



U.S. Citizenship
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FILE: EAC 03 212 50094 Office: VERMONT SERVICE CENTER Date: JUL 05 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The director's decision will be withdrawn; the petition will be remanded for further action and consideration.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the beneficiary's sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. Specifically, the director determined that the sole evidence submitted, an approval notice for a nonimmigrant visa, did not warrant approval of the similar immigrant visa.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien 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,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

Counsel's cover letter for the petition indicates that the petition includes "supporting documentation." The petitioner, however, submitted only an approval notice for a nonimmigrant visa petition and a letter from the petitioner's accountant attesting to the petitioner's ability to pay the proffered wage. No other supporting documentation appears in the record of proceedings prior to appeal.

Without issuing a request for initial evidence, the director denied the petition. The director stated:

You have provided no evidence that the beneficiary qualifies as an alien of extraordinary ability. The beneficiary's previous admission as an O-1 nonimmigrant, in and of itself is not acceptable evidence of the beneficiary's claim of extraordinary ability for qualifying purposes under section 203(b)(1)(A) of the Act.

On appeal, counsel asserts that this conclusion is "not sufficient as a basis on which to deny an application."

As stated above, the initial submission included no supporting documentation other than the nonimmigrant approval notice addressed by the director. Thus, the director addressed everything submitted. However, as

stated above, counsel's initial cover letter references "supporting documentation" in addition to the nonimmigrant petition approval notice. The regulation at 8 C.F.R. § 103.2(b)(8) provides, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence.

Counsel does not challenge the director's failure to request initial evidence or claim that evidence is available that was not submitted initially or on appeal. Nevertheless, counsel's brief does not reflect an awareness that the initial petition was submitted without supporting documentation. Thus, given the clear language in the regulation quoted above and counsel's reference to "supporting documentation" in the initial cover letter, we will remand the matter to the director for the purpose of issuing a request for initial evidence advising counsel that no initial evidence was submitted.

In considering any evidence that may be submitted in response to such a request, the director should consider that counsel's appellate assertion that the regulations for the nonimmigrant and immigrant classifications in the petitioner's field of art mirror each other is incorrect. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. Compare 8 C.F.R. §§ 214.2(o)(3)(ii), (iv) with 8 C.F.R. § 204.5(h)(3).

In light of the above, the matter is remanded to the director for action in accordance with this decision. As always, the burden of proof in visa petition proceedings remains entirely 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 and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.