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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D8

DATE: APR 07 2011 Office: CALIFORNIA SERVICE CENTER FILE: WAC 10 127 51551

IN RE: Petitioner:
Beneficiary: [redacted]

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:

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 $630. 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's status as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in the arts. The petitioner is self-described as a photography agency and gallery. It seeks to employ the beneficiary in the position of "Art Dealer, International" for one additional year.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner will engage the beneficiary's services for a specific event or events as required by the regulations, and failed to satisfy the regulatory requirement at 8 C.F.R. § 214.2(o)(2)(ii)(C). Specifically, the director concluded that the petitioner failed to establish that the beneficiary "will be performing in a particular event, project, conference, convention or engagement, but rather would be performing "the usual duties of someone employed as an International Art Dealer." The director determined that the petitioner has not offered a temporary position with specific beginning or end dates.

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 term "event" as defined at 8 C.F.R. § 214.2(o)(3)(ii) is in fact not limited to a scientific conference, convention, lecture series, tour, exhibit, business project, academic year or engagement." Counsel cites a July 20, 2010 United States Citizenship and Immigration Services (USCIS) Policy Memorandum, "Clarifying Guidance on 'O' Petition Validity Period" in support of his assertion that "a job which may not have a specific engagement or project may also fall under this definition if the job is the 'activity within the alien's area of extraordinary ability."

I. The Law

Section 101(a)(15)(O)(i) of the Act 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.

Pursuant to 8 C.F.R. § 214.2(o)(1)(i), a qualified alien may be authorized to come to the United States to perform services relating to an event or events if petitioned for by an employer. The regulation at 8 C.F.R. § 214.2(o)(2)(ii) provides that petitions for O aliens shall be accompanied by the following:

(A) The evidence specified in the particular section for the classification;

(B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed;

(C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and

(D) A written advisory opinion(s) from the appropriate consulting entity or entities.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines "event" as follows:

> *Event* means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement. Such activity may include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event. A group of related activities may also be considered to be an event. In the case of an O-1 athlete, the event could be the alien's contract.

II. Discussion

A. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it seeks to engage the beneficiary's services for a specific event or events and otherwise satisfied the regulatory requirement at 8 C.F.R. § 214.2(o)(2)(ii)(C). The director concluded that "the beneficiary will be performing the usual duties of someone employed as an International Art Dealer," rather than "performing in a particular event, project, conference, convention or engagement" with specific beginning and ending dates.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on April 6, 2010. The petitioner indicated that it intends to employ the beneficiary in the position as "Art Dealer, International" for a period of one year at an annual salary of $150,000 plus bonus.

The petitioner is self-described as a photography agency and gallery established in 2007, with gross annual income in excess of $800,000. The petitioner did not identify its number of employees but instead indicated "agency." On the O and P Classification Supplement to Form I-129, where asked to "explain the nature of the event," the petitioner stated "photography agency."

In a letter dated March 23, 2010, the petitioner described the beneficiary's position and terms of employment as follows:

> We entered into an agreement with [the beneficiary] three years ago whereby she would provide the company with her expertise and give us a competitive advantage in the highly competitive industry of photography collection, dealing, and representation of emerging and established photographers and artists. In the past three years, [the beneficiary] has consistently demonstrated her expertise by locating and representing emerging talent and making extensive investments in the Agency's proprietary inventory. Her highly specialized

> expertise and leadership has increased our company's productivity and she has proven to be an indispensable contribution to [the petitioner].
>
> We wish to extend our present agreement with [the beneficiary] for one (1) year in the same capacity, whereby she will continue her assignment with [the petitioner] as an International Art Dealer. [The beneficiary] will be remunerated in excess of $150,000.00 per annum.

The director issued a request for additional evidence ("RFE") on April 22, 2010, in which he requested, *inter alia*, the following: (1) an explanation of the nature of the events or activities and a copy of any itinerary for the events or activities; and (2) a complete itinerary for all events, including exact periods for each service and the names and address of the locations/employers.

