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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

[redacted]

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FILE: WAC 09 154 50432 Office: CALIFORNIA SERVICE CENTER Date: SEP 30 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:

[redacted]

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 $585. 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, California 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 event company, 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), as an alien with extraordinary ability in athletics. The petitioner seeks to employ the beneficiary as a performer, event supervisor, and professional ballroom instructor for a period of three years.

The director denied the petition determining that the petitioner's explanation of the intended events for the beneficiary does not establish that she is coming to the United States to provide services related to a specific event or events.

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, counsel for the petitioner asserts that the director erred in determining that the type of activity specified in the filing is not an "event" as defined in the Act. Counsel submits a brief and evidence in support of the appeal.

I. The Law

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of 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 . . . 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 extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts). In a policy memorandum, the legacy Immigration and Naturalization Service emphasized: "It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession." Memorandum, Lawrence Weinig, Acting Asst. Comm'r., Immigration and Naturalization Service, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

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

> *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.

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

> *Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:
>
> (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
>
> (B) At least three of the following forms of documentation:
>
> (*1*) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (*2*) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized or international experts in their disciplines or fields;
>
> (*3*) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
>
> (*4*) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
>
> (*5*) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
>
> (*6*) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
>
> (*7*) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
>
> (*8*) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(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.

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.

II. Discussion

The sole issue addressed by the director is whether the petitioner adequately described the nature of the beneficiary's planned events or activities, the beginning and end dates for such activities, and provided an adequate itinerary for the events or activities. The director concluded that the evidence failed to establish that the beneficiary would be performing at specific athletic events.

In denying the petition, the director cited to 8 C.F.R. § 214.2(o)(3)(ii) which defines the term "event" as follows:

> 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. Such activity may include short vacations, promotional appearances, and stopovers which are incidental to and/or related to the event. A group of related activities may also be considered to be an event. In the case of an O-1 athlete, the event could be the alien's contract.

In publishing the final O and P visa rule amending the regulations at 8 C.F.R. § 214.2 to reflect changes made by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Public Law 102-232 (December 12, 1991), the legacy Immigration and Naturalization Service made the following observations:

> Admission Periods for O Nonimmigrants—214.2(o)(10)

> One commenter suggested that there be no regulatory limit on the length of admission for an O nonimmigrant alien. The suggestion cannot be adopted since the period of stay for an O nonimmigrant is limited by the Act to the period of time required by the alien to complete the event or events described on the petition. An O-1 classification may not be granted to an alien to enter the United States to freelance in the open market. An O-1 alien must be coming to the United States for specific reasons.

59 Fed. Reg. 41808-01, 41822. 1994 WL 422027, Rules and Regulations, Department of Justice, Immigration and Naturalization Service, 8 C.F.R. Part 214, *Temporary Alien Workers Seeking H-1B, O and P Classifications Under the Immigration and Nationality Act*, Monday, August 15, 1994.

The petitioner, an event company with six employees, indicated on Form I-129 that it seeks to employ the beneficiary as a performer, event supervisor and professional ballroom instructor and will compensate her at an hourly rate of $25.00. On the O and P Classifications Supplement to Form I-129, the petitioner, where asked to explain the nature of the event stated that the beneficiary will:

> Perform at shows and events, teach ballroom dance, and supervise at events when not performing. Competing in dance competition to enhace [*sic*] the individual as well as [the petitioner].

The petitioner further described the beneficiary's proposed duties as the following:

> Teach forms of dance with two specified dance studios; Prepare students for local, regional and national dance competition by choreographing various routines as required, coaching and leading. Perform at events with his [*sic*] partner. Compete at local, regional, national and international professional dance competitions.

In a letter dated January 20, 2009, the petitioner explained that it has been referring the beneficiary's services for performances at weddings, parties and other celebrations for the past three years and now seeks to offer her employment. The petitioner further stated:

> Apart from performing at our events, [the petitioner] will place [the beneficiary and her partner] with two dance studios (which has already been confirmed) where by their student base will grown [*sic*] as a result of that connection. Through [the petitioner], [the beneficiary] will work at these two studios teaching all forms of dance and preparing students for competition and showcasing.
>
> With [the petitioner] and its referrals, [the beneficiary] is currently:
>
> - Teaching all forms of dance for special events such as weddings, etc.
> - Performing at our special events with her partner.

