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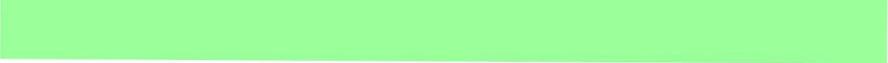
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **JUN 25 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)

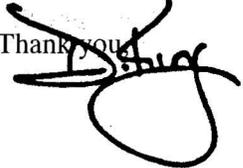
ON BEHALF OF PETITIONER:



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 Vermont Service Center Director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a marketing firm, filed this petition seeking to extend the beneficiary’s O-1A nonimmigrant classification 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. The petitioner seeks to extend the beneficiary’s employment as its “Creative Director” for one additional year.

The director denied the petition, in part, finding that the petitioner had failed to establish the beneficiary’s eligibility as an alien of extraordinary ability. The director denied the petition, in part, finding that the petitioner had failed to provide required evidence, i.e., an explanation of the nature of 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 asserts that the director erred by requesting inapplicable or previously provided documents, asserting that “no documentation [is] needed” for extension requests. The petitioner also asserts that the director erred in holding the beneficiary to an O-1A standard for business rather than the lower O-1B standard of “distinction” for the arts. The petitioner states: “the O-1A standard for proving distinction in the arts is found in 8 C.F.R. § 214[.2](o)(3)(iv), not 8 C.F.R. § 214[.2](o)(3)(iii)[;] and. . . [the] O-1B . . . is for ‘Television and Motion Picture’ not the ‘arts’ which is specifically included in O-1A.” The petitioner submits a brief and additional evidence 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 . . . .

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

*Arts* includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

\* \* \*

*Extraordinary ability in the field of arts* means distinction. 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.

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

*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, 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.

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

*Evidence required to accompany a petition.* 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 entity.

## II. The Beneficiary's Classification and Area of Extraordinary Ability

The petitioner claims that the beneficiary is an alien of extraordinary ability in the arts, which the petitioner deems is the O-1A classification. The petitioner asserts that the director erred by in holding the beneficiary to an O-1A standard for business rather than the lower O-1B standard of distinction for the arts.<sup>1</sup>

The petitioner's assertions with respect to the beneficiary's appropriate classification and area of extraordinary ability are not correct or persuasive. First, as stated by the director, the O-1A classification does not include the field of the arts. Instead, the O-1A classification refers to the fields of science, education, business, or athletics, for which the evidentiary criteria is set forth at 8 C.F.R. § 214.2(o)(3)(iii). The O-1B classification refers to the field of the arts as well as the television and motion picture industry. The evidentiary criteria for the arts is set forth at 8 C.F.R. § 214.2(o)(3)(iv), while the evidentiary criteria for the television and motion picture industry is set forth at 8 C.F.R. § 214.2(o)(3)(v).

Notably, on Question 3 (Classification Sought), Section 1 of the instant Form I-129 Supplement O/P, the petitioner checked the box stating that it was seeking classification as an "O-1A Alien of Extraordinary ability

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<sup>1</sup> Yet, the petitioner indicated on the Form I-129 application that it was seeking an extension of the beneficiary's status as an O-1A nonimmigrant.

in sciences, education, business or athletics (*not including the arts*, motion picture or television industry) (emphasis added).” The petitioner did not check the next box, which is for the classification of an “O-1B Alien of extraordinary ability *in the arts* or extraordinary achievement in the motion picture or television industry (emphasis added).” The supplement form itself clearly explains that the O-1A classification does not include the arts, and that the O-1B classification includes the arts.

Second, and more importantly, we agree with the director that the beneficiary’s appropriate field is business, based on the nature of his intended employment in the United States. Specifically, on the Form I-129 Supplement O/P, the petitioner described the beneficiary’s duties as “Oversee the creative team including copywriters, designers and account executives to develop the agency’s creative product for clients.” The petitioner’s cover letter listed the beneficiary’s duties as including the following: overseeing the petitioner’s creative team; working to make sure clients’ needs are being met and that creative goals are on track; developing every aspect of ad campaigns based on the client’s particular marketing plan and conceptualizing those ideas; assigning projects to staff; and verifying that client’s deadlines are being met. Overall, based upon the petitioner’s descriptions, it appears the beneficiary will primarily be involved in overseeing the company’s staff and projects, which is more appropriately included in the field of business. Therefore, the beneficiary’s appropriate classification is the O-1A classification for the field of business, for which the relevant evidentiary criteria are set forth under 8 C.F.R. § 214.2(o)(3)(iii).