In a response dated May 18, 2010, counsel stated:

> [The beneficiary] is the proprietor and owner of a stock of art works and prints that exceeds well over $1,000,000.00 in commercial value. [The beneficiary's] collection is now part of [the petitioner] and the arrangement has proved commercially beneficial to the U.S. enterprise and [the beneficiary].
>
> * * *
>
> As for the request for an itinerary of events, please be advised that the regulatory definition of event includes "engagement" and "a group of related activities." *See* 8 C.F.R. §214.2(o)(3)(ii). [The beneficiary's] ongoing work and employment with [the petitioner] qualifies as [an] "engagement" comprised of "a group of related activities" involving buying and selling of art in the United States and abroad.

The petitioner submitted a spreadsheet listing the details of the beneficiary's collection of approximately 60 photographic works valued at $1,023,500. The spreadsheet indicates that twelve photographs from the collection were sold between 2007 and 2010 at a total price of $697,628.

The director denied the petition on June 3, 2010, concluding that the petitioner failed to provide an explanation of the nature of the events or activities, and the beginning and ending dates for the events or activities, pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(C).

The director emphasized that the examples provided by the regulation suggest that a qualifying event or events will be occurrences or phenomena of definite and finite duration. The director concluded that "[t]he record does not establish that the beneficiary will be performing in a particular event, project, conference, convention, or engagement," and that "there is no specific beginning or ending dates to the beneficiary's employment." Rather, the director determined that "the beneficiary will be performing the usual duties of someone employed as International Arts Dealer."

On appeal, counsel for the petitioner states that the evidence submitted "clearly establishes" that the beneficiary will continue to represent the petitioner as an art dealer at an annual salary of $150,000. Counsel further asserts:

> The regulatory requirement in this respect is found at 8 C.F.R. § 214.2(o)(3)(ii). The term event is defined as "an activity such as, but *NOT LIMITED TO*, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement." [Emphasis added].
>
> A recent Policy Memorandum PM-602-0003 issued by C.I.S. further clarifies this issue and goes on to say that "In addition, a job which may not have a specific engagement or project may also fall under this definition *if the job is the "activity within the alien's area of extraordinary ability.*" [Emphasis added]
>
> Finally, the Adjudicator's Field Manual Chapter 33.4(e)(2) contains identical language and recognizes that a job in a person's field of endeavor may be classified as an event for purposes of O-1 visa eligibility when that person is deemed to be a person of such ability. {AFM Chapter 33.4(e)(2)}
>
> The beneficiary in this matter is indeed such a person of extraordinary ability and has been duly accorded that status in the past by C.I.S.

B. Analysis

Upon review, the AAO concurs with the director's ultimate conclusion that the petitioner failed to meet the regulatory requirements set forth at 8 C.F.R. § 214.2(o)(2)(ii)(C).

The director concluded that the beneficiary "will be performing the usual duties of someone employed as an international arts dealer." We agree, in part, with counsel's assertions that there may in fact be instances in which performing the "usual" or "normal" duties of one's occupation falls within the meaning of "event." The AAO notes that aliens with extraordinary ability in athletics hired by professional sports teams, as well as aliens with extraordinary ability in education hired by U.S. universities, are often hired under multi-year contracts and also perform the "normal duties" of professional athletes or university professors, respectively. Such employment circumstances are clearly considered to be within the definition of "event" at 8 C.F.R. § 214.2(o)(3)(ii), which includes an "academic year" and, for athletes, "the alien's contract," as qualifying activities.

