**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**

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**PUBLIC COPY**

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2010

IN RE: Petitioner:
Beneficiary: [redacted]

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

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

[1]**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 withdraw the director's decision and sustain the appeal.

The petitioner filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien of extraordinary ability in the arts. The petitioner is engaged in the sale, service and rental of lighting systems for theatre, concerts, trade shows, television, film, industrial and special events. It currently employs the beneficiary pursuant to an approved O-1 classification petition and now seeks to extend his status for three additional years.

On August 3, 2009, 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.

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 asserts that, although the director issued a lengthy request for evidence ("RFE"), the RFE failed to mention any perceived deficiency regarding the events for which the petitioner sought the beneficiary's services. Counsel requests that the AAO withdraw the director's decision and either approve the petition or remand the matter for issue of a new RFE.

**I. The Law**

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of 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 . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability . . . .

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.

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[1] The director identified the beneficiary's area of extraordinary ability as both "business" and "science." However, the petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it sought to classify the beneficiary as an alien of extraordinary ability in the arts. The beneficiary's area of extraordinary ability is lighting design, which is among the occupations listed as examples in the regulatory definition of "arts" at 8 C.F.R. 214.2(o)(3)(ii).

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. 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 as contemplated by the regulations. The director concluded that the petitioner failed to provide a beginning and end date for the beneficiary's employment or to identify a defined project or engagement. The director concluded that the beneficiary would be "performing the usual duties of someone employed as a Sales Representative."

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 16, 2009. The petitioner indicated that it seeks to employ the beneficiary as rental account representative for its multi-million dollar Microsoft corporate account on a full-time basis for a period of three years. The petitioner indicated that the position is commission-based and the account value is expected to exceed $2.5 million.

The petitioner provided a detailed description for the rental account representative position, which describes the terms of employment and the petitioner's Revenue/Performance benchmarking tool, which is used to

determine the annual commission to be paid, and reiterated in its supporting letter that it has offered the beneficiary the position for a period of three years.

The director issued a request for additional evidence ("RFE") on May 4, 2009. The director instructed the petitioner to provide 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 alien will be employed. The director did not request an itinerary, an explanation of the nature of the events or activities, or the beginning and ending dates for the events or activities.

In response, the petitioner resubmitted the above-referenced overview of the proffered position in lieu of a formal employment contract. Counsel emphasized that the overview describes the central job duties, the company reporting structure, and the method in which the company measures job performance.

The director denied the petition on August 3, 2009, concluding that the petitioner failed to establish that the beneficiary would be coming to the United States to perform services relating to a specific event or events for an employer. Specifically, the director stated:

> Although the petitioner provided an explanation of the duties to be performed by the beneficiary, there i[s] no indication on record as far as definite beginning or ending date[s] or no defined project or engagement. On the petitioner's initial statement, it indicates that the beneficiary will manage the company's [redacted] account. However, the petitioner did not provide any supporting documentation to support its statement.
>
> Thus, the record does not establish that the beneficiary will be performing in a particular project. There is no beginning or ending dates to the beneficiary's employment. Instead, the evidence indicates that the beneficiary will be performing the usual duties of someone employed as a Sales Representative.

In denying the petition, the director relied in part on the commentary accompanying the final O and P visa rule amending the regulations at 8 C.F.R. § 214.2 to reflect changes made by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Public Law 102-232 (December 12, 1991), in which legacy Immigration and Naturalization Service (INS) made the following observations:

> Admission Periods for O Nonimmigrants--§214.2(o)(10)
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> One commenter suggested that there should be no regulatory limit on the length of admission for an O nonimmigrant alien. The suggestion cannot be adopted since the period of stay for an O nonimmigrant is limited by the Act to the period of time required by the alien to complete the event or events described on the petition. An O-1 classification may not be granted to an alien to enter the United States to freelance in the open market. An O-1 alien must be coming to the United States for specific events.

> The three-year period of time listed in the final rule relates only to the alien's initial period of admission. The alien's total period of time in the United States will be limited to the duration of the event. There is no maximum time limit on the O-1's total stay in the United States.
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> Periods of Admission
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> Except for P-1 athletes, there is no maximum period on the on the length of time that an O and P nonimmigrant may remain in the United States. However, it is rare that a P-1 entertainment group would need more than a year to complete an event or events. Most entertainment events are for shorter periods of time and O or P classification may not be granted to an alien merely to enter the United States to freelance and seek employment. The O and P nonimmigrant alien is admitted to the United States to perform in specific events as detailed on the initial petition.

59 Fed. Reg. 41818-01, 41822 and 41828 (August 15, 1994).

On appeal, counsel indicates that the director failed to address the grounds for denial in the RFE and thus did not give the petitioner notice that the terms of employment were somehow deficient. Counsel requests that the director's decision be withdrawn and the petitioner either remanded or approved.

**B. Analysis**

Upon review, the AAO finds that the director's interpretation of the definition of "event" is overly narrow and restrictive. Given the nature of the petitioner's business and the position offered, the AAO finds that the petitioner has met its evidentiary burden by explaining the beneficiary's terms of employment, confirming that there is no formal written contract, and providing a detailed explanation of the nature and scope of the beneficiary's proposed activities, as required by 8 C.F.R. § 214.2(o)(2)(ii)(B) and (C).

The director concluded that the beneficiary "will be performing the usual duties of someone employed as a Sales Representative," but did not provide adequate support for her conclusion that this type of employment situation is prohibited by the statute and regulations. 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. However, 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." The definition includes among the list of qualifying activities the term "engagement" which is commonly defined as "employment, especially for a given period of time," or "a period of employment." Webster's II New World College Dictionary 373 (3rd Ed. 2001).

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 O-1 visa classification is expected to encompass a diverse array of occupations spanning the professions, athletics, and the arts and entertainment fields.

In discussing events and periods of admission for O-1 aliens, the commentary accompanying the final rule reveals a concern that O-1 aliens not be permitted to freelance in the open market and that they not be permitted to enter the United States for the purpose of independently seeking employment. The commentary does not express any particular concern that O-1 aliens must be prohibited from performing the "usual duties" of a given occupation. Here, the beneficiary is a lighting designer of distinction sought after by a leading company in the industry to manage the lighting systems needs of one of its largest corporate clients. There is no reason to believe that he would engage in any activities other than those described in detail in the petition and the accompanying job description.

While it is necessary to require an itinerary of discrete performances or appearances for touring musicians or other artists and entertainers who are traditionally self-employed, and therefore more likely to freelance their services once in the United States, it is not reasonable to request an itinerary for an individual offered a full-time position within their area of expertise. Given that the regulations allow for an initial three-year period of stay, consistent with other employment-based nonimmigrant classifications such as the H-1B and L-1 categories, it is reasonable to believe that the "engagement" included in the regulatory definition of "event" may include a three-year offer of employment in the alien's area of extraordinary ability, including the "normal" duties of one's profession. Of course, the petitioner must still provide a detailed description of the nature of the activities and provide a copy of its written contract or a summary of the terms of its oral agreement with the alien. The petitioner has fulfilled these requirements.

The director cited no other grounds for denying the petition, and upon *de novo* review, the AAO sees no additional basis for denial. Accordingly, the AAO will withdraw the director's decision dated August 3, 2009 and approve the petition. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Upon review, the petitioner has met its burden of proof.

**ORDER**: The appeal is sustained.