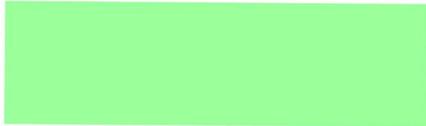




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 29 2014** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a 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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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. We will dismiss the appeal.

The petitioner, acting as an agent, seeks to classify the beneficiary as an O-1B 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 of extraordinary ability in the arts.

After issuing a request for evidence and then considering the evidence of record, the director denied the petition, finding that the petitioner did not establish that the beneficiary qualifies as an alien of extraordinary ability in the arts. The director determined that the petitioner did not establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and that the submitted evidence satisfied did not satisfy any of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which the petitioner must meet three to establish the beneficiary's eligibility.

On appeal, the petitioner submits a brief which generally asserts that the director erred based upon a "misapplication of the legal standard for O-1 artists found at 8 C.F.R. [§] 214.2(o)(3)(iv)(B) and its failure to fully recognize the finite field of endeavor," without providing any evidence to support such claims or addressing any of the evidentiary criteria. For the reasons discussed below, we will uphold the director's decision and dismiss the appeal.

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.

In the case of the arts, the term "extraordinary ability" means "distinction" or "a high level of achievement in the field of 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." Section 101(a)(46) of the Act; 8 C.F.R. § 214.2(o)(3)(ii).

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)(iv) 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.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.

- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The submission of evidence relating to at least three criteria does not, in and of itself, establish eligibility for O-1 classification. 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994). In addition, we have held that the "truth is to be determined not by the quantity of evidence alone but by its quality." Thus, in adjudicating the petition pursuant to the preponderance of the evidence standard, USCIS must examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. Discussion

A. Advisory Opinion

The director found that "the filing fails to contain a valid and favorable advisory opinion." The regulation at 8 C.F.R. § 214.2(o)(2)(ii)(D) requires "[a] written advisory opinion(s) from the appropriate consulting entity or entities." The regulation at 8 C.F.R. § 214.2(o)(5)(i)(A) further provides that the consultation is "mandatory before a petition for an O-1 or O-2 classification can be approved."

The regulation at 8 C.F.R. § 214.2(o)(5)(ii)(A) states the following with regard to the content of advisory opinions:

Consultation with a peer group in the area of the alien's ability (which may include a labor organization), or a person or persons with expertise in the area of the alien's ability, is required in an O-1 petition for an alien of extraordinary ability. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to the petitioner, it should describe the alien's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the services of an alien of extraordinary ability. A consulting organization may also submit a letter of no objection in lieu of the above if it has no objection to the approval of the petition.

The record contains an unfavorable advisory opinion from the [REDACTED]. The advisory opinion does not, however, contain "a specific statement of facts which supports the conclusion reached in the opinion," as required above. The record also contains a letter from [REDACTED] a stage manager for the [REDACTED] which states that "the [REDACTED] . . . is the relevant labor organization for O-1 visa petition purposes," but asserts that their "insight and experience is limited to mainstream theater" and the beneficiary's "extraordinary ability as a Stage Manager lies in *experimental* theater productions." According to the letter Ms. [REDACTED] bases her opinion on "personal knowledge of [the beneficiary] and upon "the information and documentation that [she] reviewed in conjunction with drafting this letter." Ms. [REDACTED] however, does not provide sufficient

evidence which “set[s] forth the expertise of the affiant,” as required by the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) beyond indicating that, like the petitioner, she works as a stage manager.

As found by the director, the petition does not contain the required advisory opinion and thus, the petition may not be approved.

B. The Beneficiary’s Field

On appeal, the petitioner’s counsel generally asserts that the director did not “fully recognize the finite field of endeavor (Experimental Theater) [which] resulted in an erroneous decision.” The petitioner repeats previous assertions that “the success and renown of an experimental Stage Manager should be compared *only* to others who work in this sub-specialization rather than the greater classification of theater in general,” but does not provide a single example of how the director’s conclusions were incorrect or would have been different if the beneficiary’s field were limited to experimental theater or even demonstrate that the director did not consider the beneficiary’s field as a stage manager in experimental theater. Regardless of whether the beneficiary’s field is limited to “this sub-specialization,” the petitioner must still satisfy the evidentiary requirements at either 8 C.F.R. 214.2(o)(3)(iv)(A), (B), or, if she can demonstrate that the criteria do not readily apply to the beneficiary’s occupation, (C).

