

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



58

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: DEC 16 2010

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner, an entertainment agency, filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien with extraordinary ability in the arts. The petitioner requests that the beneficiary be granted O-1 classification for a period of three years so that she may work as an actress, singer and narrator in the United States.

The director denied the petition, concluding that the petitioner failed to provide copies of contracts made between the beneficiary and her actual employers, as required by 8 C.F.R. § 214.2(o)(2)(iv)(E)(2).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that the director, in a request for evidence dated December 15, 2009, specifically requested copies of written contracts or summaries of oral agreements between the beneficiary and her employers. The petitioner contends that it submitted summaries of the beneficiaries' oral agreements with her actual employers, and thus complied with the director's request. The petitioner submits a statement on the Form I-290B, Notice of Appeal or Motion.

I. The Law

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.

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

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

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.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of 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 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; or
- (C) If the criteria in paragraph (o)(3)(iii) 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.

An O-1 petition "may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent." 8 C.F.R. § 214.2(o)(2)(i). The regulation at 8 C.F.R. § 214.2(o)(2)(ii) provides 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 end 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.

Finally, the regulation at 8 C.F.R. § 214.2(o)(2)(iv)(E) imposes the following requirements on petitions filed by United States agents:

Agents as petitioners. A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary; the representative of both the employer and the beneficiary; or a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by an agent is subject to the following conditions:

- (1) An agent performing the function of an employer 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.
- (2) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.
- (3) A foreign employer who, through a United States agent, files a petition for an O nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the act and 8 CFR part 274a.

II. Discussion

The sole issue addressed by the director is whether the petitioner, which filed the petition as a company in business as an agent pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E)(2), complied with the requirement that it submit copies of contracts between the beneficiary and her actual employers.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on June 15, 2009. The petitioner stated that it is in the business of representing and managing the careers of actors, singers, dancers and other performers and "has agreed to represent [the beneficiary] in the field of acting, singing and narrating in the State of Florida and the rest of the United States for the next three years starting July 2009 per our executed agent/manger [*sic*] contract."

Although the petitioner states that it has an agent/manager contract with the beneficiary, it also stated that it has secured a contract with [REDACTED] on the beneficiary's behalf, under which the beneficiary is "slated to rehearse and perform for [REDACTED] upcoming shows." The petitioner noted that "the line-up of shows is on par with New York and Los Angeles shows." The petitioner indicated that it will manage the beneficiary's engagements and return her to her native country after she completes her engagement with [REDACTED] in the United States.

The petitioner indicated that it was submitting as "Exhibit 14" the contract between [REDACTED] and the beneficiary. The document submitted is on the petitioner's letterhead and is addressed to [REDACTED]. The document states, in part:

Per our conversation, I have outlined the terms of our employment with [the beneficiary] and she has signed indicating her agreement to these terms.

1. [The beneficiary] engages the Agent as her agent and the Agent accepts such engagement. This agency contract shall include representation in connection with her employment and representation of [the beneficiary] shall not be deemed included in any separate agency contract which the Actress may have entered into.
2. The term of this contract shall be for a period of three (3) years commencing July 27, 2009 to July 27, 2012.
3. [The beneficiary] agrees to pay to the Agent as commissions a sum equal to ten percent of all moneys or other consideration received by her, directly or indirectly, under contracts of employment (or in connection with her employment under said employment contracts) entered into during the term specified in Paragraph (2) or in existence when this agency contract is entered into.

The contract continues on for several pages and was executed by the petitioner and the beneficiary on March 20, 2009. The document is not signed by a representative of [REDACTED]. As such, the contract appears to represent an agreement between the instant petitioner and the beneficiary. The regulations at 8 C.F.R. § 214.2(o)(2)(i)(B) require the petitioner to submit a copy 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.

