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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

U.S. Citizenship
and Immigration
Services

D8

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 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

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 field of science. The petitioner is engaged in the manufacture of cutting tools and coatings. It currently employs the beneficiary as a developmental research engineer pursuant to an approved H-1B classification petition and now seeks to change his status so that he may continue to work in this position for three additional years.

On July 21, 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 "[t]he concept of an event alludes to a specific period of time with specific starting and ending points," and emphasizes that the petitioner has not offered the beneficiary open-ended or speculative employment. Counsel contends that the petitioner clearly described the beneficiary's anticipated duties and the need for his services for the period of time requested. Counsel submits a brief and additional evidence in support of the appeal.

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.

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 "merely coming to perform the usual day-to-day duties as a developmental research engineer, or any other normal occupation without a specific intended purpose does not qualify as an event."

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 27, 2009. The petitioner indicated that it seeks to employ the beneficiary as a developmental research engineer for 30 to 35 hours per week for a period of three years. In a letter dated October 8, 2009, the petitioner described the beneficiary's proposed role as follows:

> [The petitioner] whishes [*sic*] to hire a Development Research Engineer with responsibilities to maintain, service and upgrade our existing coating machines, further advance our current coatings and develop new recipes, upgrade and build a strong analytical department for quality control purposes leading us to ISO 9001 and AS9100 certifications. Additionally, it will be [the beneficiary's] responsibility to implement our strategy of expansion in to other markets by designing new coating machines and developing recipes and coatings for those

markets including medical and automotive applications. These new coatings will include Diamond-Like-Carbon (DLC) and ceramic coatings.

We wish to hire [the beneficiary] for a period of 3 years at a salary of $38.57 per hour.

The director issued a request for additional evidence ("RFE") on December 28, 2009, in which she instructed the petitioner to submit the following: (1) a more detailed description of the work the beneficiary will perform for the entire requested period of validity, including specific job duties, the percentage of time to be spent on each duty, the level of responsibility and the hours to be worked per week; (2) an explanation as to whether the proffered position existed before the alien was employed; (3) a copy of any written contracts between the petitioner and beneficiary, or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed; (4) a complete itinerary for all events including the exact periods for each service and the names and locations of all locations/employers; (5) a detailed explanation of the nature of the event or events in which the beneficiary will be performing as well as an explanation of the finite nature of the event or events; and (6) an explanation as to how the petitioner determined that the event will be concluded in three years.

In response to the RFE, the petitioner provided a detailed breakdown of the beneficiary's proposed activities in the position of developmental research engineer. The petitioner indicated that the beneficiary is expected to devote approximately 35 percent of his time to conducting research and development on products for new market segments and specifications, including development of a white diamond coating for dental braces for a customer and development of a Diamond-Like-Carbon (DLC) coating for bearings for in-house production using a Balzer BA1450 coating machine. The petitioner stated that the beneficiary will spend an additional 20 percent of his time performing primary and secondary research on the durability and performance of the petitioner's existing products for marketing purposes. The beneficiary's remaining time would be allocated to maintaining, inspecting and upgrading existing production machines (15%), developing new uses for existing products and materials (20%), and developing patents and submitting documentation for future company use (10%).

The petitioner stated that the position previously existed on an interim basis, and that it is "projecting initially a 3 year employment period for [the beneficiary]," based on the views of its manufacturing team. The petitioner explained that the beneficiary would perform his duties at the petitioner's Valencia, California facility and occasionally attend events such as professional conferences in the field, the exact dates and locations of which would be determined in the future. The petitioner submitted a copy of its contract of employment with the beneficiary. In responding to the RFE, counsel for the petitioner noted that "[t]he issue of Itinerary, Event, Validity Period has been difficult to answer as this normally is asked in an Entertainment Area."

The director denied the petition on January 29, 2010, 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.

The director noted the petitioner's statement that it had difficulty responding to portions of the RFE, and the petitioner's indication that it is "projecting initially a 3 year employment period" for the beneficiary. In this regard, the director observed that "the concept of an event alludes to a specific period of time with specific starting and ending points, not projections or guesses." The director further stated:

> The Petitioner must establish that there is a limitation to the beneficiary's work in the U.S. Merely coming to the U.S. to perform the usual day-to-day duties as a developmental research engineer, or any other normal occupation without an intended purpose, does not qualify as an event.
>
> Because an itinerary and a specified event have not been established by the petitioner, it appears that the only limitation to the beneficiary's work in the U.S. is the mandated maximum validity period of three years for this visa class.
>
> Without a complete itinerary, detailed explanation of the nature of the event, an explanation of the finite nature of the event, or an explanation of how it was determined that the event will be concluded in three years, the Service is unable, at this time, to determine that an event, as the type contemplated by the Act and its implementing regulations, exists.

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)
>
> 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.
>
> * * *
>
> Periods of Admission

* * *

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 asserts that the petitioner described in detail the specific activities in which the beneficiary would be engaged, and noted the specific goals the beneficiary is expected to achieve, such as developing a coating process for FDA approval, and developing an in-house coating process using equipment already purchased for this purpose. Counsel asserts that the petitioner submitted ample evidence to establish that the beneficiary's employment is not speculative or otherwise prohibited by the regulations or the definition of "event."

In support of the appeal the petitioner submits an addendum to its RFE response letter in which it provides further explanation as to why the beneficiary's requested employment period of three years is critical to the company. The petitioner provides additional explanation regarding the beneficiary's proposed research and development activities, the petitioner's needs for his specific experience and skills, and projected completion dates for each of the five areas of responsibility to be assigned to the beneficiary. The petitioner further indicates that it "has budgeted and allocated the funds necessary to complete all tasks at the end of the duration of the O-1 visa."

B. Analysis

Upon review, the AAO agrees with counsel's assertions and finds that the director's interpretation of the definition of "event" is overly narrow and restrictive. Given the nature of the beneficiary's field and the position offered, the AAO finds that the petitioner has met its evidentiary burden by explaining the beneficiary's terms of employment, providing a copy of its contract with the beneficiary, 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 developmental research engineer," 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 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 day-to-day duties" of any "normal occupation." Here, the beneficiary is an accomplished scientist sought after by a private company to assist with the technological development of its highly-complex products. There is no reason to believe that he would engage in any activities other than those described in detail in the petition.

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 a scientist. In contrast to an artist or entertainer, the beneficiary in this case is a scientist with expertise in the development of commercial products for private employers who possesses a firm offer of employment from a U.S. company to perform work in his field.

The director's narrow interpretation of what constitutes a qualifying "event" is untenable as it would essentially prohibit private sector employers from hiring O-1 scientists, engineers, and business leaders. Rather, such persons would be limited to either working in academia or coming to the United States only for conventions, conferences, to deliver lectures, or to work on scientific or business "projects." 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 January 29, 2010 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.