Upcoming plans with [the petitioner] for [the beneficiary]:

- Teaching all forms of dance at two specified dance studios
- Preparing students for local, regional and national dance competition by choreographing various routines as required, coaching and leading.
- Choreographing, coaching and leading students in various routines for showcasing
- Performing at events with her partner [redacted]
- Demonstrations for charity events such as various senior centers, studio demonstrations and other organizations
- Preparing Brides and Grooms and their families for the 1st Dance, etc.
- Continuing as indicated above
- Compete with her partner at local, regional and national professional dance competitions which serves to enhance the name recognition and prestige for both [the beneficiary], her partner [redacted] and [the petitioner]
- Various Television Performances
- Supervision and management of events
- Whatever may come

The petitioner further stated:

> Based on student instruction alone, I anticipate that [the beneficiary] will earn a salary of $40,000.00 to $60,000.00 annually; $50.00 per student, 50 minutes per class, with five to eight students per day. With the addition of competitions and prize money, events and television, the potential earnings could be considerably higher. Not to mention that any event contracted by [the beneficiary] personally would allow her 100% of those earnings as she is allowed to work as an independent agent as well. . . . We expect that their [*sic*] will come a day in the future when [the beneficiary] will have her own business with her partner Wilfredo, it is inevitable, talent, charisma and professionalism will expect no less; we at [the petitioning organization] will encourage and support any future personal growth for business or otherwise as we continue our association, even if only in a referral capacity when that day comes.

The petitioner submitted a business plan, in which it indicated that it recently recommenced business activities in January 2009 after a two-year break from operations. The petitioner indicates that during the break, she "continued to receive many referrals for events" which she "passed on to [the beneficiary] whenever possible providing her with work as a performer for all types of special events." The business plan indicates the petitioner's intent to feature the beneficiary and her partner by providing opportunities for them to teach dance lessons, to encourage her participation in competitions, and to promote themselves on television and at personal appearances.

The petitioner submitted a copy of its agreement with the beneficiary which states that she will be retained as a consultant "to provide Dance Classes at two specific dance studios as well as perform and supervise at

special events contracted by [the petitioner] and compete professionally." The agreement indicates that the petitioner will compensate the beneficiary at a rate of at least $25.00 per hour and up to a maximum of $1500.00 "for those events requesting services of performing several dances for that event." The agreement further provides that the beneficiary is "free to peruse other business ventures while under agreement with [the petitioner]." Specifically, the agreement indicates that the beneficiary may freely contract for shows and performances without any prior consent from the petitioner.

With respect to the dance lessons to be provided by the beneficiary, the petitioner submitted a letter dated January 28, 2009 from [redacted] of [redacted] who indicates that her studio, as well as a "partner dance studio," [redacted] Dance Studio, have partnered with the petitioner for Ballroom Dance instruction. Specifically, she states that the petitioner uses its studios for ballroom dance instruction, and plans to bring in the beneficiary and her partner as new teachers "as they use our studios for their business." [redacted] states that the petitioner and the two dance studios operate independently of one another.

The petitioner also submitted a letter dated January 22, 2009 from [redacted]. She states that she owns and operates a dance studio in [redacted] and that she presents an annual dance spectacular at the [redacted] at which the beneficiary and her spouse were recently the prime attraction. She indicates that the couple "make a lovely addition to our dance group."

The director issued a request for evidence ("RFE") on September 15, 2009. The director requested, among other items, a contractual agreement between the petitioner and beneficiary, and an itinerary that includes the confirmed dates and locations of work to be performed.

In response, counsel referred the director to the agreement between the petitioner and beneficiary submitted at the time of filing. With respect to the scheduled itinerary, counsel emphasized that the petitioner is an event planner and, as such, it "regularly arranges for performers for various events, parties and festivals." Counsel stated that the petitioner submitted a list of "the more regular events" as well as an annual schedule for ballroom competitions. Counsel stated that "although these events are of limited duration, note that they repeat on a regular basis." Counsel emphasized that the petitioner is not seeking to employ the beneficiary as a dance teacher, although she may do so "from time to time," but rather as a "key and valuable performer."

In a letter dated September 25, 2009, the petitioner indicated that the beneficiary and her partner will appear monthly at the [redacted] in a program called "An Evening of Ballroom Dance" hosted by the petitioning organization, beginning "in August." The petitioner listed "other future events and plans" as the following:

> [The beneficiary] as the Featured Dancer with her partner [redacted] for event on [redacted]
>
> [The beneficiary] is teaching Ballroom Dance Instruction daily preparing students for competition and performances.