The petitioner provided the beneficiary's itinerary, or "Performances and Meetings Schedule," for the period of July 2009 through July 2012. The first two years of the itinerary are set forth as follows:

July/August 2009

Fly to Los Angeles
Los Angeles Television Episodic Season Begins
Meeting with Commercial Agency
Meeting with Theatrical Agency
Photo Shoot

September /October 2009

Discussions with casting director about upcoming Commercial
Los Angeles International Short Film Festival, Hollywood
Meeting with Casting Director about upcoming movie

November / December 2009

Attend classes at The Play House West, North Hollywood

January / February 2010

Los Angeles Pilot Season
Sundance Film Festival, Salt Lake City, UT

March / April 2010

Casting for movie
Los Angeles Pilot Season Ends

May / June 2010

Meeting with casting director, director and producer [REDACTED] about upcoming movie
The Taming of the Shrew, Re-imagined (working title)
Hollywood Black Film Festival, Beverly Hills, CA

July / August 2010

Los Angeles Television Episodic Season Begins
Meeting with private dialect coach
Rehearsal and fitting for movie

September / October 2010

Rehearsal and fitting for movie
Fly back to London, England to attend the London Film Festival

Teach classes at Ridgeway Studios Performing Art School, London.

November / December 2010

Q&A at Stagecoach London, England.

Meeting with an English Director about upcoming movie

Fly to New York, photo shoot

Fly back to Los Angeles, CA

January / February 2011

Los Angeles Pilot Season

Sundance Film Festival, Salt Lake City, UT

Filming in Birmingham, AL

March / April 2011

Los Angeles Pilot Season Ends

Reshoot scenes, finish filming

May / June 2011

Hollywood Black Film Festival, Beverly Hills, CA

Meetings and Castings

July/August 2011

Los Angeles Television Episodic Season Begins

Meetings and Castings

September / October 2011

Fly to New York

Theatrical casting and meetings

Workshop at TVI Studios, NYC

November / December 2011

Workshop at TVI Studios, NYC

Fly back to Los Angeles for castings, meetings

Classes at The Play House West, North Hollywood, CA

The beneficiary's itinerary for 2012 includes the beginning and end of the Los Angeles pilot season, two film festivals, meetings with a commercial agency, meetings with a theatrical agency, and "meetings in London."

On August 4, 2009, the director issued a request for evidence ("RFE"), in which he requested additional evidence pertaining to the eligibility requirements for aliens of extraordinary ability in the arts pursuant to 8 C.F.R. §§ 214.2(o)(3)(iv)(A) and (B). The petitioner submitted a timely response on November 2, 2009,

which included a copy of the above-referenced itinerary. On December 15, 2009, the director issued a second RFE in which he advised the petitioner as follows:

U.S. Citizenship and Immigration Services regulations allow agents to file on behalf of multiple employers. When an agent represents both the beneficiary and the beneficiary's employer(s), the agent is required to provide all supporting documentation, including itineraries and all employers' contracts, and terms of conditions of the various employment.

Submit a complete itinerary of engagements which shows the specific dates of each engagement, the name of the actual employer and the name and address of the facility where the services will be performed.

Submit copies of written contracts or summaries of oral agreements between the employers and beneficiary.

In a response dated January 28, 2009, the petitioner stated that "in accordance with your request, [the beneficiary] has provided us with an updated and more complete itinerary."

The amended itinerary indicated that the beneficiary would be working on the film tentatively titled *The Taming of the Shrew, Re-imagined*, from February 2010 until August 2011, including two months for "calendar call," two months for fitting and rehearsals, four months of pre-production, six months of production, and four months of post-production. According to the itinerary, the beneficiary would begin work on a television pilot for BBC One in England called "The Good Citizen" beginning with calendar call and rehearsals in September and October 2011. According to the itinerary, production in the United States would occur in July and August of 2012, and the project would be completed by October 2012.

