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FILE: LIN 04 131 51238 Office: CALIFORNIA SERVICE CENTER Date: FEB 24 2006

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an entertainment productions firm. The beneficiary is a choreographer and dancer. The petitioner seeks O-1 classification of the beneficiary as an alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to employ her as a choreographer, coordinator and dancer for two years at a yearly salary of \$35,000.

The director denied the petition finding, in part, that the petitioner had failed to establish an event or events in which the beneficiary would perform and, in part, that the petitioner failed to submit either a written contract or the terms of an oral agreement under which the beneficiary would be employed.

On appeal, counsel for the petitioner submits additional documentation.

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

The beneficiary is a native of the former Soviet Union and a citizen of Russia. He entered the United States on November 20, 2002, pursuant to a P-1 nonimmigrant visa to work for [REDACTED]. The evidence establishes that the beneficiary was the choreographer of the Russian Girls Gymnastics Team, which won a gold medal in the 1996 Olympics.

The first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will perform in an event or events as required by the statute and regulations.

Under section 101(a)(15)(O) of the Act, a qualified alien may be authorized to come to the United States to perform services relating to an event or events if petitioned for by an employer. 8 C.F.R. 214.2(o)(1)(i). The term "event" is defined at 8 C.F.R. 214.2(o)(3)(ii) as an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner stated that the event was "coordinating various entertainment events for television, corporate functions and Stage Shows." In its letter accompanying the petition, the petitioner stated:

We are delighted to have the opportunity to employ [the beneficiary's] services in choreographing and consulting on some of the specialty acts for entertainment events such as half time shows for NBA, WNBA and NHL, and corporate events like Novartis "No Limits" [sic] show, Volkswagon [sic] "Polo" [sic] in Brazil, Merck Hospital and others. [She] is superb as the principal in shows like "Beats of Passion" [sic] at the Venetian Las Vegas and "Le Diner Cabaret" at the Greek island Hotel and Casino in Las Vegas.

The petitioner submitted no itinerary, contract or other documentary evidence to establish that an event or events existed at which the beneficiary would perform.

In a request for evidence dated August 19, 2004, the director instructed the petitioner to "[p]rovide an explanation of the nature of the events or activities and a copy of any itinerary for the events or activities."

The petitioner submitted no evidence of the nature of the events or a copy of the itinerary in response to this request by the director.

On appeal, the petitioner submits a copy of an agreement dated August 21, 2004, in which it agrees to hire the beneficiary for a period of three years as a choreographer, consultant and aerial performer beginning on February 14, 2005. The petitioner also submitted a copy of an August 10, 2004 "Letter of Intent" from Q Productions for the beneficiary's services "throughout the year 2005-2006."

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The appeal will be adjudicated based on the record of proceeding before the director.

The record before the director does not contain evidence, pursuant to regulation, that beneficiary will perform in an event or events.

The second issue to be addressed in this proceeding is whether the petitioner submitted a copy of a written contract or the terms of an oral agreement under which the beneficiary would be employed.

The regulation at 8 C.F.R. § 214.2(o)(2)(ii) states, in pertinent part:

Evidence required to accompany a petition. Petitions for O aliens shall be accompanied by the following:

(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.

In his RFE, the director instructed the petitioner to "[p]rovide a copy of any written contracts between the petitioner and the 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 did not submit a copy of a written contract or a summary of an oral contract for the beneficiary's employment in response to the RFE.

As discussed above, the petitioner was put on notice of the deficiency in the evidence and given an opportunity to respond. The petitioner failed to submit the requested evidence and now submits it on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition will be adjudicated on the record before the director.

The record before the director did not contain a copy of a written contract or a summary of an oral contract of the beneficiary's employment, as required by the regulation.

Beyond the decision of the director, the petitioner has not filed a timely petition.

The petition was filed on April 1, 2004. The petitioner's agreement with the beneficiary and the Letter of Intent are both dated in August 2004 with an employment date beginning in February 2005. The regulation at 8 C.F.R. § 214.2(o)(2)(i) states, "The petition may not be filed more than 6 months before the actual need for the alien's services."

As the beneficiary's services were not needed prior to February 14, 2005, the petition should not have been filed earlier than August 14, 2004. This constitutes an additional ground for denial of the petition.

The petitioner noted that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.