The regulatory definition of "event" provides only a short list of examples of qualifying activities and specifically states that it is not an exhaustive or definitive list, thus suggesting that officers would have the discretion to determine on a case-by-case basis what constitutes a qualifying "event." This flexibility in the regulatory definition is also reflected in the evidentiary requirements at 8 C.F.R. § 214.2(o)(2)(ii)(C) which instruct the petitioner to provide "an explanation of the nature of the events *or activities*, and to provide a copy of *any* itinerary." The regulations recognize that not every petitioner will be able to provide an itinerary or evidence of a list of discrete performances, competitions, or tour dates, depending on the field of employment. The

definition of event must be interpreted broadly, as the visa classification is expected to encompass a diverse array of occupations spanning the professions, business, athletics, and the arts and entertainment fields.

Therefore, an established art gallery might reasonably require the services of a full-time art dealer to perform "the normal duties" of that occupation, and under certain circumstances, the AAO could deem such an employment arrangement a qualifying "event" for the purposes of this classification.

However, the petitioner must still provide a detailed description of the nature of the activities, the beginning and ending dates of such activities, and provide a copy of its written contract or a summary of the terms of its oral agreement with the alien. 8 C.F.R. § 214.2(o)(2)(ii)(B) and (C). Here, the petitioner has not fulfilled these requirements.

The petitioner has not submitted a copy of a written contract with the beneficiary, nor has it provided a summary of the terms of an oral agreement with the beneficiary. The petitioner indicates in its letter dated March 23, 2010 that it "entered into an agreement" with the beneficiary three years ago, now seeks to extend that agreement, and will remunerate the beneficiary at an annual rate of $150,000. The petitioner's statements to this effect are insufficient to establish that it has a written or oral agreement in place with the beneficiary defining the terms and conditions of her employment, including the beginning and ending dates of that employment. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

Furthermore, in order to meet the plain language of the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(C), the petitioner must provide an explanation of the nature of the events or activities. The petitioner initially stated that the beneficiary provides the company with expertise in photography dealing and representation of emerging and established photographers and artists. Specifically, the petitioner stated that the beneficiary "has consistently demonstrated her expertise by locating and representing emerging talent and making extensive investments in the Agency's proprietary inventory."

In response to the director's request for further explanation of the nature of the events or activities to be undertaken, counsel indicated that "[the beneficiary's] collection is now part of [the petitioner] and the arrangement has proved commercially beneficial to the U.S. enterprise and [the beneficiary]." As noted above, the evidence submitted indicates that the beneficiary sold twelve paintings from her collection since 2007 for a total of nearly $700,000.

The petitioner describes itself as "a dynamic international photo agency and gallery whose mission is to acquire and sell highly significant works of photography from the 20th century masters and today's contemporary masters." The petitioner states that it assists collectors with building and refining their photography art collections, represents prominent and up-and-coming photographers, and maintains an archive of major works of art. The record contains no additional evidence regarding the petitioner's agency and gallery, such as copies of its marketing materials, media about the gallery, evidence that it maintains a

web site, a list of photographers it represents, a list of the gallery's overall inventory, or any other evidence that the petitioner is an ongoing business venture.[1]

Based on the foregoing, the beneficiary's only documented activities as an art dealer in the United States appear to include selling photographic works from her own private collection. The petitioner did not explain under what terms the beneficiary's million-dollar art collection is "now part of" the petitioning organization, and the AAO cannot conclude that the beneficiary is selling artwork from her collection on behalf of the petitioner. The nature of the beneficiary's relationship with the petitioner, duties performed for the petitioner, and the terms of her employment are not adequately documented in the record, and therefore, the AAO cannot determine that the beneficiary's proposed employment for the petitioner as an art dealer is a qualifying "event" for the purposes of this classification.

While we acknowledge that there is more flexibility in the regulatory definition of "event" than the director allowed, a petitioner cannot be exempted from providing a detailed description of the nature of the activities and a copy of its written contract or a summary of the terms of its oral agreement with the alien, as required by 8 C.F.R. §§ 214.2(o)(2)(ii)(B) and (C). There is no reliable other way to determine whether the beneficiary possesses a firm offer of employment from a U.S. company to perform work in her field of extraordinary ability.