With respect to the beneficiaries' contracts for these projects, the itinerary included a one-paragraph "Summary of Agreement" for each project. The first summary, for *The Taming of the Shrew, Re-Imagined* project, indicates that the beneficiary's employer will be [REDACTED] and states:

The first moneys received by the company for the film will be applied to payment of all outstanding accounts payable for the production and distribution of the film until paid in full, next to the repayment to the investors of the entire amounts of their contributions actually expended for the production and distribution of the film, and thereafter, all moneys received by the company for the film will be paid by the company in percentages to the producer, director, actors, etc. As one of the leading actresses, [the beneficiary] (as "Bianca") will be paid 6.5%.

The itinerary indicates that the beneficiary's employer for [REDACTED] and provides the following "Summary of Agreement":

Under the terms the actress shall play the role of [REDACTED] of *The Good Citizen*. For services rendered as specified in the Agreement, Actor will be paid a fee of £12,000 (\$19,471), payable immediately following the scheduled Close of production.

The director denied the petition on March 15, 2010. Citing to the regulatory requirements applicable to agents at 8 C.F.R. § 214.2(o)(2)(iv)(E)(2), the director concluded that "the record does not contain copies of any contracts between the beneficiary and the actual employers."

On appeal, the petitioner asserts that the director erroneously states that the petitioner failed to submit contracts between the beneficiary and the actual employers. Counsel asserts that "summaries of oral agreements were submitted as requested by a request for evidence" and notes that the request for evidence advised the petitioner that it could submit either copies of written contracts or summaries of oral agreements.

Upon review, the petitioner has not met the requirements set forth at 8 C.F.R. § 214.2(o)(2)(iv)(E)(2), which provides:

A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. A contract between the employers and the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

Upon review of the totality of the evidence submitted, the AAO finds the record inconsistent and incomplete with respect to the identity of the beneficiary's actual employers and the nature of her proposed activities in the United States. Accordingly, the AAO will affirm the director's determination.

At the time of filing the petition in June 2009, the petitioner stated that the beneficiary "is slated to rehearse and perform for [REDACTED] upcoming shows," and stated that "the engagement to be performed is in a leading or critical role for an organization that has a distinguished reputation." The petitioner stated that it was attaching a copy of the beneficiary's contract with [REDACTED] and mentioned no other engagement.

However, the beneficiary's "contract" with this entity appears to describe the terms of the beneficiary's agreement with the petitioning agency and does not appear to be an employment contract, or an agency contract, with [REDACTED]. As noted above, the document is on the petitioner's letterhead and addressed to [REDACTED]. It is signed by the petitioner and the beneficiary, but it does not indicate that [REDACTED] or [REDACTED] has entered into any contract or agreement with either party.

Furthermore, the petitioner offered no further evidence with respect to the "upcoming shows" referenced in the petitioner's initial letter. The actual itinerary submitted at the time of filing in June 2009 and in response to the first RFE in November 2009 did not clearly demonstrate that the beneficiary had in fact made any firm commitments for employment as an actress, singer or narrator. Rather the itinerary indicated that the beneficiary would meet with commercial and theatrical agencies, attend acting classes and workshops, meet with a dialect coach, participate in occasional photo shoots, attend film festivals, and participate in casting calls for film, theatrical and television roles. The itinerary did not make any specific reference to the claimed rehearsals and performances for "upcoming shows," of [REDACTED] nor did it mention with any specificity any actual rehearsals or performances in which the beneficiary would participate during the requested three-year period, either for this employer or for other employers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

The first itinerary did mention a "meeting with casting director and producer [REDACTED] about upcoming movie *The Taming of the Shrew Re-imagined*," scheduled for May or June of 2010, 10 to 11 months after the requested date of approval. However, there was nothing in the itinerary to suggest that the beneficiary had been cast in this film. The petitioner's initial evidence included a letter from [REDACTED] who states that he has seen a number of the beneficiary's British movies and is impressed with her work. He did not mention that he has cast the beneficiary, or that he was in negotiations to cast the beneficiary, in his film. There is also a reference in the initial itinerary to a "meeting with an English Director about upcoming movie" scheduled for November or December 2010. The itinerary indicates that the beneficiary would be "filming in Birmingham, Alabama" in January and February of 2011 and would "reshoot scenes, finish filming" in March or April of 2011. The itinerary does not indicate what she would be filming, identify the "English Director" with whom she would meet, or confirm whether she had actually been cast in an "upcoming movie," that would be filming in Birmingham, Alabama.

