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U.S. Citizenship  
and Immigration  
Services

D8



**MAY 01 2009**

FILE: WAC 07 054 53345 Office: CALIFORNIA SERVICE CENTER Date:

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.

  
John F. Grissom, Acting 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1 alien with extraordinary ability in the arts 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). The petitioner operates a gymnastics and circus arts training facility. It seeks to employ the beneficiary as a gymnastics and circus arts coach for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary satisfied the standards for classification as an alien with extraordinary ability in athletics. In a request for evidence (RFE) issued on January 10, 2007, the director acknowledged that the petitioner seeks to classify the beneficiary as an alien of extraordinary ability in the arts. However, the director determined that the beneficiary would serve as an athletics coach in the United States and therefore, applied the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii), rather than the evidentiary criteria applicable to aliens of extraordinary ability in the arts, at 8 C.F.R. § 214.2(o)(3)(iv).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner emphasizes that the petitioner did not purport to qualify the beneficiary as an athlete of extraordinary ability, but as a coach of extraordinary ability in circus arts. Counsel notes "it was almost impossible to respond to RFE requests which were tailored to seek evidence of extraordinary athletic achievement using our evidence of excellence in the field of circus arts." Counsel notes that the petitioner presented evidence that the beneficiary has been a professional circus performer and coach for the last twenty years, and emphasizes that she will be coaching the art of acrobatic circus performance in the United States, rather than coaching competitive gymnasts.

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) states, in pertinent part:

*Arts* includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons, such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians and animal trainers.

Upon review, the petitioner's arguments are persuasive. While the evidence submitted demonstrates that the beneficiary in this matter was once a successful competitive athlete in gymnastics, the petitioner has clearly articulated that the beneficiary's purported area of extraordinary ability is in the performing arts, particularly the

circus arts. The petitioner has not claimed that the beneficiary has coached or would coach competitive gymnasts. While competitive gymnasts and circus acrobats may possess similar skills, the fields are clearly different, and the AAO finds it reasonable to classify the former as athletes and the latter as artists.

The regulations clearly prescribe different evidentiary criteria for aliens of extraordinary ability in the arts as opposed to aliens of extraordinary ability in athletics. Consequently, the director's decision dated April 6, 2007 is withdrawn. The petition will be remanded for application of the correct evidentiary standards applicable to aliens of extraordinary ability in the arts at 8 C.F.R. §§ 214.2(o)(3)(ii) and 214.2(o)(3)(iv). If necessary, the director should re-issue the RFE to request additional evidence relevant to the criteria applicable to aliens with extraordinary ability in the arts.

Furthermore, although not addressed in the director's decision, the record as presently constituted does not contain evidence to satisfy the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(B), in the form of a written contract between the petitioner and beneficiary, or evidence to satisfy the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(D), in the form of a written advisory opinion from the appropriate consulting entity. The director is instructed to request this evidence and any other additional evidence deemed warranted and should allow the petitioner to submit additional evidence within a reasonable period of time.

As always, in visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.