stated the following with respect to the beneficiary's qualifications:

[The beneficiary] will be performing the essential role of jockey valet while utilizing essential skills on saddle weight specifications for each particular race, among others. While the jockey valet performs a variety of services attending to the jockey, he must ensure the jockey's silks and gear conform to racing regulations and that their colors also pertain to each particular stable. A jockey valet must also apply relevant skills for unsaddling horses and maintaining saddles properly clean.

* * *

The Beneficiary has extensive experience in the field of horse racing and possesses prior experience in his native Peru as groom, exercise rider and jockey.

Since [the beneficiary] has had extensive experience in horse racing, he is perfectly familiarized with all jockey's needs, such as taking care of the jockey's tack, in dressing and changing with

the correct stable's colors, weighing the saddle with the correct weight, carrying the tack to and from the scales.

[The beneficiary] possesses the appropriate qualifications to perform the above service, critical knowledge of the above services and prior experience.

The petitioner did not identify the P-1 athlete for whom the beneficiary would work as a jockey valet, but did note that it "has contracted with many P-1 jockeys for support services." The petitioner provided a list of 44 individuals identified as P-1 jockeys. The petitioner attached a generic employment agreement and noted that the beneficiary and "the P-1 jockey" would enter such agreement upon approval of the petition.

The director issued a request for additional evidence (RFE) on May 12, 2006. The director instructed the petitioner to provide a statement describing the beneficiary's prior essentiality, critical skills and experience with the principal P-1 alien, as well as a copy of the Form I-797 Approval Notice for the P-1 alien, and evidence of wages paid to the P-1 alien.

In response, the petitioner submitted a letter dated June 23, 2006 from _____ who stated:

This is to inform you that [the beneficiary] worked with me under different thoroughbred trainers at the Monterrico Racetrack in Lima, Peru from 1998 to 2003.

As jockey/jockey valet [the beneficiary] not only exercised and rode horses, but also assisted me with my tack, assisted me in dressing and ensured that my silks and gear conformed to racing regulations and their colors pertained to the relevant stable.

[The beneficiary] is perfectly competent in saddle weight specifications, unsaddling horses and maintaining saddles properly clean.

The petitioner also submitted letters from three persons identified as thoroughbred horse trainers, who described the duties typically performed by jockey valets, and noted that the valets "play an important role in the horse racing industry by attending to a jockey's needs." The letters are identical in content and appear to have been composed by the same person. None of the trainers claims to have any specific knowledge regarding the beneficiary or his prior relationship with or prior essentiality to the principal P-1 athlete, _____.

The petitioner submitted a copy of a Form I-797 Approval Notice showing that _____ is the beneficiary of an approved P-1 petition filed by _____ and valid from June 1, 2005 until May 31, 2008. _____ made his first entry to the United States on February 7, 2006. The petitioner provided evidence that _____ competes as a jockey at Canterbury Park racetrack.

The director denied the petition on September 8, 2006, concluding that the petitioner did not establish that the beneficiary qualifies as an essential support alien. Specifically, the director found that the submitted evidence failed to demonstrate that the beneficiary is highly skilled, that he is integral to the performance of the P-1 jockey, that he has a working relationship with the jockey, or that he would perform services that could not readily be performed by a United States worker.

On appeal, counsel asserts that the director “fails to understand the nature of horse racing activities and independent nature of jockey’s and jockey valet’s activities.” Counsel re-submits the letter from ██████████ and evidence of his P-1 status in the United States and asserts that sufficient evidence of the beneficiary’s experience with ██████████ and his prior essentiality was submitted.

Upon review, the petitioner has not established that the beneficiary is qualified as essential support personnel, or that he has the requisite prior relationship with the principal P-1 athlete.

In the initial letter dated January 19, 2006, counsel for the petitioner made no reference to any prior relationship between the beneficiary and the principal P-1 athlete. In fact, neither counsel nor the petitioner named the principal P-1 athlete with whom the beneficiary would work. Rather, counsel provided a list of P-1 jockeys which allegedly have a relationship with the petitioning organization. Notably, ██████████ was not among the persons listed. In addition, counsel indicated that the beneficiary has worked in the field of horse racing as a groom, an exercise rider and a jockey.

There was nothing in this letter to suggest that the beneficiary has previously worked for the principal athlete in an essential support capacity, or that he has ever worked as a jockey valet. Furthermore, the petition was submitted without any supporting evidence related to the beneficiary’s qualifications or relationship with the principal athlete. 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)). Finally, the AAO notes that the petition was filed before the principal alien, ██████████ was first admitted to the United States, and the period of stay requested for the beneficiary did not coincide with the approval dates for ██████████ P-1 status. ██████████ P-1 status expires on May 31, 2008, and the petitioner has requested that the beneficiary be granted P-1S status to provide services to ██████████ until January 24, 2009.