The petitioner fell significantly short of meeting its burden to establish the terms and conditions of employment, as the itinerary did not specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services would be performed. Further, the petitioner did not submit copies of any contracts between the beneficiary and any actual employers, or submit evidence to corroborate its statement that the "engagement" for which the beneficiary's services are being sought is rehearsals and performances for "upcoming shows" of Martin & Donalds Talent Agency.

The AAO acknowledges that the director's request for evidence specifically stated that the petitioner should submit "copies of written contracts or summaries of oral agreements between the employers and beneficiary." However, the director also advised the petitioner that it is "required to provide all supporting documentation including itineraries and all employers' contracts, and terms and conditions of the various employment," in accordance with 8 C.F.R. § 214.2(o)(2)(iv)(E)(2).

The AAO notes that an oral contract, as evidenced by the summation of the elements of the oral agreement, is enforceable and USCIS will accept the summation as evidence of an oral agreement. However, a summary of a written contract cannot be submitted in lieu of the actual written contract. *See generally* 8 C.F.R. § 214.2(o)(2)(ii)(B)(providing that a summary of the terms of the oral agreement under which the alien will be employed must be provided when there is no written contract between the parties.) Here the petitioner included in the beneficiary's revised itinerary a "summary of agreement" which the petitioner indicates it obtained from the beneficiary herself. The petitioner did not affirmatively state that the beneficiary has no written contract with her proposed employers, nor did it state that the beneficiary has a binding oral agreement with the employers. Evidence of the existence of an oral agreement may include but is not limited to: correspondence between the contractual parties, a written summation of the terms and conditions signed by the parties, or any other evidence which demonstrates that an oral agreement was created. If the petitioner is acting as the beneficiary's agent and arranged the proposed film and television roles, then such evidence should be readily available.

Furthermore, the "summaries of agreement," based on the language in which they are written, appear to have been excerpted from a written agreement. For example, the summary of agreement for the BBC One project states: "For services rendered as specified in the Agreement, Actor will be paid a fee of £12,000 (\$19,471), payable immediately following the scheduled Close of production." There is clearly an agreement specifying the terms of employment that is not fully summarized by the information provided.

Given the significant discrepancies between the two itineraries submitted and the petitioner's initial statements regarding the nature of the beneficiary's engagement in the United States, the AAO finds that the "summary of agreement" included in the beneficiary's revised itinerary is insufficient to document the existence of the claimed oral agreement. The summary identifies the amount the beneficiary will be paid and the names of the characters she would play, but describes no other terms or conditions of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)). Furthermore, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the foregoing, the AAO concurs with the director's determination that the petitioner did not satisfy its evidentiary burden to submit contracts between the beneficiary and her actual employers, as required by 8 C.F.R. § 214.2(o)(2)(iv)(E)(2). We further find that the petitioner has failed to satisfy the other components of this regulatory requirement, including submission of a complete itinerary of the proposed event or events, the names and addresses of the actual employers, and the names and addresses of the establishments, venues or locations where the services will be performed. Again, the burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation. *Id.*

As discussed above, at the time of filing, the petitioner stated that the engagement for which the beneficiary's services were sought was to rehearse and perform in "upcoming shows" of [REDACTED]

Agency. No such shows were identified on the initial itinerary, which listed no firm employment commitments. The petitioner indicated on the Form I-129 that the beneficiary would receive "industry scale" compensation, which further supports a finding that the claimed employment contracts were not in place at the time of filing. While the petitioner submitted the terms of its agency agreement with the beneficiary, there is no evidence that the beneficiary had executed any employment contract as of the date the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978). USCIS will not grant O classification to an alien merely to enter the United States to freelance and seek employment. An O nonimmigrant is admitted to the United States to perform in specific events as detailed on the initial petition. 59 FR 41818-01, 41822 and 41828 (August 15, 1994).

