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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

**PUBLIC COPY**

[Redacted]

D9

FILE [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 15 2010

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

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, with a fee of \$585. 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, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the nonimmigrant petition seeking 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), as an internationally recognized athlete. The petitioner, a horse racing business, currently employs the beneficiary and seeks to extend his P-1 status "for at least two years."

The director denied the petition pursuant to 8 C.F.R. § 103.2(b)(14) based on the petitioner's failure to submit material evidence in response to a request for evidence ("RFE") issued on August 7, 2009. The director acknowledged that counsel for the petitioner had requested additional time in which to submit the evidence, but observed that, pursuant to 8 C.F.R. § 103.2(b)(8)(iv), additional time to respond to a request for evidence may not be granted. The director concluded that the record was lacking material evidence including a contract, an explanation of the nature of events in which the beneficiary would compete, and evidence that the beneficiary is an internationally recognized athlete.

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 emphasizes that the instant petition was a request for an extension and continuation of previously approved employment without change with the same employer. Counsel asserts that the petition and evidence submitted "and the beneficiaries [*sic*] file containing other applications previously granted contain sufficient information to adequately respond to the questions raised." Specifically, counsel contends that the evidence submitted sufficiently demonstrates the terms of employment, the nature of the activities to be undertaken under the extended petition, and the beneficiary's international recognition as a professional jockey. Counsel submits a brief and evidence in support of the appeal.

## **I. The Law**

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

- (I) performs as an athlete, individually or as part of a group or team, at an internationally recognized level of performance;
- (II) is a professional athlete, as defined in section 204(i)(2);
- (III) performs as an athlete, or as a coach, as part of a team or franchise that is located in the United States and a member of a foreign league or association of 15 or more amateur sports teams, if
  - (aa) the foreign league or association is the highest level of amateur performance of that sport in the relevant country;

- (bb) participation in such league or association renders players ineligible, whether on a temporary or permanent basis, to earn a scholarship in, or participate in, that sport at a college or university in the United States under the rules of the National Collegiate Athletic Association; and
- (cc) a significant number of the individuals who play in such league or association are drafted by a major sports league or a minor league affiliate of such a sports league; or
- (IV) is a professional athlete or amateur athlete who performs individually or as part of a group in a theatrical ice skating production . . .[.]

Section 214(c)(4)(A)(ii)(I) of the Act, 8 U.S.C. § 1184(c)(4)(A)(ii)(I) provides that the alien must seek 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.

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 evidentiary criteria for internationally recognized athletes are set forth at 8 C.F.R. § 214.2(p)(4)(ii)(B). In addition, all P nonimmigrant petitions must be accompanied by the evidence set forth at 8 C.F.R. § 214.2(p)(2)(ii).

Finally, the regulation at 8 C.F.R. § 214.2(p)(13) provides, in pertinent part:

The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on Form I-129 in order to continue or complete the same activity or event specified in the original petition. Supporting documents are not required unless requested by the Director.

The regulation at 8 C.F.R. § 103.2(b)(14) states:

*Effect of request for decision.* Where an applicant or petitioner does not submit all requested

additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the evidence of record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

## II. The Issue on Appeal

The primary issue in this matter is whether the director properly denied the petition based on the petitioner's failure to submit supporting evidence in response to the RFE issued on August 7, 2009.

### *Procedural History*

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on June 22, 2009. The petitioner indicated that the basis for the classification is continuation of previously approved employment without change with the same employer and requested an extension of status.<sup>1</sup> On the O and P Classification Supplement to Form I-129, the petitioner explained the nature of the event as "races thoroughbred horses in competition [*sic*] throughout the United States." The petitioner did not indicate the intended dates of employment on the Form I-129.

The petition was accompanied by a letter from counsel dated May 26, 2009, a copy of the beneficiary's P-1 visa and Form I-94, and supporting documents which included a racetrack program with an article about the beneficiary and various winner's photographs for races won by the beneficiary between August 2008 and May 2009.

In his letter, counsel explained that there is no labor organization for jockeys and noted that the beneficiary's previous petition filed by a different employer was approved without a labor consultation. With respect to the beneficiary's qualifications as an internationally recognized athlete, counsel stated that the beneficiary "has continued his distinction as a professional jockey as evidenced by the documentation attached," and that the beneficiary, throughout his career "has been praised by the media and his peers for his excellent achievement in the field." Finally, counsel stated:

[The beneficiary] will work for [the petitioner] for a period of at least two years. Due to the nature of the field, [the beneficiary's] salary is based on a fee per ride and a percentage of the purse - ten percent (10%). The annual salary of \$30,000 is a modest approximation of his compensation. Generally, jockeys as skilled as [the beneficiary] are able to secure an even higher salary.

