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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 06 2011 Office: VERMONT SERVICE CENTER FILE: EAC 10 111 50771

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a 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:

[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, Vermont 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 remand the matter to the director for entry of a new decision.

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), 8 U.S.C. 1101(a)(15)(O)(i), as an alien of extraordinary ability. Specifically, the petitioner requested that the beneficiary be classified as an alien of extraordinary ability in the field of science, education, business, or athletics, pursuant to the criteria at 8 C.F.R. § 214.2(o)(3)(iii). The petitioner, a creative photography and retouching studio, seeks to employ the beneficiary in the position of Digital Imaging Retoucher for a period of three years.

On June 10, 2010, the director denied the petition concluding that the petitioner failed to establish that the beneficiary meets the criteria applicable to aliens of extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(3)(iv).

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 the director applied the incorrect regulations, as the petitioner clearly indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it seeks to classify the beneficiary in the "O-1A" category pursuant to the criteria at 8 C.F.R. § 214.2(o)(3)(iii). Counsel further contends that the director erred by applying the regulatory criteria applicable to aliens of extraordinary ability in the arts, as such criteria are "totally unrelated," and the beneficiary is "not an artist." Counsel submits a brief 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 extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

> It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for

those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

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

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 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 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.

II. The Issue on Appeal

The primary issue raised by the petitioner on appeal is whether the director erred by adjudicating the instant petition under the definition of "extraordinary ability" and evidentiary criteria applicable to aliens of extraordinary ability in the arts.

The petitioner has clearly and consistently indicated, on the Form I-129, Petition for a Nonimmigrant Worker, and in all supporting documentation, that it seeks to classify the beneficiary as an alien of extraordinary ability pursuant to the regulations at 8 C.F.R. § 214.2(o)(3)(iii)(A) and (B), which are applicable to aliens who possess extraordinary ability in the fields of science, education, business, or athletics.

The director issued a request for evidence on March 25, 2010, in which he acknowledged that the petitioner sought to classify the beneficiary pursuant to the criteria at 8 C.F.R. § 214.2(o)(3)(iii), and instructed the petitioner to submit additional evidence to satisfy these criteria.

After reviewing the petitioner's response, the director denied the petition on June 10, 2010, concluding that the petitioner failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the arts, pursuant to the regulations at 8 C.F.R. § 214.2(o)(3)(iv).

The AAO concurs with counsel's assertion that the director clearly erred by failing to adjudicate the petition according to the regulations applicable to the requested O-1 classification. The petitioner bears the burden of proof with respect to the specific visa classification that they request on the Form I-129 and cannot be required to meet the burden of proof for an alternative classification. USCIS will only consider the visa classification that the petitioner annotates on the petition, and has no authority to consider other classifications in the alternative.[1]

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[1] The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Here, the director failed to consider the beneficiary's eligibility under the requested O-1 classification, and had no authority to adjudicate the petition under an alternate classification. The AAO notes that, given the nature of the beneficiary's claimed area of extraordinary ability, the petitioner could have reasonably requested review of the petition under the regulations applicable to the field of arts at 8 C.F.R. § 214.2(o)(3)(iv). However, as the petitioner requested that the beneficiary be granted O-1 status as an alien of extraordinary ability in the field of science, education, business, or athletics, the director must limit his review of the evidence as it pertains to the definition of extraordinary ability and specific eligibility criteria applicable to that classification at 8 C.F.R. § 214.2(o)(3)(iii). The director failed to reach any conclusion regarding the beneficiary's eligibility under the requested classification, and instead determined that the beneficiary did not qualify under an alternative classification which is governed by a different definition of "extraordinary ability" and a different set of evidentiary criteria, at 8 C.F.R. § 214.2(o)(3)(iv).

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determination on that issue. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the beneficiary is ineligible. Rather, we remand the matter because the director based the decision on incorrect grounds and failed to address the beneficiary's eligibility under the requested classification.

Accordingly, the AAO will withdraw the director's decision and remand the petition to the director for entry of a new decision. The director is instructed to apply the definition of extraordinary ability and evidentiary criteria applicable to aliens of extraordinary ability in the fields of science, education, business or athletics pursuant to 8 C.F.R. § 214.2(o)(3)(iii).

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.