Furthermore, the itinerary provided in response to the RFE is not corroborated by any documentary evidence. The "summary of agreements" included in the itinerary does not fully describe the beneficiary's terms of employment, or establish that the beneficiary had agreed to such terms prior to the filing of the petition.

Therefore, the AAO concludes that the petitioner in this matter did not satisfy the documentary requirements set forth at 8 C.F.R. § 214.2(o)(2)(ii)(C) and 8 C.F.R. § 214.2(o)(2)(iv)(E)(2). The petitioner has not submitted evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

III. Extraordinary Ability in the Arts

Beyond the decision of the director, the petitioner has not established that the beneficiary meets the criteria for an alien of extraordinary ability in the arts as set forth at 8 C.F.R. § 214.2(o)(3)(iv). As noted above, 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. 8 C.F.R. § 214.2(o)(3)(ii).

In determining the beneficiary's eligibility under the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3).

Specifically, the *Kazarian* court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination. The final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

The AAO finds the *Kazarian* court's two-part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

If the petitioner establishes through the submission of documentary evidence that the beneficiary has been nominated for or received a significant national or international award or prize in his or her field pursuant to 8 C.F.R. § 214.2(o)(3)(iv)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The beneficiary received [REDACTED]. The award certificate is signed by the academy's "Head of Examinations." While this achievement is noted, the petitioner did not provide any additional information regarding the award to establish that such award is comparable to an Academy or Emmy award for acting, which are the examples provided in the regulations as "significant national or international" awards. The AAO further notes that this acting award is not mentioned on the beneficiary's resume, thus raising questions regarding its significance.

As the evidence of record does not demonstrate that the beneficiary has been nominated for or received a significant national or international award or prize, the petitioner must establish the beneficiary's eligibility under at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B).

In order to meet the first criterion, the petitioner must submit evidence that the beneficiary 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

According to the beneficiary's resume, she has appeared in the films *Fall Out*, *Happy Hour*, *Okay to Drive*, and *Regrets*. The petitioner has not provided evidence that she held lead or starring roles in these films or that the films have a distinguished reputation. The beneficiary's resume also indicates that she has appeared in a total of seven plays in London. While it appears that the beneficiary had lead or starring roles in some of these productions, the only supporting evidence submitted with respect to the beneficiary's theatre roles are a single playbill and testimonial letters from Los Angeles-based actors and producers who claim to have seen the performances. The petitioner cannot meet the plain language of this regulatory criterion unless it submits critical reviews, advertisements, publicity releases, publications, contracts or endorsements. Finally, the evidence of record demonstrates that the beneficiary appeared in [REDACTED] "The Afternoon Play" which originally aired in 2005. While this network television production may have a distinguished reputation, the petitioner has not submitted evidence to establish that the beneficiary's role was "leading or starring." Furthermore, the petitioner did not submit critical reviews, advertisements, publicity releases, publications, contracts or endorsements pertaining to this performance.

Finally, the regulations require that the beneficiary "has performed, and will perform, services as a lead or starring participant" in productions or events that have a distinguished reputation. As discussed, the petitioner has not established that the beneficiary had secured any employment in as a lead or starring participant in any upcoming productions at the time the petition was filed, and the record contains no published materials regarding either of the projects listed in the revised itinerary that would establish the distinguished nature of these productions. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

In order to establish that the beneficiary meets the second criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(2). The petitioner failed to submit any critical reviews or published materials about the beneficiary from any source.

