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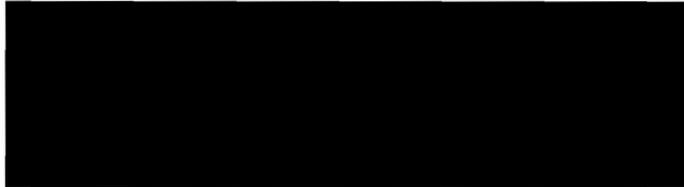
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FILE: EAC 05 800 13985 Office: VERMONT SERVICE CENTER Date: MAR 10 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for Nonimmigrant Worker Pursuant to 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:



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.


Robert P. Wiemann, Chief
Administrative Appeals Office

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DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner is self-described as an "agent for immigration purposes," and the beneficiary is a vocalist. 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 National Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i). The beneficiary seeks to perform opera as a vocalist for 20 hours per week for a period of three years.

The director denied the petition on August 17, 2005 on two separate grounds. First, the director found that the petitioner failed to submit copies of any contracts or summaries of any oral employment agreements and an itinerary of the beneficiary's engagements in the United States, as required by 8 C.F.R. §§ 214.2(o)(2)(ii)(B) and (C). Second, the director determined that the record lacked evidence that the beneficiary satisfied the regulatory criteria to establish extraordinary ability in the arts pursuant to 8 C.F.R. § 214.2(o)(3)(iv).

On appeal, the petitioner only addressed the first ground of denial, by submitting copies of contracts between the beneficiary and ██████████ of "New Day," dated June 9, 2005 and September 12, 2005, respectively. The AAO noted that evidence of the beneficiary's contracts and itineraries had been specifically requested by the director in a Request for Evidence (RFE) issued on April 1, 2005, and the petitioner had failed to provide the evidence prior to the adjudication of the petition. The AAO therefore refused to consider this evidence on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Citing *Matter of Michelin Tire Corp*, 17 I&N Dec. 248 (Reg. Comm. 1978), the AAO further determined that even if such evidence were considered, it was dated well after the date the petition was filed and was therefore not relevant to a determination of the beneficiary's eligibility.

The AAO also concurred with the director's determination that the evidence did not satisfy the regulatory criteria to establish extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(3)(iv). The AAO's decision included a detailed analysis of the evidence submitted and why such evidence failed to satisfy any of the regulatory criteria. It is noted that the petitioner did not address second ground for denial of the petition on appeal.

The petitioner subsequently filed the instant motion to reconsider. On motion, counsel for the petitioner provides the following statement on Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO):

The Appeals Unit [sic] Director failed to apply the proper legal standard in determining the extraordinary ability in the arts of the beneficiary. The term extraordinary achievement in the context of the arts is "Distinction." Distinction is defined as having a degree of skill and recognition substantially above that normally encountered." [sic] 8 CFR 214.2(o)(3)(iii). The evidence submitted came from sources of high national regard in the Ukraine, the beneficiary's home country. These unique sources unhesitatingly heralded [sic] the talent and ability of the beneficiary, to a degree far more than that normally encountered. Also the decision of the Director of the Appeals Unit was factually incorrect inasmuch as copies of contracts for some limited

engagements were indeed submitted along with the response to the Center Director's Request for Evidence.

The first issue to be addressed is whether the petitioner submitted evidence to satisfy the evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(ii)(B) and (C), which provide that the petitioner must submit copies of any written contracts for the beneficiary, summaries of any oral agreement under which the beneficiary will be employed, and an explanation of the nature of the beneficiary's intended events or activities, the beginning and end date of such events or activities, and a copy of any itinerary for such activities. As discussed above, the director and the AAO determined that the petitioner had failed to submit any such evidence prior to the adjudication of the petition and had therefore not satisfied these evidentiary requirements.

On motion, counsel for the petitioner states that the AAO's decision was factually incorrect because "copies of contracts for some limited engagements were indeed submitted along with the response to the Center Director's Request for Evidence."

