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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 01 270 51830 Office: CALIFORNIA SERVICE CENTER Date:

FEB 11 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker under 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:



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

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 Acting Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a talent management agency. The beneficiary is a singer and an actress. The petitioner filed a Form I-129, petition for a nonimmigrant worker, seeking O-1 classification of the beneficiary, as an alien with extraordinary ability in the arts, under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), in order to employ her in the United States for an unspecified period.¹ The petitioner stated that the beneficiary would be remunerated on a contract basis.

The acting director denied the petition on the grounds that the petitioner had failed to establish that the beneficiary qualifies as an alien of extraordinary achievement in the motion picture and television industry. The acting director noted that the beneficiary had been performing as part of a duo with her twin sister, Barbara Arsenault, since 1993 and that the beneficiary intended to come to the U.S. to perform with her sister as a duo in an upcoming movie project.

On appeal, counsel for the petitioner argues, in part, that the acting director misapplied 8 C.F.R. 214.2(o)(1)(ii)(A)(1) by requiring that the beneficiary demonstrate extraordinary ability as an individual, rather than as a member of a group. Counsel also asserts that the beneficiary seeks to classify the beneficiary as an individual with extraordinary ability in the arts, rather than as an alien of extraordinary achievement in the motion picture and television industry. Finally, counsel argues that since the director previously approved an O-1 petition for the same beneficiary on a thinner record, this petition merits approval.

Section 101(a)(15)(O)(i) of 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 or, with regard to motion picture and television productions a demonstrated record of extraordinary achievement, 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 beneficiary is a native and citizen of Canada. The beneficiary is both a performing artist (singer) and an actress. She was last admitted to the United States on April 18, 1999, as

¹ On appeal, counsel for the petitioner states that the petitioner intends to retain the beneficiary for a two-year period.

an O-1 nonimmigrant worker, with an authorized period of stay until July 31, 2001. Because her authorized stay expired before a subsequent petition was filed on her behalf, the director treated the instant petition as one for new employment rather than as a request for an extension.

At issue in this proceeding is whether the beneficiary must meet the standard for classification as an alien of extraordinary achievement in the motion picture and television industry, or the lower standard for classification as an alien of extraordinary ability in the arts. The petitioner asserts that the beneficiary will perform in a movie production and ultimately hopes to perform as a singer in Las Vegas. The evidence of record shows that the beneficiary has an offer to perform in a movie production and that she hopes to land a contract to sing in Las Vegas. Given the tenuous nature of the beneficiary's singing prospects, and the fact that she is coming to the United States to perform in a movie production, we find that the regulations require that she meet the higher standard for classification as an alien of extraordinary achievement in the motion picture and television industry under 8 C.F.R. § 214.2(o)(1)(ii)(A)(2).

A preliminary issue in this proceeding is whether the appropriate standard is that for an alien of extraordinary achievement in the motion picture and television industry, or the lower standard for classification as an alien of extraordinary ability in the arts. The record clearly shows that the beneficiary is coming to the United States to perform in a motion picture, so the appropriate standard is that for an alien of extraordinary achievement in the motion picture and television industry.

The salient issue in this proceeding is whether the petitioner has established that the beneficiary is eligible for classification as an alien of extraordinary achievement in the motion picture and television industry.

8 C.F.R. § 214.2(o)(2)(ii) states 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.

8 C.F.R. § 214.2(o)(3)(v) provides:

Evidentiary criteria for an alien of extraordinary achievement in the motion picture or television industry. To qualify as an alien of extraordinary achievement in the motion picture or television industry, the alien must be recognized as having a demonstrated record of extraordinary achievement as evidenced 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, and will perform, 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, government 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.

In a written notice, the director requested additional supporting evidence to satisfy the criteria set forth above.

Counsel responded by submitting additional evidence.

The petitioner did not submit evidence that the beneficiary has been nominated for, or has been the recipient of, significant national or international awards.

The petitioner submits that the beneficiary will perform in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation. The petitioner states that the beneficiary will perform in a leading role in a movie production for Elsinore Pictures. No evidence was provided to establish that either Elsinore Pictures, or the upcoming movie production, has a distinguished reputation. Further, the regulation requires the alien to establish that she has performed services in a leading role, not simply that she will do so upon arriving in the United States. 8 C.F.R. § 214.2(o)(3)(v)(B)(1).

The petitioner submitted evidence showing that the beneficiary had performed in several movie productions. No evidence was submitted, however, to show that the beneficiary has performed services as a lead or starring participant in a film or television production.

The petitioner failed to submit evidence that the beneficiary has achieved national or international recognition for achievements in the motion picture or television industry.

The petitioner failed to submit evidence that the beneficiary has a record of major commercial or critically acclaimed successes in the movie industry. The petitioner repeatedly referred to the beneficiary's success in the sound recording industry. We cannot agree that the beneficiary's success as a singer can be considered as evidence of her achievement in the motion picture industry under 8 C.F.R. § 214.2(o)(3)(v)(B)(2).

As evidence that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the beneficiary is engaged, the petitioner provided a testimonial in the form of a letter written on behalf of producer and director Stephen Spielberg. The letter says: "On two recent projects [the beneficiary and her sister] proved invaluable to production and Steven [sic] was quite impressed with their work in front of the camera."

The record contains no evidence that the beneficiary has commanded or will command a high salary. A letter from Elsinore Pictures indicates that the beneficiary will be paid "double scale plus 10% per week" for the movie production. The record is silent, however, regarding the amount of the beneficiary's proposed salary. Considering the well-publicized remuneration of nationally recognized stars in the movie industry, this letter is not sufficient evidence to establish that the beneficiary will command a high salary in relation to others in the field.

Counsel for the petitioner argues that the Service must grant the instant petition because the Service previously approved the petitioner's O-1 petition on behalf of the beneficiary. The prior petition sought O-1 classification of the beneficiary to permit her to enter the U.S. to pursue her singing career. The petitioner is now seeking O-1 classification for the beneficiary to pursue an acting career. More significantly, the Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Service nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engineering, Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied* 485 U.S. 1008 (1988).

The Screen Actors Guild issued a no objection letter on behalf of the beneficiary. The American Federation of Musicians stated in a letter dated July 24, 2001 that the organization finds the beneficiary and her sister are recognized internationally as an outstanding performer (as a group) in the popular field. Consultations are advisory in nature and are not binding on the Service. 8 C.F.R. § 214.2(o)(5)(i)(D).

After a careful review of the entire record, it is concluded that the petitioner has not shown that the beneficiary is a person of extraordinary achievement in the motion picture or television industry.

Beyond the decision of the director, there is another issue in this proceeding. In cases where the agent is the petitioner, the agent must provide the contractual agreement between the agent and

the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary. 8 C.F.R. § 214.2(o)(2)(iv)(E)(1). The petitioner did not submit a contractual agreement with the alien artist. Given that this case has been decided on other grounds, this issue need not be discussed further.

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.