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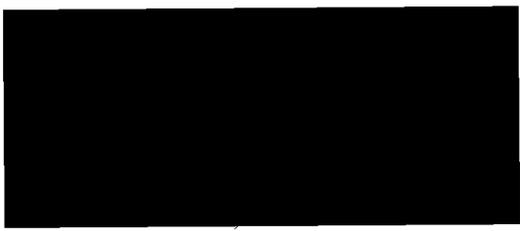
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

D9



FILE: WAC 09 135 51781 Office: CALIFORNIA SERVICE CENTER Date:

MAR 12 2010

IN RE: Petitioner:
Beneficiaries:



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).

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 dismiss the appeal.

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking P-1S classification of the beneficiaries 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 an equestrian center. It seeks to temporarily employ the beneficiaries as professional horse show grooms for a period of approximately four years and nine months.

The director denied the petition, concluding that the petitioner failed to provide evidence of the beneficiaries' prior essentiality, critical skills or experience with the principal P-1 alien, as required by 8 C.F.R. § 214.2(p)(4)(iv)(B)(2).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that "the 2006 COMPETE Act and all supporting documentation were not properly reviewed and considered in making the decision in this case." Counsel submits a brief and additional documentary 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:

- (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 sole issue addressed by the director is whether the petitioner established the beneficiaries' prior essentiality, critical skills and experience with the principal alien.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 9, 2009. The O and P Classification Supplement to Form I-129 instructs the petitioner to provide dates of the P support alien's prior experience with the O-1 or P alien. Here, the petitioner stated: "[REDACTED] August 2007." The petitioner listed nothing for the remaining two beneficiaries. The petitioner indicated on Form I-129 that none of the beneficiaries had ever requested P-1S classification before and that it had never filed a petition for any of them.

In a letter dated April 7, 2009, counsel stated that the petitioner seeks to employ the three beneficiaries "in the Essential Support Personnel capacity of [REDACTED] so that they may provide essential support services crucial to the continued success of one of the top professional athletes (professional horse rider), [REDACTED] [REDACTED]" Counsel described the petitioner's business, provided background information regarding the P-1 athlete, and described the duties to be performed by the beneficiaries as horse show grooms.

In a paragraph with the subheading "P-1S Beneficiaries' experience with the Primary P-1 Visa Applicant," counsel stated the following:

In this case, the P-1S Beneficiaries would be responsible for several horse show horses. The P-1S Beneficiaries . . . have experience working with the principal P-1 visa holder and as [REDACTED] [REDACTED] for other professional riders. [The beneficiaries] are highly skilled horse show grooms and would be an integral part of the performance of the Primary P-1 visa holder, as they will perform essential support services of [REDACTED] . . . which cannot be readily performed by a United States worker and whose services are essential to the successful performance of the Professional Rider/Athlete, Primary P-1 visa holder. They also possess critical knowledge of the P-1 visa holder's riding methods and preferences and thus the experience with the Primary P-1 visa holder. It is obvious to [the petitioner] that the P-1S Beneficiaries play a key role in the Primary P-1 visa holder's success. More importantly, they understand the formula for success: hard work and uncompromising attention to detail.

In a letter dated April 7, 2009, the petitioner stated that [REDACTED] started working with [REDACTED] [REDACTED] in 2007 and that all three beneficiaries have worked with him since 2007. The petitioner added that the beneficiaries will be taking care of a total of 30 horses. The petitioner also submitted a separate attestation in which its owner stated that [REDACTED] has been working for [REDACTED] (the petitioning organization)

since 2007, and that all three beneficiaries have worked with him since 2007.¹ The petitioner submitted evidence that [REDACTED] was granted P-1 classification for the period February 9, 2009 through January 29, 2014, and was admitted to the United States in P-1 status on February 18, 2009.

In support of the petition, the petitioner submitted three letters from the United States Equestrian Federation, Inc. (USEF), indicating that the USEF has no objection to the granting of the petition to any of the three included beneficiaries. The petitioner also submitted a letter dated November 7, 2008 from [REDACTED], a professional horse show rider who states that he has competed against the world's best riders. [REDACTED] stated:

I know [the three beneficiaries], [REDACTED], and [REDACTED], [REDACTED], and have found them to be some of the most hard working and knowledgeable professional Horse Show Grooms available. They are very well educated in every aspect of the horse industry. Their invaluable service to professional riders in the show jumping world is highly sought after and well appreciated. I would highly recommend their talents in preparing top show horses to anyone lucky enough to employ them. Each are an asset to [REDACTED] and [the petitioner].