Critically, while the petitioner repeatedly asserts that the beneficiary’s field is in the arts, the petitioner has not provided any explanation or documentary evidence to support its assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

### III. Evidentiary Criteria

To establish that the beneficiary has extraordinary ability in the field of business, the petitioner must establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iii)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).<sup>2</sup>

The petitioner has not explained whether it is claiming eligibility under 8 C.F.R. 214.2(o)(3)(iii)(A) and/or 8 C.F.R. § 214.2(o)(3)(iii)(B). Moreover, the petitioner has not submitted evidence to establish the beneficiary’s eligibility under any of the above criteria with the instant petition. Instead of submitting evidence under the

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<sup>2</sup> 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. at 41820; *cf. Kazarian v. USCIS*, 596 F.3d 1115 (9<sup>th</sup> Cir. 2010)(discussing a two-part review where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination).

regulatory criteria, the petitioner relies solely upon the beneficiary's prior approval for the O-1A classification as evidence of the beneficiary's eligibility for the instant petition.

The evidence submitted to support the initial petition consisted of:

- The petitioner's cover letter;
- An advisory opinion;
- The petitioner's letter;
- A copy of Form I-797B, Approval Notice, for the petitioner's first Form I-129 on behalf of the beneficiary;

In response to the director's request for evidence (RFE), the petitioner asserted that it has "serious concerns about the validity of the request and misapplication of regulations." Specifically, the petitioner asserted that the director was improperly re-requesting evidence that was previously submitted with its first approved Form I-129 on behalf of the beneficiary, and claimed that no documentation is needed for extension requests other than a statement explaining the reason for the request. In response to the RFE, the petitioner provided:

- A copy of the beneficiary's Form I-94;
- A copy of the USCIS Memorandum HQOPRD 72/11.3 from William R. Yates, The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity (April 23, 2004) (Yates Memorandum); and
- A copy of Kurzban's Immigration Law Sourcebook, 13<sup>th</sup> Edition (citing Office of Business Liason, USCIS, Employer Information Bulletin 15 (Dec. 8, 2004) at 3, *reprinted in* 82 No. 3 *Interpreter Releases* 149, 160, 180-84 (Jan. 17, 2005)) (Kurzban's).

We are not persuaded by the petitioner's explanation for why it has not submitted evidence to establish the beneficiary's eligibility under any of the criteria at 8 C.F.R. § 214.2(o)(3)(iii).

We acknowledge that USCIS previously approved a nonimmigrant petition filed on behalf of the beneficiary for O-1A classification. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give some deference to a prior determination of eligibility. However, 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); *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). *See also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). The Yates Memorandum similarly states that, while prior determinations should be given deference, "[a]djudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous."

Here, the director had good reason to question whether the beneficiary's prior approval for O-1A classification was granted by mistake, considering that the petitioner is now requesting to classify the beneficiary as an alien of extraordinary ability in the field of the arts, which is the O-1B classification. The director specifically stated in the RFE: "It appears USCIS may have issued an erroneous approval if the beneficiary obtained an approval for O-1A, if the evidence supporting that petition was based on the arts, not business as implicated in this petition." Based on the lack of evidence with the instant petition, the director properly issued an RFE instructing the petitioner to submit additional evidence under the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii).

However, in response to the RFE, the petitioner did not submit any evidence under the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii). Instead, the petitioner asserted that the beneficiary was eligible for the instant extension request based on the prior O-1A approval. The director denied the petition, finding that the petitioner submitted no evidence establishing eligibility under the regulatory criteria. The director noted that the RFE specifically requested evidence regarding the regulatory criteria, but the petitioner elected not to provide any of the requested evidence. The director advised the petitioner that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The director also observed that each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof, and that 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. § 103.8(d); 8 C.F.R. § 103.2(b)(16)(ii).

On appeal, the petitioner reiterates that no documentation is needed for an extension request other than proof of its prior approval. However, as discussed above, this is not entirely correct. Where, as here, the director deems additional evidence to be necessary and issues the petitioner a request for evidence, then the petitioner may submit a complete response containing all the requested information, submit a partial response and ask for a decision based on the record, or withdraw the benefit request. 8 C.F.R. § 103.2(b)(11). In this case, the petitioner submitted a partial response and requested a decision based on the record. As the director correctly noted, the instant record contained no evidence establishing eligibility under the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii). The director properly denied the petition.

