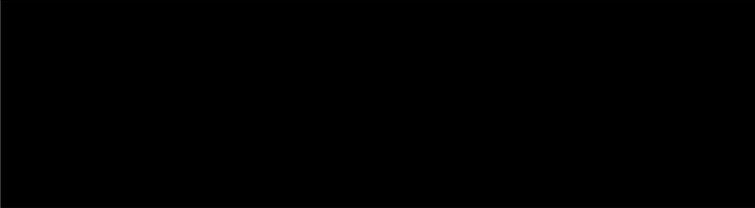


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FILE: EAC 03 039 50209 Office: VERMONT SERVICE CENTER

Date: AUG 31 2005

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The district director's decision will be withdrawn and the case will be remanded to her for entry of a new decision.

The petitioner seeks O-1 classification of the beneficiary, as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ her in the United States for a period of three years.

The director denied the petition, finding that the petitioner failed to establish that the beneficiary qualifies for O-1 classification.

On appeal, the petitioner indicates that it is appealing two decisions, one denying the beneficiary's request for a change of status from H-1B to O-1; and the decision denying the instant petition. There is no appeal from the denial of a request for a change of status. 8 C.F.R. § 248.3(g).

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The 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 first issue to be addressed in this proceeding is whether the director applied the correct evidentiary standard to the beneficiary. The petitioner asserts that the director applied the wrong evidentiary criteria in the instant case. The director determined and the AAO concurs that the higher evidentiary standard is appropriate in the instant case.

Although the petitioner indicated on the Form I-129 petition that it intended to hire the beneficiary as an artist, the job description indicates that the beneficiary's primary job duties are other than that of an artist. The petitioner wrote, "[t]his employee will [sic] responsible for conducting art tours for exchange students from Japan and elsewhere and will manage the culture division for a three year period. In addition, [the petitioner] will act as agent for [the beneficiary] and will represent her in obtaining sales of her art work through the arrangement of gallery exhibitions." The petitioner further wrote:

We would like [the beneficiary] to act as a curator and guide for international visitors who come to view our gallery. . . . [The petitioning organization] is involved in Japan-New York City art/culture exchange and art tours. [The beneficiary] will conduct/manage the art tours and will utilize her exceptional ability in art to discuss and promote an exchange of art and culture.

The petitioner stated that it has its own art gallery, and the director found that the beneficiary would be working primarily as a curator of an art gallery and only secondarily as an artist. In its June 14, 2004 appellate letter, the petitioner asserts that the director should have used the evidentiary criteria for artists. It must be noted that the June 14, 2004 letter specifically names the petitioner's own website. A review of this website reveals that the petitioner provides limousine and tour services.<sup>1</sup> 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). Given the discrepancy between the petitioner's self-description and information on its own website, the AAO cannot determine whether the art gallery exists, whether the petitioner is in fact a limousine company and the nature of the beneficiary's actual employment.

Pursuant to 8 C.F.R. § 103.2(b)(8), where the evidence submitted with a petition either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, Citizenship and Immigration Services (CIS) may request additional evidence. In the instant case, the evidence in the record raises additional questions regarding eligibility beyond the director's decision.

The matter will be remanded to the director to allow her to request additional evidence from the petitioner to establish the exact nature of its business and the location of its gallery. The statute requires that an O-1 nonimmigrant seek to enter the United States to continue work in the area of extraordinary ability. If the beneficiary intends to work for the petitioner as a limousine driver, the record must establish that the beneficiary has sustained acclaim as a limousine driver.

Accordingly, this case shall be remanded back to the director so that she can request additional evidence. After receipt and consideration of the additional evidence, the director should enter a new decision.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The case is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

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<sup>1</sup> [www.hinomaruny.com](http://www.hinomaruny.com) [as accessed on 8/17/05].