The director issued an RFE on August 7, 2009, in which she requested: (1) a copy of any written contracts between the petitioner and the beneficiary, or, if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed; (2) an explanation of the nature of the

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<sup>1</sup> Where asked to indicate the petition receipt number for the beneficiary's current petition, the petitioner listed the number for a 2006 petition filed by a different employer, the validity of which had expired on July 2, 2008. On page 3 of the Form I-129, the petitioner responded "No" where requested to indicate whether it had previously filed a petition on behalf of this beneficiary.

events or activities, the beginning and end dates for the events and activities, and a copy of any itinerary for the events or activities; (3) an itinerary with the dates and locations of the events or performances; (4) evidence establishing that the beneficiary is an internationally-recognized athlete pursuant to the eligibility criteria at 8 C.F.R. § 214.2(p)(4)(ii)(B); and (4) a consultation with a labor organization with expertise in the area of the beneficiary's sport. The director advised the petitioner that it had until September 18, 2009 to submit the requested information, and that, pursuant to 8 C.F.R. § 103.2(b)(11), the failure to submit all of the evidence requested at one time may result in the denial of the petition.

On September 21, 2009, the director received a letter from counsel. Counsel acknowledged the request for evidence, and stated:

Unfortunately, I have had some emergencies which have made it impossible to work with my clients to secure the documentation requested. Consequently, I am writing to respectfully request additional time to submit our response.

The director denied the petition on September 26, 2009. The director noted that the regulation at 8 C.F.R. § 103.2(b)(8)(iv) bars USCIS from granting a petitioner additional time in which to respond to a request for evidence. The director noted that pursuant to 8 C.F.R. § 103.2(b)(14), counsel's letter must be treated as a request for a decision based on the evidence of record. The director denied the petition based on the petitioner's failure to submit material evidence, specifically, the beneficiary's contract, an explanation of events or activities, and evidence that the beneficiary is an internationally-recognized athlete.

On the Form I-290B, Notice of Appeal or Motion, counsel asserts:

Appellant maintains that the application submitted and the beneficiaries [*sic*] file containing other applications previously granted contain sufficient information to adequately respond to the questions raised and in particular appellant claims error inasmuch as:

1. The documentation provided with the Form-129 application appellant made it clear that there was no contract stating "[the beneficiary] will work for [the petitioner] for a period of at least two years. Due to the nature of the field, [the beneficiary's] salary is based on a fee per ride and a percentage of the purse.
2. As to explanation of events the above explains that he will be a jockey for [the petitioner]. As can be seen from the clippings, newspaper and magazines attached to the application, [the beneficiary] is involved in horse races throughout the Midwest and based on approval of prior application and the documentation attached verify that he has been involved in horse races in Florida, Tennessee, Mexico and many other states.
3. As to the issue international recognition suffice it to say that [the beneficiary] has shown that he is of international acclaim that is why he has previously been approved and is only requesting an extension besides as noted above his participation in the sport in many states and Mexico demonstrates his distinction

as a professional jockey.

In his subsequently submitted brief, counsel emphasizes that the beneficiary has held P-1 status since August 2006 with the petitioner and another employer and as such "has been recognized as a professional jockey of enough stature" to be granted the requested classification. The petitioner submits a copy of the beneficiary's initial P-1 approval notice granted in 2006, along with the cover letter from the prior petitioner's counsel which accompanied that petition. The petitioner also submits a complete copy of the first petition it filed on behalf of the beneficiary in 2008.

Counsel asserts that the evidence shows that the two prior petitions "contained exactly the same explanation for why there was no contract," the same explanation as to the nature of the events in which the beneficiary would be competing, and the same evidence of the beneficiary's international acclaim. Counsel questions why additional information would be required with respect to the instant petition, asserts that the denial of the petition was arbitrary, and requests that the matter be remanded to the director.

#### *Analysis*

Upon review, counsel's assertions are not persuasive. The director's decision to deny the petition based on the petitioner's failure to submit requested material evidence in response to the RFE was appropriate.

As noted above, the regulation at 8 C.F.R. § 214.2(p)(13) provides that supporting documents are not required in support of an P-1 extension request *unless* requested by the Director. The plain language of the regulations gives the director the authority to request supporting documentary evidence even in those cases involving an extension of status for a beneficiary to continue employment in the same position with the same employer. The regulations do not specify that the director may do so only under specific circumstances or that the director cannot request evidence beyond what might have been submitted in support of a prior petition. 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 the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The director clearly had the discretionary authority to issue an RFE in this matter.

The RFE issued in this matter did not instruct the petitioner to submit any evidence that is not specifically set forth in the regulations as required evidence to establish eligibility for the requested P-1 classification pursuant to 8 C.F.R. §§ 214.2(p)(2)(ii) and 214.2(p)(4)(ii)(B). Again, while the director has the discretion to adjudicate an P-1 extension petition without such evidence, she is not required to do so.

