



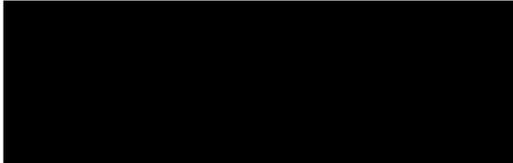
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U.S. Department of Justice

Immigration and Naturalization Service

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



File: LIN-01-236-54992 Office: Nebraska Service Center Date: 17 SEP 2002

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]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. An appeal was summarily dismissed by the Associate Commissioner for Examinations. The matter is again before the Associate Commissioner on motion to reopen. The motion will be granted; the appeal will be dismissed.

The petitioner is a dance studio. The beneficiary is a professional competitive dancer and dance instructor. The petitioner seeks O-1 classification of the beneficiary, as an alien with extraordinary ability in the arts pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the "Act"). The petitioner seeks to employ her in the United States for three years as a dance instructor at a salary of \$60,000 per year.

The center director denied the petition on January 23, 2001, finding that the petitioner failed to establish that the beneficiary satisfies the regulatory standards for classification as an alien with extraordinary ability in the arts.

The Associate Commissioner, by and through the Director, Administrative Appeals Office ("AAO"), summarily dismissed the appeal on July 18, 2002, based on the failure of the petitioner to submit a brief or additional evidence within the time allotted.

On motion, counsel for the petitioner argued that a brief was timely submitted to the Service, but apparently not routed to the record prior to the issuance of the decision. Counsel submitted a copy of the material hand delivered by messenger to the AAO.

Based on this evidence, the motion to reopen the proceeding is hereby granted. The appeal will be reviewed on its merits.

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. Section 101(a)(46) of the Act further states that the term "extraordinary ability" means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.

The beneficiary is a native and citizen of Belarus. She is a professional ballroom dance competitor. The petitioner submitted, in part, proof of her having won dance competitions in ballroom, smooth dance, and dancesport competitions, including proof that she and her partner are the reigning smooth dance champions in the competition sponsored by Arthur Murray.

Competitive dance is a recognized sport and is under consideration as an Olympic event. Dance is also a traditional art form. The regulatory provisions governing O-1 classification are different for athletes and for performing artists. The provisions for athletes is much more stringent than those for artists. The center director considered the petition for classification under the criteria for the arts. The AAO will consider the appeal under the criteria for the arts without reaching a finding on the sport/art distinction for competitive dance.

The first issue is whether the petitioner has established that the beneficiary qualifies as an alien with extraordinary ability in the arts within the meaning of this provision.

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 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.

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 order to establish eligibility for O-1 classification as an alien with extraordinary ability in the arts, a petitioner must establish that the alien beneficiary has distinction in the field of arts. For the purposes of this proceeding, distinction is defined as a high level of achievement and recognition substantially above that ordinarily encountered, and a

demonstration that the alien is renowned, leading, or well known in the field of arts. 8 C.F.R. 214.2(o)(3)(ii).

The petitioner did not establish that the beneficiary has received a significant national or international award pursuant to 8 C.F.R. 214.2(o)(3)(iv)(A). Therefore, in order to establish the requisite extraordinary ability, the petitioner must satisfy at least three of the criteria at 8 C.F.R. 214.2(o)(3)(iv)(B), or submit comparable evidence as provided for by 8 C.F.R. 214.2(o)(3)(iv)(C).

The center director concluded that the evidence presented was sufficient to satisfy criteria numbers 3 and 5 above, but that the evidence did not show at least three of the criteria listed at 8 C.F.R. 214.2(o)(3)(iv)(B) had been satisfied.

On appeal, counsel argues that the proposed salary of \$60,000 is high for a dance instructor in satisfaction of criteria number 6. Counsel further argued that the sum of the evidence supports the contention that the beneficiary has distinction in the field of dance.

After careful consideration of the evidence, counsel's argument is not persuasive. Here, the petitioner submitted evidence that the beneficiary has won "state championship" dance competitions in the U.S., has won a national competition in Canada, and has appeared on televised dance competitions. However, the petitioner failed to provide a comprehensive summary of the beneficiary's career in dance or any documentation explaining the role of dance competitions in dance as an art form. Absent such information, the Service is unable to conclude that such achievements are sufficient to establish distinction in the field of endeavor.

The argument that a proposed salary of \$60,000 is significantly higher than the average salary of a dance instructor is not sufficient to satisfy criteria 6, because the petitioner did not provide sufficient information relating to the prize money and earning in the field of dance in general. In addition, contrary to the discussion by the center director, the record is insufficient to establish that the beneficiary has satisfied criteria 3 or 5. It has not been established that the alien performed the lead role in a distinguished production as demonstrated in trade journals and it has not been established that she has received significant recognition from critics in the field. Therefore, the petitioner has not satisfied at least three of the criteria of 8 C.F.R. 214.2(o)(3)(iv)(B). Nor is it persuasive that the sum of the evidence demonstrates that the beneficiary has reached a level of skill and recognition substantially above that ordinarily encountered in the field of arts pursuant to 8 C.F.R. 214.2(o)(3)(iv)(C).

In addition, while not a basis of the director's discussion, O-1 nonimmigrant visa classification is available to a qualified alien to come to the United States to perform services relating to an event or events if petitioned for by an employer. 8 C.F.R. 214.2(o)(1)(i). *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. 8 C.F.R. 214.2(o)(3)(ii).

In this case, the petitioner seeks to employ the beneficiary as a dance instructor. There is no indication in the record that she will either perform or compete in dance. While not explicit in the record, an instructor at a dance studio is generally engaged in teaching introductory dance to novices. It is acknowledged that the petitioner asserted that the beneficiary would spend the majority of her time supervising other dance instructors at the facility. However, as the petitioner declared only three employees on the petition form, it is not reasonable that the beneficiary would be primarily engaged at the supervisory level at a dance studio with only three personnel.

On review, it cannot be concluded that the proposed position of dance instructor is consistent with O-1 classification. First, working as a dance instructor is not the type of specific event contemplated by the Act and its implementing regulations for O-1 classification. An O-1 classification may not be granted to an alien to enter the United States to free lance in the open market. 59 Fed.Reg. 41818-41842 (Aug. 15, 1994). Second, the Act stipulates that O-1 classification is for the alien to continue work in the area of extraordinary ability. It has not been demonstrated that teaching introductory dance for recreational purposes is continuing in the area of the arts at a level of extraordinary ability.

The denial of this petition is without prejudice to the petitioner pursuing classification of the beneficiary 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.