C. Comparable Evidence

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) provides that an alien of extraordinary ability in the arts must be recognized as being prominent in his or her field of endeavor and must submit evidence to establish that the beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides “[i]f the criteria in paragraph (o)(3)(iv) 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.” It is the petitioner’s burden to explain why the regulatory criteria are not readily applicable to the beneficiary’s occupation and how the evidence submitted is “comparable” to the objective evidence required at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) through (6). In the instant petition, the petitioner asserts that the petitioner’s invitation “to serve as a **innovative** Award” should be considered as comparable evidence. The petitioner further asserts that a letter from [redacted], Faculty Coordinator and Lead Instructor of the [redacted] at the beneficiary’s alma mater, regarding “the *extraordinary person* of [the beneficiary], in combination with the preponderance of evidence provided pertaining to the extraordinary ability of [the beneficiary], qualify as ‘other comparable evidence.’” The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that the six criteria specified by the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B) are not readily applicable to the beneficiary’s occupation of stage manager. In fact, the petitioner asserts that the beneficiary meets four of the six criteria. The director discussed a fifth criterion pertaining to significant recognition as demonstrated by critical review or other published material, and the petitioner has not explained why that criterion and the final criterion pertaining to commanding a high salary are not readily applicable to stage managers. Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence, the regulation does not allow for the submission of comparable evidence.

D. The Petitioner

Although not addressed by the director, the regulation at 8 C.F.R. § 214.2(o)(iv)(E)(2) regarding agents as petitioners states, in pertinent part, that “[a] person or company in business as an agent may file the petition involving multiple employers.” We conduct appellate review on a *de novo* basis. Our *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The petitioner has not provided any documentation to establish that she is “in business as an agent,” as required by the plain language of the regulation. Notably, the petitioner asserts that she is a freelance producer, casting director, and theater artist, having recently helped to produce two unnamed winning shows. She does not claim that she is “in business as an agent.”

E. Evidentiary Criteria

The petitioner does not claim that the beneficiary meets the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iv)(A). Thus, the petitioner must establish that the beneficiary meets at least three of the evidentiary criterion at 214.2(o)(3)(iv)(B).² In denying the petition, the director determined that, based upon the submitted evidence, the petitioner did not establish that the beneficiary met any of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Regarding the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1)-(5), the director thoroughly discussed the submitted evidence and found that the petitioner did not establish that the beneficiary met these criteria. The director also found that the petitioner had not claimed that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(6). As previously stated, the petitioner did not contest the findings of the director for any of the evidentiary criteria on appeal. Instead, the petitioner suggests the director reached an erroneous conclusion by not taking into account that the beneficiary works in experimental theater. Essentially, the petitioner requests that we reconsider the director’s decision without identifying any specific error other than a vague assertion that the director did not fully consider the nuances of the beneficiary’s occupation.

A review of the director’s decision reveals that the director addressed each criterion at length and appears to have taken into account the nature of stage managing as an occupation. For example, in discussing the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), which requires evidence that the beneficiary has performed and will perform as a lead or starring participant in productions or events that have a distinguished reputation, the director accepted that the role of a stage manager could be leading or starring. The director instead focused on the reputation of the productions. Similarly, pursuant to the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(4), which requires evidence of major commercial or critically acclaimed success, the director did not question that a stage manager could be credited with the success of a show. Rather, the director concluded that the petitioner had not established that the shows on which the beneficiary worked were either a major commercial or critically acclaimed success. The petitioner has not explained on appeal how either of these analyses, or any of the director’s other analyses, demonstrate that the director did not “fully

² In response to the director’s request for evidence, the petitioner asserted that the beneficiary “is, by USCIS definition **prominent**...by virtue of her Bachelor of Fine Arts degree” based upon Chapter 33.9(a) of *The Adjudicator’s Field Manual* (AFM). This section of the AFM compares the overall standard of the O-1 classification to the overall standard of the prior H-1B standard of “prominent.” This AFM section does not imply that an undergraduate degree relieves the petitioner from satisfying the initial evidence requirements at 8 C.F.R. § 214.2(o)(3)(iv).

recognize the finite field of endeavor.” If it is the petitioner’s position that the distinguished reputation and critical acclaim analysis must be in the context of experimental theater, it is still the petitioner’s burden to demonstrate through the submission of the type of independent, objective evidence that the director found lacking, that the shows on which the beneficiary worked enjoyed a distinguished reputation among experimental theaters and garnered critical acclaim among critics of experimental theater. Ultimately, after careful review of the entire record, we conclude that the record supports the director’s ultimate finding that the petitioner did not establish that the beneficiary meets at least three of the criteria at 8 C.F.R § 214.2(o)(3)(iv)(B) and the reasoning underlying that finding.

Based on the foregoing, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iv)(A) or at least three criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Consequently, the petitioner has not established that the beneficiary is eligible for classification as an alien with extraordinary ability in the arts. For this reason alone, the petition may not be approved.

III. Conclusion

The petitioner has not established the beneficiary’s eligibility under any of the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B). In addition, the evidence in the aggregate does not establish that the beneficiary is an alien of extraordinary ability in the arts. The record also does not contain the required advisory opinion and the petitioner has not established that she is “in business as an agent,” as required by the plain language of the regulation at 8 C.F.R. § 214.2(o)(iv)(E)(2).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.