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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC 07 015 50561 Office: CALIFORNIA SERVICE CENTER Date: NOV 07 2007

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is described as a private investor. The petitioner seeks to extend the nonimmigrant classification of the beneficiary, as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), for a period of one year. The beneficiary seeks employment as a choreographer/contemporary dancer/visual artist/multimedia artist.

The director denied the petition, finding that the petitioner is not an agent and therefore lacked standing to file the petition on the beneficiary's behalf.

On appeal, counsel states that the director erred by failing to issue a request for evidence or a notice of intent to deny. The petitioner submits, on appeal, a copy of a memorandum from William R. Yates, Associate Director of Operations, Citizenship and Immigration Services (CIS), *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* (February 16, 2005). That memorandum, citing 8 C.F.R. § 103.2(b)(8), indicated that a "petition or application may be denied, without issuance of a RFE or NOID, based on evidence of clear ineligibility, in that additional evidence or explanation could not perfect the filing." In this instance, the director did not find that the petitioner had submitted insufficient evidence that the petitioner qualifies as an agent (in which case an RFE would have been in order). Rather, the director found that the information provided by the petitioner was sufficient to establish that the petitioner does not fit the regulatory requirements for an agent.

Counsel also contends that the denial of the requested O-1 extension "contravenes the Adjudicators Field Manual section 10:17," which, counsel states, calls for "deference to the previous decision" except "where there is a clear change or distinction in facts." Counsel's reliance on the memorandum and the Adjudicator's Field Manual is misplaced. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

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 (Commr. 1988). It would be absurd to suggest that CIS 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 at *3 (E.D. La. Mar. 15, 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

Having established that the director is not bound by prior O-1 approvals to approve the present petition to extend the beneficiary's O-1 status, we turn to the merits of the petition.

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), 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, 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.

An O-1 petition "may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent." 8 C.F.R. § 214.2(o)(2)(i).

Petitions for O aliens shall be accompanied by "[c]opies 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." 8 C.F.R. § 214.2(o)(2)(ii)(B).

8 C.F.R. § 214.2(o)(2)(iv)(E) imposes the following requirements on petitions filed by United States agents:

> *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary, the representative of both the employer and the beneficiary; or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by an agent is subject to the following conditions:
>
> (*1*) An agent performing the function of an employer must provide the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary.
>
> (*2*) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary, if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed. A contract between the employers and

> the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
>
> (*3*) A foreign employer who, through a United States agent, files a petition for an O nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the act and 8 CFR part 274a.

In a statement accompanying the filing of the petition, the petitioner described his role in the proceeding:

> I am and have been for over 30 years Editor-in-Chief of The New Republic Magazine. I am also a co-founder of TheStreet.com, the real-time financial e-publication which is also a public company, of which I was Co-Chairman and am now a Director. . . . Besides being an astute business/financial manager and investor, I am a Patron of culture and the Fine Arts. I desire, for philanthropic reasons, to assist in guiding and transacting the financial and artistic affairs for those artists I find compelling and possessing outstanding talent and potential for artistic success in the U.S. For people in the arts, who are usually not business oriented, this is a valuable and necessary service. In so doing, I am acting as an arts patron and a business representative, e.g. a form of agent. I will perform these services for the Beneficiary without fee. . . .
>
> I anticipate that he will earn a minimum of $750 per week from live performances during the next year. We will provide our standard business management services to him regarding all of these financial arrangements, as per his direction.

Counsel stated that the beneficiary himself "has arranged a schedule of new engagements, performances and projects lined up in New York City and in Ann Arbor over the next year, including departmental showcases for University of Michigan's prestigious, state-of-the-art Interactive Telecommunications Program."[1] The record contains no documentary evidence to show what role, if any, the petitioner played in making these arrangements.

