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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

DATE: **MAY 22 2014**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The California Service Center Director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an alien with extraordinary ability in the field of business, pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O). The petitioner seeks to employ the beneficiary as its Marketing Manager for a period of two years.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to establish that the beneficiary qualifies as an alien with extraordinary ability in business. The director determined that the evidence submitted did not satisfy the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A), or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). Specifically, the director determined that the evidence met only two criteria: 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(7) and (8). The director also determined that the petitioner failed to establish eligibility for the “comparable evidence” regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C).

The petitioner subsequently filed an appeal to the Administrative Appeals Office (AAO), which was summarily dismissed on March 25, 2014.<sup>2</sup> However, upon review of new facts submitted to the AAO, it appears the appeal was improperly dismissed, as the petitioner did submit a brief. As such, the AAO hereby exercises its discretion to reopen the appeal *sua sponte*.

On appeal, counsel asserts that the director erred by not considering the “comparable evidence” submitted under 8 C.F.R. § 214.2(o)(3)(iii)(C). Specifically, counsel asserts that the director undervalued the testimonial letters submitted under 8 C.F.R. § 214.2(o)(3)(iii)(C). Counsel submits a brief in support of the appeal.

For the reasons discussed below, the AAO will dismiss the appeal.

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<sup>1</sup> The petitioner indicated on Form I-129 that the beneficiary will be employed as its Marketing Manager, but indicated in other documentation that the beneficiary will be employed as its Director of U.S. Operations. It is noted that the petitioner was advised of this discrepancy in the AAO’s decision dated March 25, 2014, and that the petitioner has not addressed this discrepancy.

<sup>2</sup> The record is unclear as to whether the instant appeal was properly filed by the petitioner or the petitioner’s attorney. The instant Form I-290B, Notice of Appeal or Motion, was signed and filed by the petitioner’s former attorney of record, [REDACTED] Esq., purportedly on behalf of the petitioner. However, the new Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, filed with the instant appeal indicates that [REDACTED] Esq. is entering his or her appearance as attorney at the request of the beneficiary. The beneficiary’s name and personal address is listed in Part 3 of Form G-28 relating to the applicant, petitioner, or respondent, and the beneficiary signed as the applicant, petitioner, or respondent for the instant Form I-290B. If the beneficiary or the beneficiary’s attorney filed the instant appeal, then the appeal would be rejected. The beneficiary of a visa petition is not a recognized party in an appellate proceeding. 8 C.F.R. § 103.3(a)(1)(iii)(B). It is noted that the petitioner was advised of this deficiency in the AAO’s decision dated March 25, 2014, and that the petitioner has not addressed this deficiency.

**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 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.

## II. Discussion

The only issue raised is whether the testimonial letters submitted under the “comparable evidence” regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) may be considered in establishing the beneficiary’s eligibility.<sup>3</sup>

We conclude that the submitted testimonial letters may not be considered under the “comparable evidence” regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C).<sup>4</sup> The petitioner failed to establish eligibility for the “comparable evidence” regulation, as the petitioner failed to establish that the regulatory criteria in 8 C.F.R. § 214.2(o)(3)(iii)(B) “do not readily apply to the beneficiary's occupation.” 8 C.F.R. § 214.2(o)(3)(iii)(C).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) provides that 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 receipt of a major internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), or by submitting evidence to satisfy at least three of the eight forms of documentation set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). In contrast, the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C)

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<sup>3</sup> The petitioner only asserts eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), 8 C.F.R. § 214.2(o)(3)(iii)(B)(8), and 8 C.F.R. § 214.2(o)(3)(iii)(C). The director determined that the petitioner established eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(7) and (8). Upon review, we agree that the petitioner has established eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(7) and (8).

<sup>4</sup> The petitioner does not claim to submit the testimonial letters under any of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

provides that comparable evidence “may” be submitted if the criteria in 8 C.F.R. § 214.2(o)(3)(iii)(B) do not readily apply to the beneficiary's occupation.

It is clear from the use of the word “must” in 8 C.F.R. § 214.2(o)(3)(iii), as opposed to the word “may” in 8 C.F.R. § 214.2(o)(3)(iii)(C), that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). 8 C.F.R. § 214.2(o)(3)(iii)(C) provides an exception to that rule, but only where it has been established that the criteria in 8 C.F.R. § 214.2(o)(3)(iii)(B) do not readily apply to the beneficiary's occupation. Hence, the petitioner must first establish that the criteria in 8 C.F.R. § 214.2(o)(3)(iii)(B) do not readily apply to the beneficiary's occupation. Then, only if the petitioner is able to establish that the regulatory criteria do not readily apply to the beneficiary's occupation, may the comparable evidence be considered.

In the instant matter, the petitioner has not articulated why the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) “do not readily apply to the beneficiary's occupation,” as required by the plain language of 8 C.F.R. § 214.2(o)(3)(iii)(C). While the petitioner has submitted letters stating that the beneficiary's field in thermal technology is “a niche field” that is not “conducive” to the winning of awards or the publication of articles, this fall short of establishing that none of the regulatory criteria applies to the beneficiary's particular field.

We note that the petitioner claims eligibility under the “comparable evidence” regulation, in addition to claiming eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(7) and (8). As indicated earlier, the regulatory language allows for the consideration of comparable evidence only where the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) do not apply to the beneficiary's occupation. Since the petitioner has claimed and established that two of the regulatory criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(B) apply, the petitioner's claim of eligibility for the “comparable evidence” regulation is further undermined. An inability to meet one or some of the regulatory criteria is not evidence that the regulatory criteria do not apply to the beneficiary's occupation. Where an alien is simply unable to meet or submit documentary evidence meeting three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), the plain language of 8 C.F.R. § 214.2(o)(3)(iii)(C) does not allow for the submission of comparable evidence.

Overall, the petitioner has claimed and established eligibility under 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(7) and (8). However, the regulation requires the petitioner to establish eligibility under at least three of the criteria found at 8 C.F.R. § 214.2(o)(3)(v)(B), which the petitioner has failed to do here. The petitioner does not claim eligibility under any other criteria set forth at 8 C.F.R. §§ 214.2(o)(3)(iii)(B), nor does the petitioner claim eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(A). Finally, the petitioner has not established eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(C). Accordingly, the petitioner has failed to establish that the beneficiary qualifies as an alien of extraordinary ability in the field of business.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.