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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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Services

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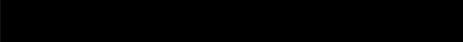


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DATE MAY 11 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

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.

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, with a fee of \$630. 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, California 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 nonimmigrant petition seeking to extend the beneficiary's status as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), as an alien with extraordinary ability in business. The petitioner, an Indian restaurant, seeks to employ the beneficiary as its executive chef for two additional years.¹

The director denied the petition, concluding that the petitioner: (1) failed to submit evidence specifically requested in the director's request for additional evidence issued on October 13, 2010; and (2) failed to establish that the beneficiary qualifies as an alien of extraordinary ability. The director noted that the petitioner did not submit evidence relating to the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B), either in support of the initial petition or in response to the director's request for evidence. The director acknowledged counsel's assertion that a request for an extension of an alien's O-1 status, pursuant to 8 C.F.R. § 214.2(o)(12)(i), requires only a statement explaining the reasons for the extension. The director emphasized that the regulations do in fact grant U.S. Citizenship and Immigration Services (USCIS) the authority to request additional evidence in cases involving the extension of status for a beneficiary to continue employment in the same position with the same employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel asserts that the petitioner believed, relying on a 1992 legacy Immigration and Naturalization Service (INS) memorandum and the regulations at 8 C.F.R. § 214.2(o)(11), that USCIS would rely on its prior finding that the beneficiary is eligible for O-1 classification and that "whatever documentation [of] extraordinary ability had previously been submitted was available" for reconsideration. In support of the appeal, the petitioner submits a copy of the beneficiary's initial O-1 petition with supporting documentation, along with documentation which counsel claims is sufficient to satisfy the regulatory criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(1), (3), (5) and (7).

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.

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

¹ Pursuant to 8 C.F.R. § 214.2(o)(12)(ii), an extension of stay may be authorized in increments of up to one year for an O-1 beneficiary to continue or complete the same activity for which he or she was admitted plus an additional 10 days to allow the beneficiary to get his or her personal affairs in order. A two-year extension of stay cannot be granted.

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 extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:²

Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics. An alien of extraordinary ability in the fields of science, education,

² The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it sought to classify the beneficiary as an alien of extraordinary ability in sciences, education, business or athletics. In response to the RFE, counsel noted that the appropriate category for an executive chef is that of an alien of extraordinary ability in the arts. The AAO notes that, given the nature of the beneficiary's claimed area of extraordinary ability, the petitioner could have reasonably requested review of the petition under the regulations applicable to the field of arts at 8 C.F.R. § 214.2(o)(3)(iv). However, as the petitioner requested that the beneficiary be granted O-1 status as an alien of extraordinary ability in the field of science, education, business, or athletics, the director properly limited her review of the evidence as it pertains to the definition of extraordinary ability and specific eligibility criteria applicable to that classification at 8 C.F.R. § 214.2(o)(3)(iii). The petitioner bears the burden of proof with respect to the specific visa classification that they request on the Form I-129. USCIS will only consider the visa classification that the petitioner annotates on the petition, and has no authority to consider other classifications in the alternative. Further, The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008). If the petitioner wishes to classify the beneficiary as an alien of extraordinary ability in the arts, it may, of course, file a new petition and request such classification.

business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
 - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized or international experts in their disciplines or fields;
 - (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
 - (4) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
 - (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - (8) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
- (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.

The regulations pertaining to extensions of an O-1 alien's visa petition validity and stay are set forth at 8 C.F.R. §§ 214.2(o)(11) and (12). The regulation at 8 C.F.R. § 214.2(o)(11) governs extensions of visa petition validity and states:

The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on Form I-129, Petition for a Nonimmigrant Worker, in order to continue or complete the same activities or events specified in the original petition. Supporting documents are not required unless requested by the Director. A petition extension may be filed only if the validity of the original petition has not expired.

The regulation at 8 C.F.R. § 214.2(o)(12)(i) provides, in relevant part:

Extension procedure. The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I-129 accompanied by a statement explaining the reasons for the extension.