Since the director exercised her discretionary authority to issue a request for evidence, the petitioner was obligated to submit the requested evidence within the given timeframe. 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). Therefore, the director properly denied the petition based on the petitioner's failure to submit the requested documentation in response to the RFE.

The AAO acknowledges counsel's assertions that the evidence of record was sufficient to establish eligibility and that a decision based on the evidence of record therefore should have resulted in approval of the petition. Specifically, counsel asserts that the evidence submitted at the time of filing contained adequate evidence of

the beneficiary's contract, the beneficiary's itinerary and nature of events, and the beneficiary's qualifications as an internationally recognized athlete to warrant approval. The AAO concurs with the director's determination that the record does not contain much of this material evidence.

The regulation at 8 C.F.R. § 214.2(p)(2)(ii)(B) requires the petitioner to submit 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 will be employed. Counsel asserts that there is "no contract" and due to the nature of the sport, the beneficiary will work for an undisclosed fee per ride and a ten-percent share of his winnings. USCIS cannot accept counsel's unsupported assertions as "a summary of the terms of the oral agreement" under which the beneficiary will be employed or as evidence that an oral agreement was created. 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 Obaigbena*, 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). Furthermore, the AAO notes that counsel's entire supporting letter, including the explanation regarding the beneficiary's terms of employment and salary, was taken nearly verbatim from a letter written by counsel for the prior petitioner in June 2006, thus raising questions as to whether it is an accurate reflection of the beneficiary's actual agreement with the current employer.

Pursuant to 8 C.F.R. § 214.2(p)(2)(ii)(C), the petitioner is required to provide 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. Counsel stated that the beneficiary will continue to be employed by the petitioner as a jockey for "at least two years" and that he will continue to race thoroughbred horses in the Midwest and other parts of the United States. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. The AAO concurs with the director that this explanation from counsel is insufficient to meet the petitioner's burden. The petitioner did not indicate the intended length of employment on the Form I-129 or provide any upcoming schedule of events in which the beneficiary is expected to race. Simply stating that he will continue to race thoroughbreds in the United States for at least two years is insufficient to establish that the beneficiary's services as an internationally-recognized athlete are required for specific athletic events for a discrete period of time.

Furthermore, it is not clear whether the petitioner in this matter is acting as the beneficiary's employer or agent. The AAO notes that the recent race results submitted for the beneficiary include only one race in which the petitioner is identified as the winning horse's owner and trainer. If the petitioner is acting as the beneficiary's agent, it must be emphasized that agents acting as employers must specify the wage offered and the other terms and conditions of employment by contractual agreement with the beneficiary and must provide an itinerary of definite employment and information on any other services planned for the period of time requested. 8 C.F.R. § 214.2(p)(2)(iv)(E)(1).

Finally, the AAO concurs with the director that the evidence submitted in support of the instant petition is insufficient to establish that the beneficiary meets the evidentiary criteria for internationally recognized athletes set forth at 8 C.F.R. § 214.2(p)(4)(ii)(B). The record contains no evidence that the beneficiary has participated in international competition with a national team, in a prior season with a major United States

sports league, or in a prior season with a U.S. college or university in intercollegiate competition. The petitioner has also not submitted written statements from an official of the governing body of the sport detailing how the beneficiary is internationally recognized, or provided a written statement from a member of the sports media or a recognized expert detailing how the beneficiary is internationally recognized. The record does not contain evidence that the beneficiary is ranked in the sport. The evidence submitted establishes that the beneficiary has won a number of races in the Midwestern United States during the previous year, but it cannot be determined whether such wins are indicative of "significant honors or awards" in the sport as required by 8 C.F.R. § 214.2(p)(4)(ii)(B)(vii). At most, the evidence may satisfy one of the seven criteria at 8 C.F.R. § 214.2(p)(4)(ii)(B), of which two are required to establish the beneficiary's eligibility.

Based on the foregoing, the AAO concludes that the director properly denied the petition based on the petitioner's failure to submit the material evidence requested in the properly issued RFE. Accordingly, the appeal will be dismissed.

The AAO acknowledges that USCIS has previously approved two P-1 nonimmigrant petitions filed on behalf of the beneficiary, including one filed by the current petitioner with essentially the same evidence that was filed with the instant petition. The prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

As stated above, each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. *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). Despite any number of previously approved petitions, USCIS does not have the authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

If the petitioner's prior petition was in fact submitted with essentially the same evidence that was submitted with this petition, then the prior petition was approved without sufficient evidence of eligibility in the record, and the approval would constitute material and gross error on the part of the director. Neither the director nor the AAO is 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).

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.