The petitioner's initial evidence also included a letter dated November 7, 2008 from [REDACTED] of Newmarket Stable in San Diego, California. [REDACTED] states:

During my career on the Horse Show circuit, I have had the pleasure of being acquainted with Professional Support Staff [the three beneficiaries], [REDACTED], and [REDACTED]. [The three beneficiaries], [REDACTED] and [REDACTED] exemplify great skills in preparing horses for top international competitions.

As the owner of Newmarket Stable, I know that [the three beneficiaries], [REDACTED], [REDACTED] and [REDACTED] have demonstrated great results with their professional skills. I would highly recommend [the three beneficiaries], [REDACTED], [REDACTED] and [REDACTED] as Professional Support Staff to anyone lucky enough to employ them.

The petitioner also submitted a letter dated September 12, 2008 from [REDACTED] of [REDACTED], which is essentially identical in content to the letter provided by [REDACTED].

Finally, the petitioner submitted a letter dated November 7, 2008 from [REDACTED] of Equestrian Real Estate, who stated:

As the owner of Equestrian Real Estate, I know that [the three beneficiaries], [REDACTED], [REDACTED], and [REDACTED] are aware of the rigors of the sport and are

¹ U.S. Citizenship and Immigration Services (USCIS) records indicate that [REDACTED] was previously the beneficiary of an H-2B petition filed by [REDACTED] in September 2007 (WAC 07 273 53201), which was valid until September 30, 2008.

able to handle each horse with fine skill. They are a very important addition to [the petitioner] because of their abilities as Professional Support Staff.

[The three beneficiaries], [REDACTED] and [REDACTED] not only have extensive knowledge of the sport but also exemplify the professionalism of great Horse Show Grooms.

The petitioner submitted extensive documentation in support of the petition, but the AAO notes that the evidence related to the persons who provided letters in support of the petition, rather than to the beneficiaries and their prior relationship with the principal P-1 athlete.

The director issued a request for additional evidence (RFE) on April 15, 2009, in which she requested, *inter alia*, a statement describing the beneficiaries' prior essentiality, critical skills, and experience with the principal alien and any additional documentation that would establish the beneficiaries' critical knowledge of and prior experience with the P-1 alien.

In response, the petitioner submitted a declaration from [REDACTED] dated April 29, 2009, in which he described in detail the duties the beneficiaries would perform as horse show grooms. With respect to the beneficiaries' relationship with the P-1 athlete, [REDACTED] stated:

The P-1S beneficiaries . . . have extensive experience as Horse Show Grooms for the Primary P-1 Athlete Rider [REDACTED]. [T]hey have worked together for close to two years. They are highly skilled P-1 Support grooms and will be an integral part of the performance of the Primary P-1 Athlete as performs essential support services, which cannot readily performed by a United States worker and whose services are essential to the successful performance as a Professional Rider by the Primary P-1 Athlete. They also possess critical knowledge of the riding and training methods and preferences used by the top professional riders/athletes. It is critical to [the petitioner] that the P-1 Support Staff plays a key role in Primary P-1 Athlete's success as well as the entire business. Most importantly they understand the formula for success: Hard work and uncompromising attention to every detail.

In a letter dated April 29, 2009, counsel for the petitioner emphasized that there are very few qualified horse show grooms in the United States, and noted that hundreds of temporary and permanent labor certifications are filed for such positions annually. The petitioner submitted documentation related to the shortage of horse show grooms in the United States, but provided no additional documentary evidence to establish the beneficiaries' prior experience with the P-1 alien.

The director denied the petition on May 13, 2009, concluding that the petitioner had failed to establish that the beneficiaries qualify as essential support aliens. Specifically, the director found that the petitioner submitted insufficient evidence of the beneficiaries' prior experience with the principal P-1 athlete. The director noted that the evidence submitted in this regard consisted solely of the unsupported assertions of the petitioner and counsel. The director acknowledged the four testimonial letters submitted at the time of filing, but found that "providing general praise of the beneficiaries' abilities as horse grooms does not establish that they possess prior essentiality, critical skills and experience with the principal alien."

On appeal, counsel for the petitioner reiterates that the beneficiaries "have years of experience working with the principal P-1 visa holder." Counsel further states:

The supporting documentation submitted absolutely proves that the support beneficiaries are essential to the success of the P-1 athlete. The peer letters submitted attest to the high level of skills of the beneficiaries, no where in the regulations does it require that the peers know how long the beneficiary has worked with the athlete. That evidence is most properly supplied by the employer, in that case, [REDACTED] who stated in his declaration that "they have worked together for close to two years." In addition, [REDACTED] also submitted the beneficiaries' extensive job description and list of skills and responsibilities, which clearly shows that the skills of the beneficiaries are essential to the performance of the principal athlete.