While the petitioner subsequently submitted a letter from ██████████ the AAO notes that the letter is extremely vague with regard to the details of his prior working relationship with the beneficiary. He stated that the beneficiary worked “with him” under different thoroughbred trainers at the Monterrico Racetrack in Peru from 1998 until 2003. However, he stopped short of stating that the beneficiary worked specifically for him or performed essential support services for him. He further confused the issue of the beneficiary’s prior experience by referring to him as a “jockey/jockey valet.”

As noted above, the beneficiary was granted P-1 status as an internationally recognized athlete in 2003, a status he would not have been granted had he actually been working as a jockey valet for ██████████ in the years preceding the filing of his P-1 petition. *See generally* 8 C.F.R. § 214.2(p)(4)(ii)(A). Given these facts, ██████████ letter alone is insufficient to establish that the beneficiary has actually previously worked for the principal alien as a jockey valet. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Given these discrepancies, and considering the lack of documentary evidence related to the beneficiary's prior experience in the field, the petitioner has not established the beneficiary has appropriate qualifications to perform the proposed services, critical knowledge of the specific services to be performed, and experience in providing such support to the P-1 alien, as required by 8 C.F.R. § 214.2(p)(3).

Furthermore, even if the AAO assumes, *arguendo*, that the beneficiary has previously worked as a jockey valet for the principal athlete, the petitioner has not established that the duties performed by a jockey valet require a "highly skilled, essential person," integral to the performance of the P-1 alien, or that jockey valets perform support services which cannot be readily performed by a United States worker. The jockey valet's duties include assisting a jockey with tack, assisting a jockey with dressing, ensuring that silks and gear conform to racing regulations, understanding saddle weight specifications, unsaddling horses, and maintaining saddles properly clean. The petitioner has not established that the knowledge required to perform these duties would be specific to a certain jockey. In fact, counsel stated that the beneficiary, "is familiarized with all jockey's needs," thereby suggesting that all jockey's needs in terms of valet services are essentially the same.

On appeal, counsel asserts that the evidence submitted is sufficient to establish the beneficiary's prior working relationship with and essentiality to the principal alien. For the reasons stated above, the AAO disagrees. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). The record remains devoid of probative documentary evidence of the prior relationship between the beneficiary and the principal P-1 athlete. Furthermore, given the petitioner's failure to even name a P-1 athlete in the initial filing, and the lack of a contract, discussed *infra*, the evidence of record raises serious doubts as to whether the beneficiary would be providing essential support services for if the instant petition were approved.

Based on the foregoing discussion, the petitioner has not established that the beneficiary is qualified for classification as an essential support alien. Accordingly, the appeal will be dismissed.

The second issue in this matter is whether the petitioner satisfied the evidentiary requirement set forth at 8 C.F.R. § 214.2(p)(4)(iv)(B)(3). The regulations require the petitioner to submit a copy of the written contract or a summary of the terms of the oral agreement between the alien and the employer.

At the time of filing, the petitioner submitted a generic "employment agreement" which failed to identify the beneficiary and the principal athlete by name. Instead, the agreement refers to "[P-1 jockey's name]" and "[jockey valet's name]." Counsel indicated that the unidentified P-1 jockey and the beneficiary would enter into the contract effective upon approval of the petition.

The director ultimately denied the petition, finding that the petitioner had not "substantiated the services of the beneficiary [have] been secured through the means of an 'executed' contractual agreement."

Neither counsel nor the petitioner addresses the director's determination on appeal. Accordingly, the AAO concurs with the director's decision and affirms the denial of the petition on this additional ground. The unsigned, generic contract does not meet the evidentiary requirements pursuant to 8 C.F.R. § 214.2(p)(4)(iv)(B)(3). A visa petition may not be approved based on speculation of future eligibility or after

the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As discussed above, there is reason to question whether there has been or would be any relationship between the beneficiary and the principal athlete in this matter, and the petitioner's claim that a contract would be signed after the petition is approved is not credible. Again, 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. at 165.