There are many future opportunities pending. A television appearance at [redacted] for a new Dance program called "[redacted]" [The beneficiary] and her partner [redacted] have been approached to make a guest appearance and perform.

To perform at events of all types

Future Competitions:

[redacted]

The petitioner submitted a published article regarding the beneficiary's August 22, 2009 performance at the [redacted]. The article describes the program as a monthly "ballroom dancing social" hosted by the petitioner, and indicates that "[redacted] will be the dance instructors. The petitioner also submitted a number of invoices evidencing the beneficiary's receipt of payments for previous performances occurring in 2007 and 2008. This evidence shows that the beneficiary and her partner have been billing clients directly for their performances at events using the names "[redacted]" and, more recently, [redacted]

The director denied the petition on February 1, 2010. Referring to the varied list of proposed duties listed in the petitioner's initial letter, the director concluded that "teaching at a dance studio and performing at special events such as weddings is not related to a specific athletic event or events."

On appeal, counsel for the petitioner states:

> The Service decision quotes from the regulation and then proceeds to ignore most of it. 8 C.F.R. 214.2(o)(3) is quoted accurately in the decision. In part, it states "A group of related activities may also be considered to be an event." It also states "In the case of an O-1 athlete, the event could be the alien's contract."
>
> First, the Service should have considered the group of related activities described in detail by the petitioner as an "event." The petitioner is an event planning company. The nature of the business is to organize events that require the services of performers, including the beneficiary. The Service does not question that the beneficiary will perform a lead and starring role in many of these events. A reasonable interpretation is that these events, taken as a group form a group of related activities that can be classified as an event. All of the activities listed in the petition related to the performance of ballroom dance activities.
>
> Second, ballroom dancers are athletes. Ballroom dancing has been considered for status at the Olympics. The regulations provide that an event for an athlete can be a contract. . . . A contract between the beneficiary and the petitioner was provided.
>
> Third, the regulations also describe and [*sic*] event as an "engagement." Black's Law Dictionary defines "engagement" as "A contract or agreement characterized by exchange of mutual promises" which is what the beneficiary had with the petitioner. . . .

Upon review, and for the reasons discussed below, the AAO concurs with the director's determination. Upon review of the totality of the evidence, it appears that the beneficiary will be in large part freelancing on the open market rather than performing services as part of an event or group of events specifically for the petitioner. As noted above, an O-1 classification may not be granted to an alien to enter the United States to freelance in the open market.

Although the petitioner states that the beneficiary will be working "through the petitioner" in teaching dance lessons, the petitioner has not submitted any details regarding the terms of this arrangement. The petitioner's letter suggests that the beneficiary will actually retain all monies earned in providing dance instruction, rather than being paid by the petitioner to provide this service for its event planning organization. Specifically, the petitioner stated that "based on student instruction, I anticipate that [the beneficiary] will earn a salary of $40,000.00 to $60,000.00 annually; $50.00 per student, 50 minutes per class, with five to eight students per day." This information appears to be at odds with the petitioner's statement that it intends to pay the beneficiary $25.00 per hour for her services. Furthermore, the petitioner, after claiming that it expects the beneficiary to earn up to $60,000 annually as a dance instructor, indicated in response to the RFE that the beneficiary will only provide dance instruction services "from time to time." [redacted] the owner of one of the studios at which the petitioner claims it will employ the beneficiary, already counts the beneficiary as one of her dance group and she makes no mention of hiring the beneficiary through the petitioning company. While the AAO does not doubt that the beneficiary will spend some portion of her time providing services as a dance instructor, there is ample reason to question whether she will do so as an employee or contractor of the petitioner.

In addition, the petitioner clearly indicates that the beneficiary intends to personally contract her own activities and events independently of the petitioner, and the petitioner does not claim to be serving as the beneficiary's agent pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E). The petitioner indicates that in the future the beneficiary will have her own business, but the record shows that the beneficiary and her partner are already doing business as [redacted]" and have been freelancing their services under this and a previous name since early 2007. The beneficiary will be providing services to the petitioner, but the petitioner will clearly not be her only employer and it appears that she will continue to work for multiple employers on a short-term basis as she and her partner independently secure additional performance opportunities.

The only discrete future event at which the beneficiary would appear on behalf of the petitioning company is the "Evening of Ballroom" social dance at the [redacted]. The petitioner indicates that this event will occur monthly, but did not provide a copy of its contract with the hotel confirming this. Although the petitioner listed a number of competitions at which the beneficiary expects to compete through November 2010, it did not provide evidence that she will do so on behalf of the petitioner. The petitioner indicates that the beneficiary will keep all prize monies she receives at dance competitions and does not appear to be acting as her manager or agent for the purposes of such competitions.