In addition, the requirement of prior experience can be WAIVED if it is proven that there are no U.S. workers available for the position. In this case, from all of the EDD, DOL, USCIS and in-house recruiting that was done by Petitioner, it is clear that the Petitioner has met this burden of proof, although not necessary, a waiver is not necessary in this case because the primary athlete and the beneficiaries have worked together for more than one year.

Counsel further states that two of the beneficiaries began working for the petitioner in August 2007, the third beneficiary began working for the petitioner in September 2007, and the principal P-1 athlete began working for the petitioner in October 2007. Counsel asserts that "therefore they have worked together since October of 2007, well over the one year required."

Finally, counsel cites extensively to the COMPETE Act of 2006, but fails to articulate a coherent argument as to how the instant beneficiaries, as horse grooms serving in an essential support capacity, would qualify under the current statute governing P-1 athletes. It appears that counsel may intend to argue that the instant beneficiaries qualify under section 214(c)(4)(A)(i)(I) of the Act as alien athletes who perform as athletes, individually or as part of a group or team, at an internationally recognized level of performance.

Upon review, counsel's assertions are not persuasive. The petitioner has failed to demonstrate the beneficiaries' prior essentiality, critical skills or experience with the principal P-1 alien, as required by 8 C.F.R. § 214.2(p)(4)(iv)(B)(2).

As a preliminary matter, the AAO will address counsel's assertion that the director failed to properly review and consider the COMPETE Act of 2006 in reaching a determination in this case. 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.

The COMPETE Act only applies to P-1 athletes and some coaches, not to P-1S essential support personnel. Therefore, counsel's assertion that the beneficiaries should be considered part of a P-1 athletic team or group is not persuasive.

As noted by the director, the record contains no evidence that the principal P-1 athlete and the beneficiaries have a prior working relationship, other than the unsupported assertions of the petitioner and counsel. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The regulations specifically require the petitioner to submit a statement describing the alien's prior essentiality, critical skills, and experience with the principal alien. 8 C.F.R. § 214.2(p)(4)(iv)(B)(2). The petitioner's owner, [REDACTED], stated in a letter dated April 7, 2009 that the P-1 alien has been working with "Woodgrove Farm" since 2007, and that the beneficiaries have been working with the P-1 alien since 2007. [REDACTED] stated in an attestation dated April 8, 2009 that the P-1 athlete has been working for the petitioning organization since 2007. 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). These statements were not only inconsistent, but also were significantly lacking in detail. Simply stating that the beneficiaries worked with the principal athlete for a certain period of time is insufficient to meet the evidentiary requirement that the petitioner provide a statement describing the beneficiaries' prior essentiality, critical skills or experience with the P-1 alien.

The director specifically advised the petitioner that the initial evidence did not meet its burden of proof and provided the petitioner with an opportunity to provide the required descriptive statement and any other documentation to establish the essential support aliens' critical knowledge of and prior experience with the P-1 alien. The petitioner submitted no additional explanation or documentary evidence of the claimed relationship in response to the RFE. 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).

Counsel emphasizes on appeal that the petitioner, as the employer of the principal athlete and beneficiaries, is best able to provide evidence of the relationship between the athlete and essential support personnel. The AAO agrees that if the petitioner has in fact employed the P-1 athlete and the instant beneficiaries since 2007 as claimed, it should be able to provide documentary evidence of such employment, such as payroll records, employment contracts, or evidence of prior U.S. employment authorization or USCIS petition approvals. The petitioner has opted not to provide any such evidence. The AAO acknowledges that the petitioner is not required to provide testimonial letters from peers in support of this evidentiary requirement, and notes the petitioner's argument that "no where in the regulations does it require that the peers know how long the

beneficiary has worked with the athlete." However, it is not unreasonable to require some form of probative documentary evidence to corroborate the claimed relationship between the P-1 athlete and the three grooms included in this petition. 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.

Finally, the AAO acknowledges counsel's assertion that "the requirement of prior experience can be WAIVED if it is proven that there are no U.S. workers available for the position." Counsel cites no statutory, regulatory or precedent authority in support of this claim. 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). There is, in fact, no waiver of the regulatory requirement that an essential support alien have a prior relationship with the principal P alien.

In sum, the petitioner has provided no documentary evidence to corroborate the beneficiaries' claimed prior relationship with the principal athlete. Accordingly, the petitioner has failed to establish the beneficiaries' eligibility as essential support workers.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner not met that burden.

ORDER: The appeal is dismissed.