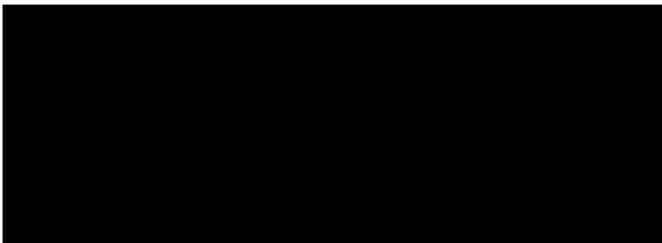


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

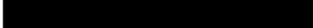


**U.S. Citizenship
and Immigration
Services**

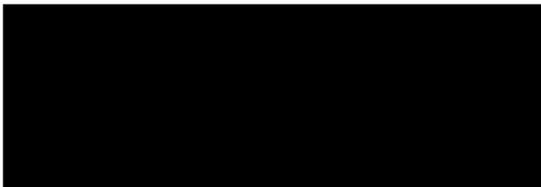


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FILE: EAC 10 073 50514 Office: VERMONT SERVICE CENTER Date: DEC 06 2010

IN RE: Petitioner: 
Beneficiary: 

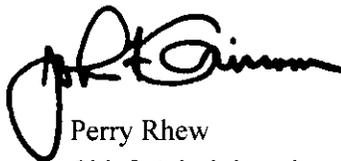
PETITION: Petition for a Nonimmigrant Worker under Section 101(a)(15)(O)(i) of the Immigration and
Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

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.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition for further action and entry of a new decision.

The petitioner, a university, filed this 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), 8 U.S.C. 1101(a)(15)(O)(i) as an alien with extraordinary ability in the arts. The petitioner seeks to employ the beneficiary in the position of Associate Professor (Adjunct) of Viola in its graduate school of music for a period of three years. The beneficiary currently serves in this position in J-1 status.

The director denied the petition based on a conclusion that the proposed employment for the beneficiary is primarily an education position, and that "teaching does not qualify as an entertainment event" necessary for an alien of extraordinary ability in the arts.

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 asserts that the proffered position in the petitioner's School of Music "requires that the person who fills it be a world class violist." Counsel contends that the beneficiary "was hired for this position based on his exceptional reputation as a violist" and that "the criteria for evaluating extraordinary ability in education do not apply." Counsel states that the beneficiary "has achieved international acclaim as a violist and has sustained that acclaim in the field of instructing at the international level," and as such "instructing viola is within [the beneficiary's] area of expertise."

Further, with respect to the specific grounds for denial, counsel asserts that the definition at event at 8 C.F.R. § 214.2(o)(3)(ii) includes an "academic year." Counsel notes that the beneficiary's temporary appointment as an adjunct professor is the "event" for which the petitioner is seeking classification, and notes that, as an adjunct professor, the beneficiary will be giving concerts, playing with the university's groups formally and informally, and teaching and leading master classes for graduate level viola students. Finally, counsel asserts that, although the petitioner believes the field of arts to be most applicable to the beneficiary's occupation, it also believes that he does meet the higher standard necessary for the extraordinary ability in education.

In support of the appeal, the petitioner submits an unpublished AAO decision involving an O-1 athletic instructor to stand for the proposition that a beneficiary who has achieved national or international acclaim as a performer or competitor in his or her field and sustained that acclaim in the field of instructing or teaching at a national level can establish that instructing or teaching is within the beneficiary's area of expertise.

I. The Law

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.

Section 101(a)(46) of the Act states that the term "extraordinary ability" means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction.

Pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii) pertaining to aliens of extraordinary ability in the arts, "distinction" means a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts. The term "arts" includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. *Id.*

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

Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

- (A) Evidence that the alien has been nominated for, or the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or
- (B) At least three of the following forms of documentation:
 - (1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;
 - (2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;
 - (3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;
 - (4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field,

box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

- (5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or
 - (6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or
- (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.

Pursuant to 8 C.F.R. § 214.2(o)(1)(i), 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. 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 ending 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.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines "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 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.

II. Discussion

The sole issue addressed by the director is whether the petitioner established that the beneficiary's proposed activities are appropriate for an alien of extraordinary ability in the arts. The director concluded that the beneficiary's proposed employment as an adjunct associate professor of viola is "primarily an education position" and that "teaching does not qualify as an entertainment event necessary for O-1B status."

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 19, 2010. The petitioner indicated that it seeks to employ the beneficiary for a period of three years as an Associate Professor (Adjunct) of Viola at an annual salary of \$95,000. The petitioner submitted documentary evidence of the beneficiary's credentials and accomplishments as a performing violist and classical recording artist. The petitioner also provided evidence that the beneficiary has served as a professor of viola and chamber music at the International Menuhin Music Academy in Switzerland, and as a viola master class instructor at the *Academie Internationale de Musique de Montpelier* and other institutions.

The director issued a request for additional evidence ("RFE") on January 22, 2010, in which he requested a copy of the petitioner's contract with the beneficiary and "evidence to establish that the beneficiary is coming to the United States to participate in an entertainment event or engagement."