The third and final basis for the denial of the petition was the petitioner's failure to submit a consultation from a labor organization with experience in the area of the alien's skill, as required by 8 C.F.R. § 214.2(p)(4)(iv)(B)(1). The regulation at 8 C.F.R. § 214.2(p)(4)(iv)(B)(1) requires a consultation from a labor organization with expertise in the area of the essential support alien's skill. The regulation at 8 C.F.R. § 214.2(p)(7) further explicates the consultation requirement and states, in pertinent part:

- (vi) *Consultation requirements for essential support aliens.* Written consultation on petitions for P-1, P-2, or P-3 essential support aliens must be made with a labor organization with expertise in the skill area involved. If the advisory opinion provided by the labor organization is favorable to the petitioner, it must evaluate the alien's essentiality to and working relationship with the artist or entertainer, and state whether United States workers are available who can perform the support services. If the advisory opinion is not favorable to the petitioner, it must also set forth a specific statement of facts which support the conclusion reached in the opinion. A labor organization may submit a letter of no objection if it has no objection to the approval of the petition.
- (vii) *Labor organizations agreeing to provide consultations.* The Service shall list in its Operations Instructions for P classification those organizations which have agreed to provide advisory opinions to the Service and/or petitioners. The list will not be an exclusive or exhaustive list. The Service and petitioners may use other sources, such as publications, to identify appropriate labor organizations. The Service will also list in its Operations Instructions those occupations or fields of endeavor where it has been determined by the Service that no appropriate labor organization exists.

The petitioner stated on Form I-129 Supplement O/P that "no such [labor] organization exists for this occupation." In the RFE issued on May 12, 2006, the director requested a written consultation from a labor organization which evaluates the beneficiary's essentiality to and working relationship with the principal P-1 alien.

In response, counsel for the petitioner once again stated that there are no labor organizations for jockey valets or jockeys. The petitioner submitted: (1) information from The Jockey Club's website, indicating that it is the "breed registry for thoroughbred horses in the United States, Canada and Puerto Rico"; (2) a statement from the Thoroughbred Owners and Breeders Association (TOBA), indicating that TOBA is a national trade association, "not a labor organization," and "not involved in the licensing of jockeys"; and (3) a letter from Regional Manager of The Jockey's Guild, who describes the guild as "the only organization in

the United States at this time that has the authority to represent jockeys in labor matters.” Mr. [REDACTED] noted that there are no other organizations in the United States with the authority to act on behalf of jockeys.

Finally, in lieu of the written consultation from a labor organization, the petitioner submitted letters from three thoroughbred horse trainers, who provided identical general statements regarding the duties performed by jockey valets and their “important role in the horse racing industry.” As discussed above, none of the letters addressed the beneficiary, his qualifications or experience as a jockey valet, or his prior essentiality to the principal P-1 athlete.

The director denied the petition based on the petitioner’s failure to provide a written consultation from an appropriate labor organization. The director acknowledged counsel’s assertion that no such organization exists, but nevertheless found that “contrary to counsel’s claim there are labor organizations with expertise in the skill area involved for the beneficiary as [jockey valet].”

On appeal, counsel for the petitioner asserts that “irrefutable official publicized evidence that no labor organizations for jockeys/jockey valets in the U.S. were submitted.” Counsel asserts that he conducted Internet searches for labor organizations in the United States and was unable to find one for horse racing industry workers. Counsel further asserts that the National Labor Relations Board has formally declined to assert jurisdiction over horseracing for various reasons. Counsel contends that “no horse racing worker[s] have banded together to achieve common goals in key areas such as wages, hours, and working conditions through such an organization.”

Upon review, the petitioner has not persuasively established that there is no appropriate labor organization with expertise in the beneficiary’s area of skill. In fact, the petitioner submitted a letter from the Jockey’s Guild which indicates that the organization “has the authority to represent jockeys in labor matters.” In light of this statement, the petitioner has not adequately explained why The Jockey’s Guild cannot be considered a labor organization with expertise in the beneficiary’s field.

Moreover, even assuming *arguendo* that counsel’s assertions were persuasive, the regulation at 8 C.F.R. § 214.2(p)(7)(i)(F) requires USCIS to render a decision based on the evidence of record in those cases where it is established by the petitioner that an appropriate labor organization does not exist. The director did render a decision based on other eligibility factors, and correctly determined that the evidence of record does not establish the beneficiary’s eligibility as an essential support alien for several reasons, as discussed above.

In sum, the petitioner has failed to establish that the beneficiary has critical knowledge of the specific services to be performed for, and his experience in providing such support to, the principal P-1 athlete as required by the regulation at 8 C.F.R. § 214.2(p)(3). The support letters also fail to sufficiently describe the beneficiary’s prior essentiality, critical skills and experience with the P-1 athlete, as required by the regulation at 8 C.F.R. § 214.2(p)(4)(iv)(B)(2). The petitioner failed to submit a properly executed written contract or summary of the terms of the oral agreement between the beneficiary and the employer, as required by 8 C.F.R. § 214.2(p)(4)(iv)(B)(3). Finally, the petitioner failed to meet the consultation requirement for an essential support alien prescribed by the regulation at 8 C.F.R. § 214.2(p)(7)(vi). Accordingly, the petitioner has not established that the beneficiary qualifies for classification under section 101(a)(15)(P)(i) of the Act as an essential support alien for the principal athlete.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.