A careful review of the entire record of proceeding reveals that no such contracts were included in the petitioner's response to the director's RFE. The record does contain a letter dated January 31, 2005 signed by A [REDACTED] of "New Day" located in Philadelphia, Pennsylvania. New Day is described in the letter as "an interpretative ensemble of traditional Ukrainian Music." This evidence was addressed by the director in his decision dated August 17, 2005, and was deemed to be insufficient to satisfy the evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(ii)(B) and (C). The AAO did not specifically address this evidence in its decision. The letter from New Day is addressed to the beneficiary and refers to a "Performance Offer." The letter states, in pertinent part, the following:

As a result of our discussions, New Day is willing to extend to you the opportunity to appear as a soloist with our ensemble to promotional purposes.

You will not be compensated, but your presence will enhance your professional good will and reputation.

The letter from New Day is neither a written contract nor a summary of the terms of an oral agreement under which the beneficiary will be employed and therefore this document does not satisfy the evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(ii)(B). Nor does this evidence satisfy the petitioner's burden to provide an explanation of the nature of the beneficiary's planned events or activities, the beginning and ending dates for such events, or an itinerary for the events or activities, as required by 8 C.F.R. § 214.2(o)(ii)(C). The evidence submitted in response to the director's RFE suggested that the petitioner seeks O-1 status for the beneficiary not for already-planned specific events, but rather to enable the beneficiary to be available for engagements that may occur during the intended period covered by the petition. Therefore, the AAO affirms its previous determination that the petitioner failed to comply with the regulations at 8 C.F.R. §§ 214.2(o)(ii)(B) and (C).

The remaining issue is whether the petitioner has established that the beneficiary qualifies for classification as an alien with extraordinary ability in the arts as defined by the statute and regulations.

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 . . . 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) provides the following pertinent definitions:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. . . .

* * *

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the 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.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv), states, in pertinent part, that:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (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 of the following forms of documentation:
 - (1) 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;
 - (2) 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;
 - (3) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

- (4) Evidence that the alien has received significant recognition for achievements from organizations, critics, government 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; or
 - (5) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

In its previous decision, the AAO determined that the record contained no evidence that the beneficiary has been nominated for or received any significant national or international awards or prizes in her field pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(A). Accordingly, the AAO discussed her eligibility under the relevant criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and determined that the record did not demonstrate that the beneficiary meets at least three of these criteria.

On motion, counsel for the petitioner asserts that the AAO failed to apply the proper legal standard in determining whether the beneficiary qualifies as an alien with extraordinary ability in the arts. Counsel contends that the evidence submitted "came from sources of high national regard" in the beneficiary's home country and is sufficient to establish her "distinction" in the field as that term is defined at 8 C.F.R. § 214.2(o)(3)(ii). Counsel asserts that "these unique sources unhesitatingly heralded [sic] the talent and ability of the beneficiary, to a degree far more than that normally encountered."

Counsel's assertions are not persuasive. Although counsel suggests that the AAO applied an improper legal standard, he fails to address the AAO's determination that the petitioner failed to meet the specific evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A) or 8 C.F.R. § 214.2(o)(3)(iv)(B). Counsel's assertion that the petitioner established the beneficiary's "distinction" in her field, and therefore her extraordinary ability, is insufficient to overcome those evidentiary deficiencies.

As the petitioner has not established that the beneficiary has been nominated for or received any significant national or international awards or prizes in her field, it must establish that she meets three of the six criteria outlined at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The first criterion requires the petitioner to submit 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. None of the submitted evidence referred to the beneficiary's participation in any capacity in any specific production or event. Accordingly, the petitioner did not establish that the beneficiary meets this criterion.

The second criterion requires the petitioner to submit 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 petitioner provided no critical reviews or other published materials in support of the petition. Therefore, the petitioner did not establish that the beneficiary meets this criterion.

The third criterion requires the petitioner to submit 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.

The petitioner submitted a letter from [REDACTED], President of the Ukrainian League of Philadelphia, in which he thanks the beneficiary for performing at the League's fundraiser on December 17, 2004. While [REDACTED] praises the beneficiary's contribution, he does not indicate that the beneficiary performed a lead, starring or critical role for the League. The record is also devoid of any evidence that the League has a distinguished reputation.