In a letter dated February 1, 2010, the petitioner stated:

As Associate Professor of Viola, [the beneficiary] will be engaged in the following duties over the next three years:

- Studio instruction of a minimum of 12 and maximum of 14 graduate viola students;
- A weekly seminar for viola students;
- Weekly coaching of one to two chamber music ensembles;
- Auditions, juries, recitals, and committee work as required. . . .

As a faculty member at [the petitioner's] School of Music, [the beneficiary] will be engaged to perform in association with the [petitioner's] school of music over the next three years. For example, he will appear on February 9, 2010 at Carnegie Hall in New York City on the Prokofiev Rediscovered program as part of the Yale in New York series, alongside [REDACTED]

The petitioner submitted a copy of its 2009-2010 School of Music bulletin listing the beneficiary among the school's strings performance faculty. The bulletin indicates that "the members of the performance faculty at the [petitioner's] school of music are internationally recognized artists and teachers." The petitioner submitted programs for the beneficiary's upcoming solo performance as part of the petitioning university's Faculty Artist Series on March 2, 2010, and for the above-referenced Carnegie Hall performances in February 2010.

The director denied the petition on February 18, 2010, concluding that "the proposed employment for the beneficiary is primarily an education position" and that "teaching does not qualify as an entertainment event for O-1B status." The director acknowledged the beneficiary's planned performances, but noted that "three performances a year for three years do not establish an entertainment event or events for the requested three year period of employment."

On appeal, counsel for the petitioner asserts that, pursuant to 8 C.F.R. § 214.2(o)(3)(ii), an 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." Counsel emphasizes that the beneficiary's temporary appointment as an adjunct associate professor of viola for a period of three academic years is a qualifying "event," for the purposes of this classification. Counsel notes that the beneficiary's activities will include a combination of "giving concerts, playing with Yale groups formally and informally, teaching and leading so called 'master classes' for [the petitioner's] viola students."

The petitioner further asserts that the petitioner requires that the person who fills the proffered position be a "world class violist," and that "the beneficiary was hired for this position based on his exceptional reputation as a violist." Counsel asserts that the criteria for evaluating extraordinary ability in education do not apply in this matter, but does note that the petitioner believes that the beneficiary could meet the more stringent standards for O-1 classification applicable to aliens of extraordinary ability in the fields of business, science, education or athletics.

Counsel further contends that the beneficiary has achieved international acclaim as a violist and has sustained that acclaim in the field of instructing at the international level. As such, counsel submits that "instructing viola is within [the beneficiary's] area of expertise." In support of this argument, counsel relies on an unpublished AAO decision in which the AAO acknowledged a "nexus between participating in a particular sport as a competitor and coaching or instructing."

Upon review, the AAO disagrees with the grounds for denial and will withdraw the director's decision. The director provided no support for his finding that an alien with extraordinary ability in the arts is strictly limited to coming to the United States to provide services for an "entertainment event." As correctly noted by counsel, the regulatory definition of "event" at 8 C.F.R. § 214.2(o)(3)(ii) specifically includes an "academic year." As this definition of "event" applies to all three sub-classifications within the O-1 visa category, the AAO can find no proper basis for denying the petition based solely on the grounds stated.

The AAO further finds that the petitioner has set forth a reasonable argument that the proffered adjunct faculty position in viola performance requires the services of an alien with extraordinary ability in the arts, notwithstanding the fact that the position is offered by an educational institution. The evidence establishes that the petitioner's graduate school of music requires its faculty members to be world class performing musicians with teaching experience rather than simply music educators. As the position contains elements of both teaching and performing, the petitioner must of course establish that the beneficiary has achieved distinction in both aspects of his career as a viola performer and instructor.

As the director denied the petition on inappropriate grounds and failed to even address the vast majority of the evidence submitted or the evidentiary criteria pertaining to extraordinary ability in the field of arts or in the field of education, the director's decision will be withdrawn and the matter will be remanded for further action and entry of a new decision.

Based on the claims the petitioner has made and the evidence already in the record, the AAO can find no evidence of ineligibility in the record. However, the statute requires the petition to be supported by evidence that the beneficiary's "achievements have been recognized in the field through extensive documentation." Section 101(a)(15)(O)(i) of the Act. Although the petitioner asserts that the beneficiary could meet the eligibility requirements under 8 C.F.R. § 214.2(o)(iii) and 8 C.F.R. § 214.2(o)(iv), the petitioner has not yet fully documented the beneficiary's eligibility. For example, the petitioner indicates that the beneficiary won two prizes in the Lionel Tertis International Viola Competition in 2000, but has provided no direct evidence of these prizes, nor sufficient evidence to establish the significance of these prizes or the event at which they were received. Similarly, while the record contains a list of venues all over the world at which the beneficiary has performed, this list alone is insufficient to satisfy the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(I) or (3), which require specific documentary evidence of the beneficiary's services or performances in a lead, starring or critical role for organizations, establishments, productions or events which have a distinguished reputation.

Therefore, at this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determinations on those issues. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the beneficiary is ineligible. Rather, we remand the matter because the director based the decision on incorrect grounds and failed to address the critical substantive issue in the matter in the previous request for evidence and in the decision dated February 18, 2010.

The AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. As always in these 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 discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.