In order to establish that the beneficiary meets the third criterion, the petitioner must submit 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). The petitioner has submitted a number of testimonial letters, but no published materials regarding the beneficiary's prior or upcoming roles. The regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) provides that affidavits from present or former employers or recognized experts certifying to the recognition and extraordinary ability of the alien shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information. The petitioner has submitted four letters from individuals who identified themselves simply as "actors in Los Angeles, California." The actors mention the beneficiary's roles and praise her work, but they do not set forth their expertise, the means by which they acquired information regarding the beneficiary's performances in the United Kingdom, and do not mention the specific organizations and establishments that have employed the beneficiary or address the reputation of those organizations or establishments.

The petitioner also submitted a letter from American actor [REDACTED] who states that he was impressed by the beneficiary's performance in an acting class that he taught. While his letter is highly complimentary to the beneficiary's talents as an actress, [REDACTED] does not address the beneficiary's prior or upcoming roles or discuss the reputation of the organizations or establishments that have employed and will employ the beneficiary. Finally, the petitioner provided a brief letter from American producer [REDACTED], who states that he has seen a number of the beneficiary's British movies, and notes that she has performed lead roles in a number of plays. Again, he does not discuss any upcoming lead or starring roles that the beneficiary has secured or provide any information that would establish the distinguished reputation of the organizations and establishments that have employed the beneficiary in the past. Overall, the testimonial evidence submitted is insufficient to establish that the beneficiary meets this criterion.

To establish that the beneficiary meets the fourth criterion, the petitioner must establish that the beneficiary 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(4). The petitioner did not submit any published evidence that would establish a record of major commercial or critical acclaimed successes in the performing arts.

In order to meet the fifth regulatory criterion, the petitioner may submit 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 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). As discussed, the petitioner has submitted a number of testimonial letters, the majority of which are from American actors who fail to set forth their authority, expertise or the basis for their knowledge regarding the beneficiary. While the AAO recognizes that the individuals who provided letters hold a very high opinion of the beneficiary's talent and potential, the submitted testimonials do not satisfy the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5). None of the persons providing testimonials have clearly indicated their knowledge of the beneficiary's achievements in the field of acting. Rather, the majority of them opine that the beneficiary is a talented actress, without specifically addressing her achievements or significant recognition in the field.

The sixth and final criterion requires the petitioner to submit evidence that the beneficiary 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. 8 C.F.R. § 214.2(o)(3)(iv)(B)(6). The petitioner indicated on Form I-129 that the beneficiary will receive "industry scale" wages for her proposed work in the United States, which cannot be considered a high salary compared to other actors. The record contains no evidence pertaining to the remuneration the beneficiary has received for past roles and performances. The petitioner provided updated salary information for the beneficiary eight months after filing the petition. Again, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978). Regardless, the petitioner did not establish through the submission of reliable evidence that the beneficiary's proffered

salaries as set forth in the beneficiary's revised itinerary meet the criteria of a "high salary" for a film or television actress. Such evidence could include statistical comparisons of the salaries in the field of endeavor.

Kazarian sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. However, as discussed above, the petitioner established eligibility under none of the six criteria, of which three are required under the regulation at 8 C.F.R. § 214.2(o)(3)(v)(B).

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has 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 she is renowned, leading or well-known in the field of arts, pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary is recognized as being prominent in her field of endeavor, pursuant to 8 C.F.R. § 214.2(o)(3)(iv). *See Kazarian*, 2010 WL 725317 at *3.

Upon review, the AAO finds that the petitioner has not established that the beneficiary has achieved distinction as an actor to the extent that she is recognized in the field as prominent, renowned, leading or well-known.

The specific deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). The petitioner submitted some documentation relating to the beneficiary's work experience. Although the evidence establishes that the beneficiary is a working actress in the United Kingdom, the minimal evidence submitted does not distinguish the beneficiary from any other actress and is insufficient to establish that she is recognized as leading or well-known in the field.

Therefore, the conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the minimal evidence does not distinguish the beneficiary as an actress who is prominent in the theater, film or television industry. The documentation submitted in support of a claim of extraordinary ability in the arts must clearly demonstrate that the beneficiary has a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered. The petitioner has not met this burden. For this additional reason, the petition cannot be approved.

IV. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.