Upon review, the record remains nearly devoid of documentation to support the petitioner's claim that the beneficiary will be engaged in qualifying "events" on behalf of the petitioner. If the beneficiary is in fact "representing" the petitioner in dance competitions, then it is reasonable to expect the petitioner to be able to produce some documentary evidence in support of its claims. The petitioner has not provided evidence that it intends to compensate the beneficiary in any way for her competitive dancing, nor does the petitioner claim to receive anything in return. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on the evidence of record, it appears that the beneficiary, at most, may be working part-time as a dance instructor for the petitioner, occasionally performing at the petitioner's events, independently performing at live and televised events that she and her partner independently arrange under the fictitious name of "[redacted]" and independently entering dance competitions. Given the largely freelance nature of the beneficiary's work, the AAO concurs with the director's conclusion that the beneficiary's proposed activities are not the type of specific events contemplated for an alien with extraordinary ability in athletics.

The AAO acknowledges that the definition of "event" for an athlete could include the athlete's contract. While we agree that competitive ballroom dancing is a sport and the beneficiary is an athlete, it is difficult to characterize the submitted consulting agreement between the petitioner and beneficiary as a typical athlete's contract. The contract has no defined beginning or end date, is scheduled to terminate "upon completion of services," and allows the beneficiary to freely seek other "business ventures" and employment on the open market. The petitioner has not supported its claim that it intends to utilize the beneficiary's full-time services over a period of three years for a discrete event or events, or that the employment arrangement described in

the record, in which the beneficiary is encouraged to arrange her own work, is acceptable for an O-1 alien of extraordinary ability. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, a remaining issue is whether the petitioner has submitted the required written advisory opinion from an appropriate consulting entity, pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(D).

On the O and P Classification Supplement that accompanied the Form I-129, the petitioner indicated that it obtained the required written consultation and attached it to the petition. The petitioner did not identify the name of the peer group or labor organization that provided the consultation.

Upon review of the index of documents that accompanied the initial petition, the petitioner did not identify which exhibit contained the required consultation letter, but rather listed two exhibits containing "letters of reference." Furthermore, the petitioner did not provide a copy of any previous consultation letter submitted on behalf of the beneficiary.

The petitioner indicated that it was submitting "information from the Professional Dancers Federation (PDF) indicating its policy of remaining neutral in immigration-related matters." This evidence consisted of an e-mail message dated August 28, 2006 in which [redacted] advised [redacted] that [redacted] should not use his PDF title or letterhead if he writes a recommendation letter in support of an immigration petition. [redacted] stated that "we should remain neutral with regard to immigration matters." The petitioner provided evidence that [redacted] and [redacted] held the positions of President and Western Vice President, respectively, within PDF.

As noted above, the director issued an RFE on September 15, 2009, in which the director advised the petitioner of the requirement to submit a consultation from a peer group or labor organization. The petitioner did not submit a consultation from a labor organization or peer group in response to the RFE or otherwise acknowledge this request.

The regulation at 8 C.F.R. § 214.2(o)(5)(ii)(A) provides that the required consultation may be provided by "a person or persons with expertise in the area of the alien's ability." The regulation states that "if the advisory opinion is favorable to the petitioner, it should describe the alien's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the services of an alien of extraordinary ability." *Id.*

As noted above, while the record contains numerous letters of reference from ballroom dancers, the petitioner did not indicate that any specific letter or letters were being submitted to satisfy the evidentiary requirement at 8 C.F.R. § 214.2(o)(ii)(2). The petitioner did not refer to this requirement other than providing evidence that one organization, the Professional Dancers Federation, is unwilling to provide consultations in immigration matters. The petitioner did not establish that there is no appropriate peer group or labor organization with expertise in the beneficiary's field.

While the submitted reference letters are highly complimentary to the beneficiary, and some of the letters mention some of the beneficiary's specific achievements in her field, none of the letters describe the nature of

the duties to be performed or state whether the position requires the services of an alien of extraordinary ability. Such content is specifically required by 8 C.F.R. § 214.2(o)(5)(ii)(A).

Based on the foregoing, the AAO concludes that the petitioner has not submitted the required written advisory opinion from an appropriate consulting entity. For this additional reason, the petition cannot be approved.

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 at 1043.

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, the petitioner has not met that burden.

ORDER: The appeal is dismissed.