[REDACTED], President of the Philadelphia Branch of the Ukrainian Congress Committee of America (UCCA), similarly praises the beneficiary's work as a volunteer associate music director of the *Akkolada* Chamber Choir that is sponsored by the UCCA Philadelphia Chapter, but [REDACTED] does not indicate that the beneficiary performs a lead, starring or critical role for the organization. The record also contains no evidence that the UCCA Philadelphia Chapter has a distinguished reputation.

[REDACTED], Chief Choirmaster of the Lviv Opera House in the Ukraine, states that he has known the beneficiary since 2000 when she was a soloist with the Lviv Opera Choir. [REDACTED] does not further describe the nature or significance of the beneficiary's role with the Choir or indicate that she was the lead or principal soloist or otherwise performed a lead, starring or critical role for the Choir. The record is also devoid of any evidence that the Lviv Opera Choir has a distinguished reputation.

Counsel's claim on motion that the petitioner's evidence "came from sources of high national regard in the Ukraine" is insufficient to demonstrate the distinguished reputation of these organizations. 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). Counsel does not address the AAO's observation that none of the organizations who submitted letters on the beneficiary's behalf mentioned that she had performed or would performed in a lead, starring or critical role. Accordingly, the beneficiary does not meet this criterion.

To meet the fourth criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B), the petitioner must submit evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications. The petitioner submitted no documentary evidence to establish that the beneficiary has a record of major commercial or critically acclaimed success and thus failed to demonstrate that the beneficiary meets this criterion.

The fifth criterion requires the petitioner to submit evidence that the alien has received significant recognition for achievements from organizations, critics, government 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.

██████████ states that he has known the beneficiary since 1999 as her vocal coach. He opines that the beneficiary is "a vocalist of outstanding ability" because she "learned huge amount of material from operas repertoire [sic] and showed big professionalism in performing it on the stage" and "has always demonstrated exceptional level [sic] in theatrical art and highest vocal talent along with auctorial [sic] mastering on the stage."

██████████, Director of the Opera Studio of the Lviv Lysenko Federal Conservatory in the Ukraine, states that he has known the beneficiary since 1999 as her vocal coach. ██████████ praises the beneficiary's "unique voice and talent," "breathhtaking" performances and states that the beneficiary "was awarded many times" for her unspecified achievements.

While ██████████ and ██████████ attest to the beneficiary's musical abilities, their testimonials fail to demonstrate that the beneficiary has received significant recognition for her achievements. Rather, the letters indicate that the beneficiary is well-respected by two individuals with whom she worked closely in the past. Despite ██████████'s statement that the petitioner has received many, unspecified awards, the record remains devoid of any evidence that the petitioner has received awards or other significant recognition for her achievements from organizations, critics, government agencies or other recognized experts in her field beyond individuals with whom she has worked directly.

The sixth and final criterion set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B) requires the petitioner to submit evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence. The petitioner submitted no evidence pertaining to the salary commanded by the beneficiary for her services in the past. The petitioner stated on Form I-129 that the applicant would work for 20 hours per week at a rate of \$50.00, although it was not clear if this is a weekly or hourly rate. The petitioner submitted no contracts prior to the director's decision, and only provided a vague performance offer letter indicating that the beneficiary would have the opportunity to perform with the New Day ensemble on an unpaid basis. The petitioner therefore did not demonstrate that the beneficiary has received or would receive a high salary or other substantial remuneration.

Again, on motion, counsel does not directly address the AAO's specific findings and instead relies on his unsupported claim that the applicant has achieved "distinction" based on the petitioner's submission of letters from "sources of high national regard" who attest to her "talent and ability." As stated at 8 C.F.R. § 241.2(o)(3)(ii), distinction means a high level of achievement in the 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. None of the submitted evidence demonstrates that the applicant has received the requisite level of achievement or recognition, or that she could be considered renowned, leading, or well-known in her field.

Moreover, as discussed above and in the AAO's previous decision, the petitioner has failed to establish that the beneficiary meets any of the evidentiary criteria at 8 C.F.R. § 214.2(3)(iv). Consequently, the beneficiary is ineligible for nonimmigrant classification under section 101(a)(15)(O)(i) of the Act and the petition must be denied.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the previous decision of the AAO will be affirmed.

ORDER: The AAO's decision dated April 19, 2007 is affirmed.