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U.S. Citizenship and Immigration Services

[redacted]

File: WAC 06 800 08609 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting 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 summarily dismiss the appeal.

The petitioner states that it operates a management company. It filed the instant 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. The petitioner seeks to temporarily employ the beneficiary as a composer/screenwriter/director for a period of three years.

The director denied the petition on September 21, 2007, concluding that the evidence submitted does not support a claim of extraordinary achievement in the motion picture and television industry, as defined by the statute and regulations.

Counsel for the petitioner electronically filed the Form I-129, Petition for a Nonimmigrant Worker, May 31, 2006, but did not subsequently submit the required initial evidence in support of the petition. On May 18, 2007, the director issued a request for evidence, granting the petitioner 12 weeks to provided documentary evidence demonstrating that the beneficiary meets the statutory and regulatory criteria as an alien of extraordinary ability in the arts or an alien of extraordinary achievement in the motion picture or television industry, as well as a written consultation from an appropriate labor union or peer group, an itinerary for the beneficiary, and copies of any written contracts between the petitioner and beneficiary. On August 9, 2007, counsel for the petitioner advised that her office had not yet received all of the documentation it was expecting although it had requested such evidence "quite a while ago." Counsel requested 14 additional days in which to produce the requested evidence, but never submitted the response. Consequently, the director denied the petition based on insufficient evidence of eligibility for the O-1 classification.

On appeal, counsel asserts the following:

> It is clear from the Request for Evidence submitted by the Service that they did not have the complete file when attempting to adjudicate this case. This is the 4th time that this case has gone up to the AAO and each time the Service commits one error or another.
>
> This time the Service asked us to re-create a portion of the file that it has apparently lost or misplaced. We know this because the decision states that the case was filed in 2006 when, in fact, it was submitted in 2003; the file is missing the original form I-129, the history of [the beneficiary's] stay in the United States and all the references and letters of recommendation obtained from professional organizations to support his petition.
>
> The Service asked us to recreate the file. We could not do so in the amount of time specified because it was initially handled by another attorney and we did not have all the documents required. The requirements for letters from the various guilds have also changed and necessitated additional work and documentation to obtain. We therefore asked for additional time to enable us to put together the lost portion of the Service's file.

> Our case was denied because we could not do so fast enough. We do not believe that we should be penalized for the Service's disorganization. We have already obtained most of the documentation required to re-create this file and would like to complete and submit the results of our efforts for proper adjudication.
>
> Our case was denied because we could not do so fast enough. We do not believe that we should be penalized for the Service's disorganization. We have already obtained most of the documentation required to re-create this file

Counsel for the petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that she would submit a brief and/or additional evidence within 30 days. Counsel filed the appeal on October 24, 2007. On December 15, 2008, the AAO contacted counsel by facsimile to advise her that no additional evidence had been incorporated into the record. The AAO requested that counsel confirm whether she submitted a brief and additional evidence within the time period indicated on Form I-290B. Counsel replied that she had not done so. Therefore, the record will be considered complete.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who, with regard to motion picture and television productions, has a demonstrated record of extraordinary achievement, and 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. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991).

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

> Extraordinary achievement with respect to motion picture and television productions as commonly defined in the industry, means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.

The evidentiary criteria for aliens seeking classification as O-1 aliens with achievement in the motion picture and television industry are set forth at 8 C.F.R. § 214.2(o)(3)(v). Specifically, the petitioner must establish that the beneficiary meets the criteria at 8 C.F.R. § 214.2(o)(3)(v)(A), or three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(v)(B). The evidence submitted must demonstrate that the beneficiary has been recognized as having a demonstrated record of extraordinary achievement.

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. The director denied the petition based on the petitioner's failure to submit evidence to meet any of the above-referenced criteria.

On appeal, rather than addressing the grounds for denial or submitting the required evidence, counsel suggests that the service center director did not have the "complete file" when reviewing the petition and inappropriately asked the petitioner to recreate it. Counsel's assertion that the instant petition was filed in

2003 and not 2006 is simply incorrect. The petitioner did file an O-1 classification petition on behalf of the beneficiary in 2003 (WAC 03 193 52043), but the instant petition (WAC 06 800 06444), with filing fee, was filed electronically on May 31, 2006. Although counsel previously indicated that the petitioner was attempting to collect the required initial evidence, counsel now states that the requested evidence was already included in the record. It is worth emphasizing that that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, U.S. Citizenship and Immigration Services (USCIS) is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of separate nonimmigrant petition proceedings are not combined.

Moreover, despite the petitioner's indication on Form I-129 that the instant petition was filed to request a continuation of previously approved employment without change, the previous petition was never approved, and the instant petition must be treated as a petition for new employment. The director did not request that the petitioner "recreate" a file, but simply requested that the petitioner comply with the evidentiary requirements of the instant visa classification. The AAO can find no errors on the part of the director in issuing the request for evidence. Such requests are standard and necessary in cases in which a petitioner files a Form I-129 electronically and fails to submit any documentary evidence in support of the petition.

The petitioner has now had two and one-half years to obtain the initial evidence that it should have had available to submit as of the date of filing in May 2006 and has yet to produce any evidence to establish the beneficiary's eligibility pursuant to the criteria at 8 C.F.R. § 214.2(o)(3)(v). Although counsel indicated that the petitioner had obtained most of the required evidence as of October 24, 2007, the petitioner has opted not to submit the evidence on appeal.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, counsel does not identify an erroneous statement of fact or conclusion of law on the part of the director. Rather, counsel acknowledges that no evidence has been submitted in support of the petition to date.

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. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

ORDER: The appeal is summarily dismissed.