On appeal, the petitioner provides, for the first time, *inter alia*: screen shots of the beneficiary's website which contains copies of some of his works and a personal statement; copies of the beneficiary's academic credentials; and the beneficiary's resume. However, under these circumstances, we need not consider the sufficiency of the newly submitted evidence submitted 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, we 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).

As the record before the director contained no evidence establishing eligibility under the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii), the petition was properly denied. No further discussion of the regulatory criteria is warranted. Accordingly, the appeal will be dismissed.

#### IV. Nature of Events or Activities

The regulation at 8 C.F.R. § 214.2(o)(2)(ii)(C) states that petitions for O aliens shall be accompanied by “[a]n 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’s cover letter dated August 12, 2013, submitted with the initial petition, provided the following description of the beneficiary’s intended employment:

[The beneficiary] will continue to oversee [the petitioner’s] creative team to help develop its creative product for clients. The team includes copywriters and account executives. [The beneficiary] will continue to work to make sure clients’ needs are being met and that creative goals are on track. As Creative Director he also develops every aspect of ad campaigns based on the client’s particular marketing plan, conceptualizes those ideas for clients, assigns projects to staff and verifies the client’s deadlines are being met. [The beneficiary] will continue to work closely with [the petitioner’s] CEO.

The petitioner also submitted a separate letter explaining that it would like to petition for an extension of an O-1A visa for the beneficiary for the position of Creative Director for an additional year. This letter reiterates that the beneficiary “will continue to help develop creative product for [the petitioner’s] clients and oversee copywriters and account executives,” and that he will continue to work with the company’s CEO “to make sure [the company’s] clients’ needs are being met and that their creative goals are on track.”

The director determined the above to be insufficient to describe the nature of the beneficiary’s events or activities in the United States. Specifically, the director notified the petitioner in the RFE that the provided narratives do not adequately identify the services the beneficiary will provide for the petitioner. The director instructed the petitioner to submit, *inter alia*, a comprehensive job description for the beneficiary.

In response to the RFE, the petitioner asserted that no documentation was needed for extension requests, other than a statement explaining the reason for the request. The petitioner submitted no additional documentation relevant to this request in response to the RFE. The director denied the petition, citing the petitioner’s failure to provide the requested evidence. On appeal, the petitioner reiterates its belief that that no documentation is needed for extension requests.

Again, we are not persuaded by the petitioner’s explanation for why it has not submitted an explanation of the nature of the events or activities pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(C). We agree with the director that the petitioner’s evidence failed to sufficiently describe the nature of the beneficiary’s events or activities in the United States.

As the director articulated, the petitioner asserts that the beneficiary is an alien of extraordinary ability in the arts, but the beneficiary’s job duties indicate that his appropriate field is business. The petitioner failed to provide a comprehensive description of the beneficiary’s job duties in response to the RFE, as requested. The failure to

submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner submits, for the first time, *inter alia*, an additional letter describing the beneficiary as “the leader of [the company’s] creative team” and a “vital” team member on a proposed project which the petitioner is currently negotiating. The petitioner also submitted a recent Proposal for Services listing the beneficiary as the Project Leader. However, under these circumstances, these documents will not be considered. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533. Even if we were to consider these documents, they are insufficient to describe the nature of the beneficiary’s events or activities in the United States. The petitioner’s letter describing the beneficiary as “the leader of [the company’s] creative team” and a “vital” team member does not provide any details as to the beneficiary’s actual job duties. Similarly, while the Proposal for Services lists the beneficiary as the Project Leader, the document did not explain the Project Leader’s duties, nor did the petitioner provide any further explanation of the beneficiary’s duties with respect to this project. Notwithstanding, the beneficiary’s title of “Project Leader” lends support to the conclusion that the beneficiary’s appropriate field is business, not the arts.

Overall, the petitioner has not sufficiently explained the nature of the beneficiary’s events or activities in the United States, considering the inconsistent evidence in the record. For this addition reason, the appeal will be dismissed.

## V. Conclusion

The evidence of record indicates that the beneficiary’s area of extraordinary ability falls within the field of business rather than the arts. The petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. 214.2(o)(3)(iii)(A), or at least three of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B), necessary to establish eligibility as an alien of extraordinary ability in the field of business. Lastly, the petitioner failed to adequately explain the nature of the beneficiary’s events or activities in the United States.

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. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.