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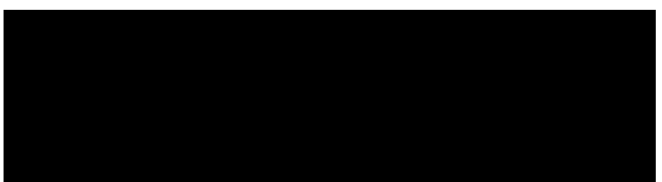
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



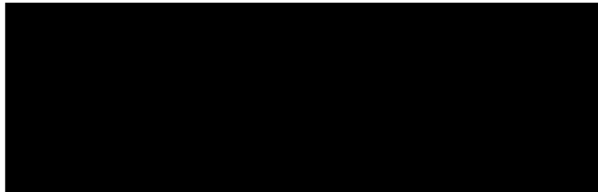
b8.

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 3 0 2010

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Petition for 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:



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

The petitioner filed the nonimmigrant visa petition seeking classification of the beneficiary under 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 a ballet company and currently employs the beneficiary as a dancer and choreographer pursuant to an approved O-1 classification petition. It seeks to extend the beneficiary's employment for a period of two years.

The director denied the petition on November 9, 2009, concluding that the petitioner failed to submit the required written consultation from a labor organization or peer group with expertise in the area of the beneficiary's ability.

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 asserts that the petitioner submitted the required written consultation with its initial evidence in August 2009. The petitioner provides a copy of its previous submission in support of the appeal and requests that the petition be approved.

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.

Section 101(a)(46) of the Act states that the term "extraordinary ability" means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.

Pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii) pertaining to aliens of extraordinary ability in the arts, "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 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 the following forms of documentation:

(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;

(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;

(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;

(4) 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;

(5) 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

(6) 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.

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 end 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)(5)(ii) further details the consultation requirements for an O-1 alien of extraordinary ability as follows:

(A) Content. Consultation with a peer group in the area of the alien's ability (which may include a labor organization), or a person or persons with expertise in the area of the alien's ability is required in an O-1 petition for an alien of extraordinary ability. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to the petitioner, it should describe the alien's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the services of an alien of extraordinary ability. A consulting organization may also submit a letter of no objection in lieu of the above if it has no objection to the approval of the petition.

(B) Waiver of consultation of certain aliens of extraordinary ability in the field of arts. Consultation for an alien of extraordinary ability in the field of arts shall be waived by the Director in those instances where the alien seeks readmission to the United States to perform similar services within 2 years of the date of a previous consultation. . . . Petitioners desiring to avail themselves of the waiver should submit a copy of the prior consultation with the petition and advise the Director of the waiver request.

The sole issue in this matter is whether the petitioner fulfilled the written consultation requirement or, alternatively, qualified for waiver of this requirement

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, using the USCIS e-Filing system on August 7, 2009. The petitioner indicated on the O and P Classification Supplement to Form I-129 that it has obtained the required written consultation from "ACE" on August 19, 2008.

Counsel for the petitioner submitted a letter dated August 12, 2009 in which he outlined the beneficiary's qualifications as an alien of extraordinary ability in the arts. Counsel provided also provided an index with a detailed listing of 33 attached exhibits. Counsel did not list the consultation from ACE as being among the included attachments, nor did he indicate that the petitioner was requesting a waiver of the consultation requirement pursuant to 8 C.F.R. § 214.2(o)(5)(ii)(B).

The director issued a request for additional evidence ("RFE") on September 15, 2009 in which she requested, *inter alia*, the required written advisory opinion from an appropriate consulting entity. The petitioner's response included a letter from counsel dated October 23, 2009 and additional documentary evidence, but did not include the requested consultation letter, or any acknowledgement that such evidence had been requested.

The director denied the petition on November 9, 2009, based on the petitioner's failure to submit the required written consultation. The director further noted that the petitioner failed to establish that an appropriate peer group or labor organization does not exist.

On appeal, counsel for the petitioner asserts that "the mandatory consultation letter dated August 14, 2008 was submitted in our first supporting documents letter dated August 12, 2009 and not in our response to the request for evidence letter dated October 23, 2009." Counsel re-submits a copy of his letter dated August 19, 2009 and 33 attachments in support of the appeal.

Upon review, the petitioner has not overcome the grounds for denial of the petition. As discussed above, the written consultation from "ACE" was not included in the petitioner's initial submission or in its response to the RFE, nor was it listed among the evidence the petitioner submitted on either occasion. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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).

Notwithstanding the director's denial of the petition based on these sole grounds, the petitioner has not opted to submit a copy of the required consultation on appeal, but instead resubmits a copy of its initial evidence and insists that a letter dated August 14, 2008 from ACE was included. Again, after a thorough review of the record of proceeding in its entirety, the AAO found no such letter.

The record of proceeding contains numerous testimonial letters, but none of them are purported to meet the written consultation requirement. Rather, the testimonials were submitted as "evidence of [the beneficiary's] international and national recognition, acclaimed successes and achievements," pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*). Regardless, none of the letters meet the content requirements set forth at 8 C.F.R. § 214.2(o)(5)(ii)(A).

Furthermore, the petitioner has not met the regulatory requirements for a waiver of the consultation requirement set forth at 8 C.F.R. § 214.2(o)(5)(ii)(B), as it has not provided a copy of any prior written consultation nor advised the director of its waiver request.

Based on the foregoing, the petitioner has not met the written consultation requirement set forth at 8 C.F.R. § 214.2(o)(2)(ii) or established that it qualifies for a waiver of this requirement. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary qualifies as an alien of extraordinary ability in the arts through submission of evidence to satisfy the evidentiary criterion at 8 C.F.R.

§ 214.2(o)(3)(iv)(A), or three of the six evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). While it appears that the petitioner claims the beneficiary meets the eligibility criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*), (*2*), (*3*) and (*5*), the evidence submitted does not fully establish her eligibility under at least three of these criteria, and the prior approval alone is insufficient to establish that the instant petition is approvable.

Specifically, the petitioner has not submitted sufficient evidence to establish that the beneficiary will perform services as a lead or starring participant in productions or events which have a distinguished reputation, or for organizations and establishments that have a distinguished reputation, in her role as a dancer and choreographer for the petitioner.

The petitioner submitted programs for three of its recent productions, including its December 2008 production of [redacted], its March 2009 production of [redacted] and its March 2009 production [redacted] The beneficiary's name is listed among the members of the *corps de ballet* in these programs rather than as a soloist, principal soloist, or principal dancer. The evidence submitted does not establish how the beneficiary is considered to have a lead, starring or critical role within the petitioner's ballet company or its productions, and there is no evidence that the beneficiary had received any promotion within the company as of the date the petition was filed.

As such, the petitioner has not established that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) or (3), and at most, can satisfy only two of the six criteria. 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).

The AAO acknowledges that the beneficiary was previously granted O-1 status authorizing her employment with the petitioner. 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 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). 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 was ineligible for an extension of the nonimmigrant visa petition's validity based on the petitioner's failure to submit the required written advisory opinion for an appropriate consulting entity. The director was well within the scope of her discretionary authority when she requested such evidence, and for this reason alone and the reasons discussed above, we must conclude that the evidence contained in the current record does not

establish eligibility for the requested classification. 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.

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.