II. Discussion

A. *Evidentiary requirements for an O-1 petition extension*

The primary ground for denial in this matter was the petitioner's failure to submit evidence relating to the eligibility criteria for the requested classification at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B), either in support of the initial petition or in response to the director's request for evidence dated October 13, 2010.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 30, 2010. The petition was accompanied by: (1) a copy of a prior approval notice granting the beneficiary O-1 status for employment with the petitioner from October 11, 2008 through September 30, 2010; a copy of the beneficiary's current Form I-94 and passport pages; (3) an advisory opinion letter dated September 11, 2008 from [REDACTED] of the Nevada Restaurant Association; and (4) a letter from counsel dated September 28, 2010. In this letter, counsel stated:

This is a request for an extension of a previously approved visa for the same employer. According to a memorandum authored by [REDACTED] 214h-C (Sept. 29, 1992) reprinted in 69 Interpreter Releases 1471-72 (Nov. 16, 1992) no additional documentation is necessary other than a statement explaining the reason for the stay request. To that end, we are attaching the statement of [REDACTED] and supporting documentation for her request.

The petitioner did not, in fact, submit a statement explaining the reason for the extension request. There is no statement from a [REDACTED] in the record and no other mention of this individual.

The director issued a request for additional evidence ("RFE") on October 13, 2010, in which requested: (1) evidence to satisfy the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B); (2) a copy of the petitioner's

contractual agreement with the beneficiary; and (3) documentation of remuneration the beneficiary received in the three months preceding the filing of the petition as evidence that he has been maintaining a valid nonimmigrant status. The director acknowledged that the instant petition is a request for an extension of status, but noted that "without any documentation, USCIS cannot verify at this point that there has not been a material change to either the petitioner's or the beneficiary's eligibility for the nonimmigrant classification sought."

In a response dated November 6, 2010, counsel acknowledged that the petitioner had inadvertently failed to submit the required statement explaining the reasons for the extension request pursuant to 8 C.F.R. § 214.2(o)(12)(i). The petitioner submitted a letter dated November 5, 2010, indicating the petitioner's desire to employ the beneficiary in his current position of Executive Chef for an additional two years at a salary of \$60,000. The letter is attributed to the petitioner's owner, but was not signed.

The petitioner failed to submit any additional documentation in response to the RFE. Counsel explained as follows:

On or about October, 2008, your office initially approved an I-129 petition for [the petitioner] on behalf of [the beneficiary] as an alien of extraordinary ability. The job title listed on the petition was "executive chef." This is the same employer and the same job title for the same position at the same restaurant as initially approved. Upon approval there was a de facto determination made by your office that the beneficiary was an alien of extraordinary ability. As mentioned earlier, the regulations require only a statement explaining the reasons for the extension when the petitioner is seeking an extension "to continue or complete the same event or activity." [8 CFR 214.2(o)(12)(i)]. The Bednarz Memo dated September 29, 1992 reprinted at 69 Interpreter Releases 1471-71 (Nov. 16, 1992) further explains that no additional documentation is necessary other than this statement. Section 30.2(d)(2)(B) of the U.S.C.I.S. Adjudicator's Field Manual is consistent with this approach

Counsel asserted that he was "unable to find any authority for the proposition as suggested in the RFE that the employee needs to reestablish his entitlement to O-1 extraordinary ability status." Counsel suggested that additional evidence could only be requested if there has been a change in the terms and conditions of employment.

The director denied the petition based, in part, on the petitioner's failure to provide evidence in response to USCIS' request noting that, pursuant to 8 C.F.R. § 103.2(b)(14), failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. The director emphasized that the regulation at 8 C.F.R. § 214.2(o)(11) does in fact provide the director the authority to request supporting documentary evidence, even in those cases involving an extension of status for a beneficiary to continue employment in the same position with the same employer. The director noted that the regulations do not specify that additional evidence may be requested only under specific circumstances.

On appeal, counsel notes that the petitioner believed that it properly relied on the regulation at 8 C.F.R. § 214.2(o)(12)(i) and the above-referenced [REDACTED] and further believed that it could rely on USCIS' previous approval and "whatever documentation [of] extraordinary ability had previously been submitted." Counsel notes that "apparently this was not the case."

Upon review, the petitioner has failed to overcome the stated grounds for denial. Counsel's assertion that the director did not have the authority to request additional evidence in this matter is clearly incorrect. As noted by the director, the plain language of the regulation at 8 C.F.R. § 214.2(o)(11) provides that "supporting documents are not required *unless specifically requested by the Director.*" (Emphasis added.) The regulations do not qualify this provision by indicating that the director may request additional evidence only under specific circumstances.

