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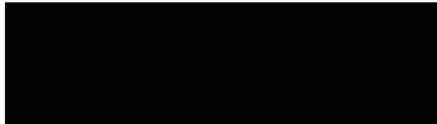
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



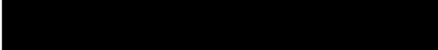
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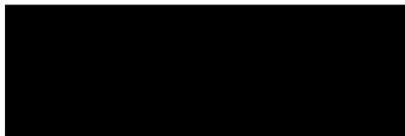


FILE:  Office: VERMONT SERVICE CENTER Date: **NOV 05 2010**

IN RE: Petitioner: 
Beneficiary: 

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

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 dismiss the appeal.

The petitioner 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), as an alien of extraordinary ability in the arts. The petitioner is engaged in music production, performance and instruction, and the beneficiary is a jazz singer. The petitioner requests that the beneficiary be granted O-1 classification for a period of three years.

On September 11, 2009, the director denied the petition concluding that the petitioner failed to submit: (1) a written consultation from an appropriate labor organization; and (2) 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.

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, the petitioner submits a consultation letter from the American Federation of Musicians. The petitioner further clarifies the nature and scope of the beneficiary's intended services in the United States, and asserts that the contract submitted at the time of filing was a "standard artistic management agreement" prepared by counsel. The petitioner submits a new summary of the terms of its oral agreement with the beneficiary in support of the appeal.

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

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 regulation at 8 C.F.R. § 214.2(o)(1)(i) provides that 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.

Pursuant to 8 C.F.R. § 214.2(o)(2)(i), an O-1 petition may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent. An O alien may not petition for himself or herself.

The regulatory requirements for agents as petitioners are set forth at 8 C.F.R. § 214.2(o)(2)(iv)(E):

A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent.

Finally, 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.

II. Discussion

A. Written Advisory Opinion from an Appropriate Consulting Entity

The first issue addressed by the director is whether the petitioner submitted the required written advisory opinion from an appropriate consulting entity. *See* 8 C.F.R. § 214.2(o)(2)(ii)(D). Pursuant to 8 C.F.R. § 214.2(o)(5)(ii)(A), consultation with a peer group in the area of the alien's ability (which may include a labor organization) or a person or person with expertise in the area of the alien's ability, is required in an O-1 petition for an alien of extraordinary ability.

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it was submitting a peer group consultation from the [REDACTED]. The petitioner submitted a letter from the association's president and artistic director, who stated that the beneficiary is "in the vanguard of her profession as a musician and educator."

The director issued a request for evidence ("RFE") on January 28, 2009. The director instructed the petitioner to submit a written advisory opinion from an appropriate association or entity with expertise in the beneficiary's area of ability.

In response, the petitioner, through counsel, re-submitted the opinion letter from the [REDACTED] [REDACTED] along with a second letter from [REDACTED] Dean and Professor with the [REDACTED]

The director denied the petition on September 11, 2009, based on the petitioner's failure to provide a written consultation from a labor organization. The director observed that [REDACTED] is not the appropriate union, labor or management organization for singers." The director noted that "due to the fact that the beneficiary will be performing as a jazz singer, and there are labor organizations for singers, the requirement for a written consultation from such organization will not be waived." The director noted that USCIS had requested a consultation from the American Federation of Musicians on July 30, 2009, but had received no response.

On appeal, the petitioner submits a favorable consultation from the [REDACTED] which was issued on September 24, 2009.

Upon review, the AAO will withdraw the director's determination. The regulation at 8 C.F.R. § 214.2(o)(5)(i)(F) requires the petitioner to submit a written consultation from a peer group, labor organization, or from a person or persons with expertise in the beneficiary's field. The petitioner is not required to submit a consultation from a labor organization, as long as it submits one of the qualifying forms of documentation. In fact, the request that USCIS sent to the [REDACTED] on July 30, 2009 states: "Petitioner has submitted a letter from [REDACTED]. This has been determined to be sufficient evidence of consultation from a peer group."

The regulations require USCIS to request a labor consultation when the petitioner provides an advisory opinion from a peer group or from a person or persons with expertise in the beneficiary's field. Pursuant to 8 C.F.R. § 214.2(o)(5)(i)(F), the labor organization has 15 days to respond to USCIS' request for an advisory opinion, comment or no objection letter. If no response is received within 15 days, USCIS shall render a decision without the advisory opinion. Therefore, it was improper for the director to deny the petition based on the petitioner's failure to submit a consultation with a labor organization. Under the circumstances, the labor consultation should have been waived. Furthermore, the record now contains a favorable consultation letter from the [REDACTED]. Therefore, the AAO will withdraw the director's determination that the consultation requirement has not been met.

B. 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

The second issue in this matter is whether the petitioner met its burden to describe the nature of the beneficiary's proposed events or activities, the beginning and ending dates for the events or activities, and to provide an itinerary pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(C). The director emphasized that, pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(A) a petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work.

The petitioner indicated on the Form I-129 that the beneficiary will be employed as a "Jazz Singer" on a full-time basis. The petitioner requested a three-year approval and indicated that the beneficiary's wages will vary "per contract." In a letter submitted in support of the petition, counsel for the petitioner stated that the beneficiary "seeks to enter the United States to continue her work as an internationally renowned jazz singer and will continue to utilize her unique talents in this field."

