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U.S. Citizenship
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Services

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FILE: EAC 04 024 52731 Office: VERMONT SERVICE CENTER Date:

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

PETITION: Petition for 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:



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

RP Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Vermont Service Center Director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a ballet company and school. The petitioner seeks 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), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ him as a ballet instructor on a part-time basis for two years.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary satisfies the standards for classification as an alien with extraordinary ability in the arts.

On appeal, counsel for the petitioner submits a brief.

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, 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 a 56-year old native and citizen of the United Kingdom. In 1959, he won a scholarship to the Royal Academy of Dancing. He joined the Royal Ballet School in September 1962. In 1966, the beneficiary graduated into the Royal Ballet Company. The beneficiary played leading roles in the late 1960's and 1970's. After he retired from dancing in 1985, he pursued a career as a ballet instructor. According to the evidence on the record, he last entered the United States with a visa waiver on August 25, 2003.¹

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary qualifies as an alien with extraordinary ability in the arts as defined by the statute and the regulations.

The regulation at 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.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) states that in order to qualify as an alien of extraordinary ability in the arts, 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

¹ An alien who is in the United States under the visa waiver provisions of section 217 of the Act, 8 U.S.C. § 1187, is ineligible for a change of status. 8 C.F.R. § 248.2(f).

(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, 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.

(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.

The beneficiary has neither been nominated for, nor has he been the recipient of any significant national or international awards or prizes equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iv)(A).

In response to the director's request for additional evidence, the petitioner asserted that the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) do not readily apply to the beneficiary's field of endeavor, ballet instruction; hence, comparable evidence should be considered. The AAO concurs in part but to the extent that the criteria do apply to the beneficiary in his past capacity as a dance performer, the evidence will be considered in relation to the evidentiary criteria for an O-1 alien of extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(3)(iv).

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.

For criterion number one, the petitioner submitted a copies of an article, a website featuring the beneficiary, and printed programs for productions in which the beneficiary performed. The productions include the following:

Raymonda (1966), Poeme de L'Extase (1972) and The Sleeping Beauty (1972). According to the evidence on the record, the petitioner established that the beneficiary played a lead or starring role in productions that have a distinguished reputation, but the evidence does not establish that he will perform in such a role in the future. The beneficiary does not satisfy this criterion.

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.

For criterion number two, the petitioner submitted a biographical sketch of the beneficiary that was published on the website of Steps on Broadway, a dance school located in New York City. The petitioner submitted an excerpt of either an article or a program that outlines the beneficiary's dance career. In the absence of a name and date of publication, the excerpt cannot be considered. Similarly, the petitioner submitted an article written by Peter Williams titled "Back to the Source" that mentions the beneficiary, but fails to state the date and name of the publication. The petitioner has failed to establish that the beneficiary satisfies this criterion.

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.

For criterion number three, the petitioner submitted testimonials that establish that the beneficiary has performed in lead and starring roles in the past. The petitioner has failed to establish that the petitioner will perform in such a role in the future. The beneficiary does not satisfy this criterion.

No evidence was submitted in relation to criterion number four.

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.

The petitioner did not assert and the record does not establish that the beneficiary has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field. The beneficiary does not satisfy this criterion.

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.

Initially, the petitioner indicated that the dance company intended to pay the beneficiary \$45 an hour. In response to a request for additional evidence, counsel for the petitioner noted that "the petitioner is amending that part of his petition relating to salary," and that the beneficiary is "now being offered \$75 per class for normal classes, \$115 for partnering classes and \$150 for professional classes," and such "remuneration is at the highest level for the beneficiary's field." The director noted that a petitioner cannot make material changes to his petition in an effort to make a deficient petition conform to Service requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998). The AAO concurs. Furthermore, in the absence of wage surveys, the AAO is unable to evaluate whether the proffered wage may be considered high in relation to others in the beneficiary's field of endeavor.

Counsel for the petitioner asserts that the evidentiary criteria are inapplicable to dance instructors. The petitioner submitted a letter written by [REDACTED] a dance and theatre critic for the *New York Post*, that states:

The criteria at [8 C.F.R. § 214.2(o)(3)(iv)(A) and (B) are] not applicable to the field of dance instruction and while [the beneficiary] could have readily met this criteria when he was dancing for the Royal Ballet as a principal dancer, that type of documentation is not relevant to this application. Instead, the government should look to [the beneficiary's] training and professional history both as a dancer and teacher as well as to the reputation of the companies that have employed him and seek to employ him as an instructor/teacher. In this case, all of his potential employers are internationally recognized as distinguished groups. Lastly, the government should consider the quality and quantity of dance professionals who have recommended [the beneficiary] for this O-1 visa.

In the recent past, this office has recognized that there exists a nexus between playing and coaching a given sport. In similar analysis, this office recognizes a nexus between performing an art and instructing that art form. In a case where an alien has clearly achieved a high level of achievement in the arts such that the alien is renowned as a performer and has sustained that renown in the field of instruction at a national or international level, we will consider the totality of the evidence as establishing an overall pattern of extraordinary ability. Specifically, we will consider the level at which the alien acts as an instructor. An instructor who has an established successful history of teaching dancers who perform at the national level has a credible claim; an instructor of novices does not. According to the petitioner's website, the beneficiary is currently teaching advanced ballet and pointe² to teenagers, partnering, and ballet at levels 1 through 3.³ The evidence does not indicate that the beneficiary is teaching dancers who perform at a national level. Accordingly, the petitioner has not shown that the beneficiary has demonstrated extraordinary ability as a ballet instructor.

The petitioner submitted a favorable consultation from the American Guild of Musical Artists. Consultations are advisory in nature and are not binding on Citizenship and Immigration Services (CIS). 8 C.F.R. § 214.2(o)(5)(i)(D).

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.

² Toe dance.

³ [http://\[REDACTED\]](http://[REDACTED]) as accessed on 1/5/2005.