The evidence submitted at the time of filing did not meet even the minimum evidentiary requirements set forth at 8 C.F.R. § 214.2(o)(12)(i) for an extension request as it did not include a statement from the petitioning employer. In such cases, the regulation at 8 C.F.R. § 103.2(a)(8)(ii) gives the director authority to either deny the petition or to request additional evidence.

The AAO notes that the "Bednarz memorandum" on which counsel relies pre-dates the current regulations governing the O-1 visa classification, and is not in fact a memorandum but a letter. Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although such letters may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Finally, we acknowledge counsel's claim that the petitioner believed that the director had available evidence of the beneficiary's extraordinary ability that was submitted with the initial petition. As noted by the director, each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the records of related nonimmigrant proceedings are not combined.

Based on the foregoing, the petitioner has failed to overcome the director's determination that the petitioner failed to submit requested evidence that precludes a material line of inquiry. Such failure shall be grounds for denying the petition pursuant to 8 C.F.R. § 103.2(b)(14). Accordingly, the appeal will be dismissed.

B. The Beneficiary's Eligibility as an Alien of Extraordinary Ability

The remaining issue in this matter is whether the petitioner established that the beneficiary is an alien of extraordinary ability in business.

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. If the petitioner does not submit evidence that the beneficiary has received a major, internationally recognized award, the petitioner

must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

In denying the petition, the director determined that the petitioner neither submitted evidence nor made any assertions regarding the beneficiary's eligibility under any of the applicable evidentiary criteria, and therefore failed to meet its burden of proof. The director emphasized that the petitioner chose not to avail itself of the opportunity to submit evidence of the beneficiary's eligibility as requested in the RFE.

On appeal, counsel asserts that the petitioner sought to rely on the approval of the initial O-1 petition and did not believe that additional evidence of the beneficiary's eligibility was required to warrant the approval of the petition extension. Counsel does not claim that the petitioner submitted any evidence of the beneficiary's eligibility under the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B) prior to the adjudication of the petition.

Counsel requests that the AAO consider on appeal a copy of the beneficiary's previous O-1 petition and supporting documentation, as well as additional documentary evidence pertaining to the beneficiary's eligibility under the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(1), (3), (5) and (7).

Upon review, the AAO finds that the director properly denied the petition. The petitioner's complete reliance on the prior approval of its O-1 petition was misplaced. The AAO notes that prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm'r. 1988).

As noted above, each nonimmigrant petition filing is a separate proceeding with a separate record of proceeding and a separate burden of proof. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity based on the petitioner's failure to submit any substantive evidence relating to the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(A) or (B). In both the request for evidence and the final denial, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. See section 291 of the Act.

Further, we note that, although the petitioner requested on the initial Form I-129 petition that it was requesting classification of the beneficiary as an alien of extraordinary ability in business, USCIS records reflect that the petition was approved as an "O1B" petition filed on behalf of an alien of extraordinary ability in the arts. As noted above, the petitioner bears the burden of proof with respect to the specific visa classification that they request on the Form I-129. USCIS will only consider the visa classification that the petitioner annotates on the petition, and has no authority to consider other classifications in the alternative. It appears that USCIS erred in

adjudicating the initial petition by applying the regulatory criteria applicable to aliens of extraordinary ability in the arts, rather than applying the criteria applicable to the classification requested by the petitioner.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts). As it appears that USCIS applied the lower standard when adjudicating the previous petition, a full review of the beneficiary's eligibility under the requested classification is clearly warranted in this matter.

Further, the AAO notes that the evidence submitted in support of the initial petition, now available for review, included: information about the petitioner; the beneficiary's resume; letters from the beneficiary's prior employers solely confirming his dates of employment and job titles; a few published articles that mention the beneficiary; and the above-referenced peer advisory opinion letter from Nevada Restaurant Association. It is unclear how the director determined, based on the amount and type of objective evidence submitted, that the beneficiary met the eligibility requirements for aliens of extraordinary ability in business, or even the lesser requirements for aliens of extraordinary ability in the arts.

Finally, we note that we will not consider the new evidence offered on appeal. 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.* Under the circumstances, the AAO need not and does not consider the sufficiency of the new evidence submitted on appeal. For this additional reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.