The petitioner submitted a management agreement executed by the petitioner and beneficiary on November 7, 2008. The agreement provides, in relevant part:

1. Term: The term of this Agreement shall be for three (3) years, beginning on the date of the O-1 Visa approval. . . .
2. Services: Company shall (a) assist Artist in the development, negotiation, organization and administration of income-producing opportunities and activities and (b) consult with and advise Artist regarding the planning and management of Artist's career and related business affairs.
3. Compensation: As full and complete compensation for the Services, Artist will receive eighty percent (80%) of performing pursues [*sic*] and will give to the Company the remaining twenty percent (20%). Artist will also receive eighty percent (80%) of all endorsement and/or sponsorships and will give to the company the remaining twenty percent (20%).
4. Exclusivity: In providing such management and marketing representation services, Company shall be Artist's exclusive worldwide representative. . . .

In the request for evidence dated January 28, 2009, the director instructed the petitioner to submit a complete itinerary of engagements which shows the specific dates of each engagement, the name of the actual employer, and the name and address of each facility where services will be performed, accompanied by copies of written contracts or summaries of oral contracts entered into by the petitioner and beneficiary.

In a response dated January 9, 2009, counsel for the petitioner stated that the beneficiary will be working at the petitioner's primary address as a jazz singer teacher. Counsel further stated:

[The beneficiary] will also participate in several music events during the next three years, as estipulate [*sic*] in the contract between the petitioner and [the beneficiary].

The petitioner will manage her professional career as a jazz singer and will be responsible for scheduling the music events. The dates of the events cannot be schedule[d] before the confirmation of the approval of her petition. All events will be under the petitioner[']s responsibility as an agent and employer as stipulated in the management contract.

The petitioner, through counsel, resubmitted a copy of the above-referenced management agreement, but did not further address this issue.

In denying the petition, the director noted that the petitioner submitted conflicting information regarding the nature of the beneficiary's services. The director observed that the petitioner indicated on Form I-129 that the beneficiary will work as a jazz singer, with the petitioner acting as her agent with the responsibility for scheduling performances and events, and later indicated that the beneficiary would be employed by the petitioner as a jazz singer teacher at the petitioner's premises. The director emphasized that the management agreement that was twice submitted by the petitioner clearly stipulates that the petitioner will be managing the beneficiary's professional career and makes no reference to the beneficiary's employment as a jazz singing instructor. The director concluded that the petitioner is not exempt from submitting an itinerary, as it has stated at the time of filing and in response to the request for evidence that the beneficiary will be performing at various musical engagements.

On appeal, the petitioner, which appears to have filed the appeal without the assistance of counsel, asserts that it was unaware of the director's request for evidence, or the specific request for an itinerary of engagements with specific dates. The petitioner further asserts:

Regarding the management agreement that was in our Petition, it was elaborated by the Law office hired, who had used a standard artistic management agreement. Actually, I just need to hire the work of the beneficiary two times a year, during 3 subsequent years, and for a period of 7 days, with few chances to extend the referred period. During these periods, we plan to have the beneficiary teaching and demonstrating through performances and other presentations, mainly in our premises . . . what is her specific ability: the vocal technique and phrasing of Brazilian Jazz, which require live demonstration. After the works being performed, the beneficiary will be free to return to her native Country, Brazil, and will come back only 6 months later to perform such works again, as we have presented with other artists. There is no interest and it wouldn't make any sense having in the US for longer than the necessary to present her work.

The petitioner submits a written summary of the terms of its oral agreement with the beneficiary, which provides:

Subject: Presentation by artist/educator [the beneficiary] of 6 (six) one week vocal clinics/workshop/demonstration/performances during 3 (three) subsequent years (2010, 2011, and 2012).

Type of event: Vocal lessons and performances for students and to the public in general.

Music Style covered: Brazilian Jazz vocal.

Dates:

2010: Jan. 15th thru 20th and July 19th thru 24th
2011: Jan. 17th thru 22nd and July 18th thru 23rd

2012: Jan. 16th thru 21st and July 9th thru 14th

The summary of the terms of the oral agreement further states that the beneficiary will work two hours per day when in the United States, will work at the petitioner's location, and will receive a guaranteed payment of at least \$1,200 per week.

Upon review, the petitioner's newly submitted evidence will not be accepted for consideration. Rather than identifying an erroneous conclusion or statement of fact on the part of the director, the petitioner acknowledges that he and the beneficiary signed a "management agreement" prepared by counsel that did not accurately reflect the nature of their relationship, or the terms and conditions of the beneficiary's employment. As noted above, the management agreement submitted at the time of filing and in response to the request for evidence indicates that the petitioner acts as a manager and agent for the beneficiary with responsibility for arranging, marketing and promoting her musical performances. The petitioner now claims that it seeks to hire the beneficiary only as an instructor on a limited basis. The petitioner also signed a Form I-129 that indicates the beneficiary will provide services on a full-time basis for three years and now claims that the beneficiary will work for two hours a day, for two weeks per year, over a three year period. The petitioner's admission that inaccurate information and documentation was submitted in support of the petition provides sufficient grounds to affirm the denial of the petition.

While the AAO acknowledges that no itinerary would be required from the petitioner under the terms of the newly submitted oral agreement, the petitioner may not simply substitute the newly submitted evidence for the previously submitted management agreement and request that the petition be adjudicated on that basis. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The director's decision was correct based on the evidence submitted prior to the adjudication of the petition. Accordingly, the appeal will be dismissed.

The denial of this petition is without prejudice to the filing of a new petition by the petitioner accompanied by the appropriate supporting evidence and fee.

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.

ORDER: The appeal is dismissed.