The director denied the petition on October 26, 2006, stating that the petitioner does not qualify as an agent, because the petitioner is neither the beneficiary's employer nor a representative of both the beneficiary and the beneficiary's employer(s). The director noted "the alien has arranged his own engagements, performances and exhibitions," and found that the petitioner's asserted role as "an arts patron" and "a form of agent" does not suffice to establish that the petitioner qualifies as an agent for O-1 purposes.

The regulations do not indicate that simply any United States individual or corporation may declare itself to be an "agent" and thereby claim standing to file O-1 petitions. The regulation explicitly describes eligible agents as those acting as the beneficiary's employer, the representative of both the employer and the beneficiary or the employer's authorized agent. 8 C.F.R. § 214.2(o)(2)(iv)(E). *See also* 8 C.F.R.

[1] With regard to the beneficiary's activities at the University of Michigan, the record shows that, as of September 2006, the beneficiary was a first-year graduate student at that institution. Furthermore, a letter from a University of Michigan official made no mention of any Interactive Telecommunications Program there. Rather, a letter from [redacted] of New York University (from which the beneficiary graduated just prior to continuing his studies at the University of Michigan) referred to "the Interactive Telecommunications Program (ITP) at the Tisch School of the Arts, New York University."

§ 214.2(o)(2)(iv)(B) (referencing "established agents"). The regulatory description of eligible agents does not encompass a self-proclaimed "arts patron" and "business representative" of the beneficiary. The petitioner's work with artists is, by his own admission, an unremunerated, spare-time pursuit. The petitioner's initial filing did not contain any sort of contract or other binding agreement between the petitioner and the beneficiary, as required by 8 C.F.R. § 214.2(o)(2)(iv)(E)(*1*).

On appeal, the petitioner submits a new letter from the petitioner, addressed to the beneficiary and dated November 16, 2006 (three weeks after the denial of the petition). The letter reads, in pertinent part:

> This confirms our existing, long term patron-artist relationship since 2004:
>
> Because you are self-employed technically since you are a serious artist creating art without guarantees of payment and your art provides a cultural benefit to the artistic community, I have agreed to act as your patron and sponsor and agent and employer for all of your artistic endeavors in modern dance and video-dance projects. I will so act without you paying me a financial fee for my services. . . .
>
> While you will be so participating in the arts, and you will be doing this for the most part without payment, in the instances where there are wages or fees to be earned by you, I will either arrange for you to be paid same by any third party employers or I shall permit you to be so paid directly. Of course, since you meet such parties first hand, I authorize you to discuss possible projects with those interested in supporting your artistic endeavors.

Both the petitioner and the beneficiary have signed the letter. We note that the letter is on the letterhead of *The New Republic*. The unexplained use of this letterhead is puzzling, as *The New Republic* is a magazine of social and political commentary rather than an artists' agency.

A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). The new letter marks the first occasion in which the petitioner has identified himself as the beneficiary's "employer," in an effort to comply with 8 C.F.R. § 214.2(o)(2)(iv)(E). The director had noted that the beneficiary appears to have made his own arrangements for various shows and performances. The petitioner's after-the-fact "authorization" for the beneficiary to make these arrangements does not compel the finding that, when the beneficiary made the arrangements, the petitioner was passively the beneficiary's "agent" on those occasions.

We do not question the petitioner's dedication to the arts, or his standing in the publishing community as the editor-in-chief of a highly regarded national publication, but we concur with the director's finding that the record contains no evidence that the petitioner is, or has been acting as, an agent eligible to file a petition on the beneficiary's behalf pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E).

8 C.F.R. § 214.2(o)(1)(ii)(A)(*1*) states that the O-1 classification applies to an alien who has extraordinary ability in the arts which has been demonstrated by sustained national or international acclaim and who is

coming temporarily to the United States to continue work in the area of extraordinary ability. The director, in the denial decision, did not discuss the issue of the beneficiary's acclaim, but a review of the record does not lead us to conclude that the petitioner has met his burden of proof in this regard.

