



DR

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

File: WAC-00-047-52536 Office: California Service Center Date: 07 NOV 2001

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

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)

IN BEHALF OF PETITIONER: [Redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identifying data deleted to prevent disclosure of unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
for Robert P. Wiemann, Acting Director
Administrative Appeals Unit

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a production company operating what it terms corporate entertainment productions. The beneficiary is a performing artist engaged in the field of acrobatics. The petitioner seeks classification of the beneficiary, and a change of visa classification from P-1 to O-1, in order to employ him in the United States for a one-year season of performances at a salary of approximately \$48,000.

The director denied the petition finding that the petitioner failed to establish that the beneficiary had met the regulatory standard for an alien with extraordinary ability in the arts.

On appeal, counsel for the petitioner argued that the director applied an incorrect regulatory standard defining extraordinary ability in the arts and that the beneficiary qualifies for the classification sought. Counsel also argued that the beneficiary's partner in their two-man act was granted O-1 classification based on the submission of the same type of documentation.

Section 101(a)(15)(O)(i) of the Immigration and Nationality Act (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 beneficiary is described as a native and citizen of Canada, a former gymnast with the Canadian national gymnastics team, and a performing artist who has appeared in the cast of notable productions such as Cirque du Soleil.

At issue in this matter is whether the petitioner has established that the beneficiary satisfies the appropriate regulatory standard as an individual performer with extraordinary ability in the arts.

8 C.F.R. 214.2(o)(1)(ii)(A) states, in pertinent part, that O-1 classification applies to:

(1) An individual alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and who is coming temporarily to the United States to continue work in the area of extraordinary ability.

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

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

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.

8 C.F.R. 214.2(o)(3)(iv) states that in order to qualify as an alien of extraordinary ability, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

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

(1) Evidence that the alien has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the

field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) 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.

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.

In support of the petition, the petitioner furnished two letters from choreographers who are familiar with the beneficiary's work and who praised his abilities. The director found that this evidence was insufficient to satisfy the above regulatory standard.

On appeal, counsel submitted additional documentation made up of press clippings relating to the beneficiary's former career as a gymnast with the Canadian national team.

Upon review of the record it must be concluded that the petitioner has failed to overcome the basis for denial of the petition. First, the claim that the director applied an incorrect standard is not supported by the record. The written decision of the director clearly cited the proper standard that must be satisfied - that is a demonstration of having achieved "distinction" in the field of endeavor.

Second, two letters from choreographers are insufficient to demonstrate that at least three of the above regulatory criteria have been satisfied. The petitioner did not submit evidence of

distinction such as critical reviews from distinguished arts publications or major trade journals.

Third, documentation of the beneficiary's achievements as an athlete are considered, but are not directly applicable to satisfying the standard of having achieved distinction as a performing artist. As noted by counsel, the criteria for O-1 classification as an artist are different from those as an athlete.

Accordingly, it must be concluded that the petitioner has failed to establish that the beneficiary's achievements in the field of arts have been recognized as substantially above that ordinarily encountered in the field.

The additional argument that another similar petition was approved cannot be considered. The record of that decision is not part of the instant proceeding. If the evidence of that case was similar to the instant petition as alleged by counsel, then that petition was approved in error.

Finally, it must be noted that the petitioner failed to submit the required consultation from a peer group or labor organization. The petition cannot be approved without such a consultation from the appropriate labor organization for performing artists in the United States.

The denial of this petition is without prejudice to the petitioner pursuing the beneficiary's admission under alternate provisions of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.