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U.S. Citizenship and Immigration Services

D8

[redacted]

FILE: WAC 06 197 52823 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is self-described as a major distributor of "skin care products and services." It seeks to employ the beneficiary as its vice president for marketing/sales in Russia and Ukraine. The company 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 with extraordinary ability in business.

The director denied the petition concluding that the record as presently constituted fails to establish that the beneficiary has been recognized as one of the small percentage of persons at the very top of the field of business.

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, the petitioner asserts that the director erred and that the beneficiary is a celebrity who qualifies as an alien with extraordinary ability in business.

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.

The issue raised by the director in this proceeding is whether the petitioner has shown that the beneficiary qualifies for classification as an alien with extraordinary ability in business as defined by the statute and the regulations.

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

> *Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:
>
> (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(4) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(8) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (*o*)(3)(iii) 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)(5)(i)(A) requires, in pertinent part:

> Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for O-1 or O-2 classification can be approved.

As a threshold issue, counsel on appeal raises the issue of the standard of proof in these proceedings. It is therefore noted that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As discussed herein and for the reasons given below, the petitioner has failed to establish by a preponderance of the evidence that the beneficiary is fully qualified as an alien with extraordinary ability in business.

The record consists of a petition with supporting documentation, a request for additional evidence (RFE) and the petitioner's reply, the director's decision, an appeal and letter and additional evidence supporting the appeal. There is no evidence that the beneficiary has received a major, internationally recognized award equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iii)(A). Further, the record does not demonstrate that the beneficiary has met at least three of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). On appeal, counsel fails to address any of the criteria outlined in the regulations. Instead, counsel argues that the petitioner "needs" the beneficiary's services, that the beneficiary is qualified for the position, and that the beneficiary is a "celebrity."

For criterion number one, the petitioner submits newspaper or magazine articles that indicate that the beneficiary was previously crowned Miss Hawaiian Tropic International. Although the director specifically requested this type of evidence in the RFE, the petitioner did not submit these 2005 articles as part of its 2006 RFE response and instead submits them for the first time on appeal. 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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

However, even if the AAO were to consider this evidence, such an award does not demonstrate that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in her field of endeavor, i.e., the marketing and sales of skin care products and services.

For criterion number two, the record contains no evidence which demonstrates the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

For criterion number three, the record contains no evidence to establish that there has been published material in professional or major trade publications or major media about the beneficiary alien, relating to her work in the field for which classification is sought. First, as noted above, the only articles submitted were done so in support of the appeal instead of in response to the director's RFE in which this evidence was specifically requested. As such, the AAO will not consider this evidence for any purpose. *Id.* The appeal will be adjudicated based on the record of proceeding before the director. Second, the petitioner has not established that these articles were published in professional or major trade publications in the field of marketing or sales. Instead, the articles appear to have been published in local Canadian newspapers and tabloid magazines. In addition, the articles do not address the alien's work in the field of marketing and sales and focus instead on the beneficiary's appearance on A-Channel and ABC's *The Bachelor* as well as rumors regarding her social life and relationships. As such, this evidence, even if properly submitted, fails to meet the requirements of criterion number three.

For criterion number four, the record contains no evidence which documents the beneficiary's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought.

For criterion number five, the record contains letters attesting to the value of the beneficiary's work. [redacted], principal of the Madonna Catholic School in Sherwood Park, Alberta, Canada, indicates that the beneficiary's "performance as a Ukrainian Bilingual Educational Assistant as well as a Ukrainian translator for the Bilingual Ukrainian children was outstanding" and that she "was an exceptional representative to our School Association." A letter from [redacted] the owner/founder of Hawaiian Tropic Canada, Tanning Research Labs., Inc., states that the beneficiary "has proven, through her excellent professional skills and leadership, that she was able to promote our brand right across Canada" and that she "assisted in organizing sales and marketing meetings to prospect these markets and promot[e] our product in various aspects." The letters, however, do not indicate that the beneficiary's contributions were original and that they were of a major significance to her field of endeavor.

For criterion number six, the record contains no evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media.

For criterion number seven, the regulation clearly requires evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation. In this instance, the petitioner fails to provide any evidence which establishes that the beneficiary has ever been employed in a critical or essential capacity for an organization or establishment that has a distinguished reputation. Specifically, the only apparent work experience the beneficiary possesses in the field of marketing and sales was with Hawaiian Tropic Canada. The letter provided by that employer only indicates that the beneficiary was part of the Hawaiian Tropic Canada team and fails to indicate the critical or essential nature of her duties with this company. Moreover, no evidence has been provided to establish that Hawaiian Tropic Canada is an organization or establishment that has a distinguished reputation in the field of business or, in particular, in sales and marketing.

For criterion number eight, although the Form I-129 petition indicates that the beneficiary will earn an annual salary of $50,000 per year, the record contains no documentary evidence of the beneficiary's salary history or salary surveys to determine whether such a salary is considered high in comparison to others in the beneficiary's field of endeavor. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Although the issue of comparable evidence was not specifically addressed by counsel or the petitioner, it appears that counsel is seeking to have the beneficiary's language skills considered as evidence of her extraordinary ability in the chosen field of endeavor. First, while it is true that the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) permits "comparable evidence" where the eight criteria do not "readily apply" to the alien's occupation, the petitioner has not shown how these criteria fail to readily apply to the beneficiary's occupation. Regardless, the regulation neither states nor implies that language skills are "comparable" to the strict documentation requirements in the regulations setting forth the eight criteria. Second, the petitioner has still failed to establish that the beneficiary's knowledge of Ukrainian and Russian are exceptional or that these skills qualify her as an alien of extraordinary ability in business. To the contrary, the University of Alberta records submitted on appeal appear to indicate that the beneficiary has only taken one 200 level course, "The Ukrainian –Speaking World I." The record otherwise fails to document her knowledge above that of a general speaker of the language.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive. *See* 137 Cong. Rec. S18247 (daily ed., Nov. 16, 1991). In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained national or international acclaim" and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized. In order to establish

eligibility for O-1 classification, the petitioner must establish that the beneficiary is "at the very top" of her field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary's achievements have not yet risen to this level.

Finally, on appeal, counsel requests an oral hearing before the AAO "if necessary" to establish the beneficiary's eligibility for the benefit sought. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. **§ 103.3(b). In this** instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is 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.

ORDER: The appeal is dismissed.