Therefore, we concur with the director's ultimate conclusion that the petitioner has not submitted evidence to meet the plain language of the regulatory requirement at 8 C.F.R. § 214.2(o)(2)(ii)(C). We further find that the petitioner has not submitted a written contract or a summary of the terms of the oral agreement under which the beneficiary will be employed, pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(B). Accordingly, the appeal will be dismissed.

C. The Beneficiary's Area of Extraordinarily Ability

We further note for the record that the director misapplied the regulations pertaining to aliens of extraordinary ability in the arts in adjudicating this petition. The petitioner sought to classify the beneficiary as an alien of extraordinary ability in the arts, and the director applied the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv). However, while the petitioner sought to classify the beneficiary in the arts, the petitioner simultaneously claimed that the beneficiary meets the evidentiary criteria for aliens of extraordinary ability in business, as set forth at 8

[1] The AAO notes that an Internet search for the petitioner's stated business address at [redacted] revealed that this location is a single family home, rather than an art gallery or other commercial premises. [redacted] a copy of which is incorporated into record of proceeding). The petitioner indicates that the beneficiary works at this address. One of the individuals who provided an advisory opinion in support of the petition, [redacted] of Philips de Pury & Company, states that "due to the strength of [the beneficiary's] inventory, I am anticipating a visit to her Colorado residence to review the material."

C.F.R. § 214.2(o)(3)(iii), although it never specifically cited to this section of the regulations. For example, the petitioner indicated that it was submitting "published material about the beneficiary," "evidence of the beneficiary's participation on panels," and evidence of her "photography-related contributions." *See* 8 C.F.R. 214.2(o)(3)(iii)(B)(*3*), (*4*) and (*5*).

The director applied the evidentiary standard for aliens for extraordinary ability in the arts. Upon review, the director should have evaluated the instant petition as a petition for classification of the beneficiary as an alien of extraordinary ability in the field of business.

For purposes of the O-1 classification, the applicable definition of "arts" at 8 C.F.R. § 214.2(o)(3)(ii) is as follows:

> Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians and animal trainers.

The AAO can find no basis for including an art dealer or artist agent among this group of creative workers. The beneficiary is claimed to be responsible for the purchase and sale of works of art, and the representation and marketing of artists' works. Such responsibilities would reasonably require such tasks as negotiation of prices, collection of fees and other business-related matters and transactions. While we acknowledge that the beneficiary's work requires extensive knowledge and connections in the field of art photography, the field is properly classified as a "business" field.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

> Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

> It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1

> classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

While the director determined that the beneficiary meets the lower standard of "distinction" applicable to aliens of extraordinary ability in the arts, the petitioner has not submitted evidence that would satisfy the regulatory criteria applicable to aliens of extraordinary ability in business at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B), nor has it established through submission of extensive evidence that the beneficiary has a demonstrated record of sustained national or international acclaim as an art dealer, or that she is one of the small percentage who have arisen to the very top of her field. 8 C.F.R. § 214.2(3)(ii). For this additional reason, the petition cannot be approved.

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

III. Prior Approval and Conclusion

The AAO acknowledges that USCIS previously approved a petition for O-1 status filed on behalf of the beneficiary. The prior approval does not preclude USCIS from denying an extension of the original visa based on a reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give deference to a prior determination of eligibility. However, 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'r. 1988). Each nonimmigrant petition filing is a separate proceeding with a separate record 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).

In the present matter, the director reviewed the record of proceeding and concluded that the petitioner failed to meet all eligibility requirements for the requested classification. If the previous nonimmigrant petition was approved based on the same evidence that is contained in the current record, the approval would constitute material and gross error on the part of the director. Furthermore, as discussed above, the petitioner and the director have both misclassified the beneficiary's claimed area of extraordinary ability as "arts" rather than

"business." Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous petition approval by denying the instant petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that 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). Despite any number of previously approved petitions, USCIS does not have any 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.

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 it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043 (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.