We note that much of the evidence of record is several years old, duplicated from an earlier petition filed on the beneficiary's behalf. With respect to the beneficiary's activities in 2005 and 2006, shortly before the October 20, 2006 filing date, the recent evidence of record focuses largely on the beneficiary's activities as a graduate student in New York and Michigan, receiving the kind of university-based exposure that appears to be typical of graduate students in the arts. We note that the beneficiary's own résumé lists no dates after 2004.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) states:

> *Extraordinary ability in the field of arts* means distinction. Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

Pursuant to 8 C.F.R. § 214.2(o)(3)(iv), an alien of extraordinary ability in the arts must be recognized as being prominent in his or her field of endeavor as demonstrated by either: (A) evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or (B) at least three of six specified forms of documentation. The petitioner does not claim that the beneficiary has won significant national or international awards or prizes to satisfy 8 C.F.R. § 214.2(o)(3)(iv)(A). The petitioner claims the beneficiary has met the following lesser regulatory criteria.

> *8 C.F.R. § 214.2(o)(3)(iv)(B)(1): Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements.*

The petitioner has documented the beneficiary's performances at various venues, but the published materials relating to those performances do not demonstrate that the productions or events have a distinguished reputation. For instance, advertisements for shows in which the beneficiary has participated appear on pages crowded with advertisements for other shows, with no indication of how the beneficiary's shows are more significant than the others so advertised. The regulation does not state that the mere existence of critical reviews, advertisements, publicity releases or publications is *prima facie* evidence of a distinguished reputation. Rather, such evidence must not only exist, but its content must demonstrate the distinguished reputation of the productions or events.

The letters solicited especially to support the petition, from witnesses whom the petitioner has selected (such as the beneficiary's current and former professors and dance troupe leaders who have employed the beneficiary), are not endorsements consistent with the beneficiary having attained the distinction and prominence required by the regulation at 8 C.F.R. § 214.2(o)(3)(ii), (iv). Accordingly, the beneficiary does not meet this criterion.

8 C.F.R. § 214.2(o)(3)(iv)(B)(2): Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications.

The most recent documented media coverage that discussed the beneficiary's work at significant length (as opposed to passing mention) is dated March 2003, in local community newspapers rather than "major newspapers." A July 2004 *Time Out New York* review of a group show devotes part of one sentence to the beneficiary and his work, and refers to him as a "newcomer" despite the fact that he had been involved in the arts in New York as early as 2001 (as performance programs from a Brooklyn theater attest). This passing reference, therefore, does not support the conclusion that the beneficiary was prominent or otherwise well-known in New York or beyond in 2004. The evidence does not establish that the beneficiary meets this criterion.

8 C.F.R. § 214.2(o)(3)(iv)(B)(3): Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials.

Here, the petitioner must establish the distinguished reputations of organizations and establishments that have featured the beneficiary's work. The petitioner must also show that the beneficiary performed and will perform in a lead, starring, or critical role in the events concerned. Participating in an ensemble dance performance for course credit at a university does not convey on the beneficiary a level of recognition proportional to the reputation of the university as a whole. The record establishes that the beneficiary has danced with a number of ensembles, but the evidence does not show that these ensembles have distinguished reputations. Accordingly, the beneficiary has not satisfied this criterion.

8 C.F.R. § 214.2(o)(3)(iv)(B)(5): Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements.

The record contains a number of witness letters, many of them from 2001 or earlier. A number of these letters discuss the beneficiary's potential for achievement and success at some future time. The letters are from the beneficiary's own teachers and employers (such as a dance school in Israel), and therefore do not demonstrate significant recognition outside of that circle consistent with the prominence, distinction and sustained acclaim required of aliens with extraordinary ability in the arts. Consequently, the beneficiary does not meet this criterion.

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 evidence relating to the beneficiary's recognition in the arts does not establish that the beneficiary is prominent in his field of endeavor, or that he has earned sustained national or international acclaim, as

required by section 101(a)(15)(o)(i) of the Act and pursuant to 8 C.F.R. § 214.2(o)(3)(iv). The petitioner has also failed to establish that he is an eligible agent pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. 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.