



U.S. Citizenship
and Immigration
Services

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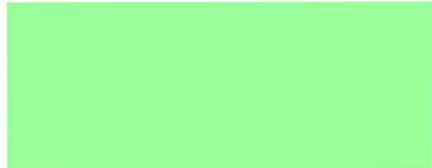


DATE: **SEP 23 2014** Office: VERMONT SERVICE CENTER FILE:

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 Acting Director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. We will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an O-1B alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i). The petitioner, self-described as a land, cattle, investments and cutting horses business, requests that the beneficiary be granted O-1B classification so that she may be employed as a horse trainer and groom for a period of three years.

The acting 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 acting 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 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 asserts that the acting director erred in not also considering the petitioner's submitted evidence under the "comparable evidence" regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C). The petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that she would submit a brief and/or additional evidence within 30 days. In a letter accompanying the appeal, the petitioner requested 60 days, "to submit the brief and supporting evidence." As of this date, more than five months have passed and we have not received the brief or additional evidence as indicated on the Form I-290B. Accordingly, the record will be considered complete. For the reasons discussed below, the AAO will 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.

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)(3)(iv) states, in pertinent part:

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.

II. Discussion

A. The Field of Arts

As a preliminary matter, we note that the petitioner claimed eligibility under the evidentiary criteria for aliens of extraordinary ability in the arts at 8 C.F.R. § 214.2(o)(3)(iv)(B), and asserted that the beneficiary meets the standard of "distinction" applicable to the arts, pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii). The acting director reviewed the petition under these criteria and determined that the petitioner did not establish the beneficiary's eligibility as an alien of extraordinary ability in the arts. However, we find that the petitioner did not establish that the beneficiary is primarily involved in a creative activity or endeavor, such that she can be classified as an alien of extraordinary ability in the arts.

For purposes of the O-1 classification, the applicable definition of "arts" at 8 C.F.R. § 214.2(o)(3)(ii) is as follows:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians and animal trainers.

While the regulation at 8 C.F.R. § 214.2(o)(3)(ii) specifically includes animal trainers as an example within the field of the arts, not all types of animal trainers can properly be classified as within the field of the arts. As noted in 8 C.F.R. § 214.2(o)(3)(ii), the definition of "arts" focuses on "any field of creative activity or endeavor." Thus, certain types of animal training, such as animal acts and circuses, would reasonably be among this group of creative workers in the performing arts. Other types of animal training, however, such as of animals engaged exclusively in cutting competitions, would not be among this group.

The nature of the intended events or activities in the United States is critical in determining whether the beneficiary is entering the United States to provide services in the arts. Here, according to the petitioner's initial letter, the beneficiary's services are required "to train and halter break [the petitioner's] horses to ascertain whether they are able to compete in the 'cutting' horse industry" According to the petitioner, "[c]utting is an equestrian event in the western riding style where a horse and rider are judged on their ability to separate a single animal away from a cattle herd and keep it away for a short period of time." The petitioner expressly states that the

beneficiary is needed to prepare horses for a “challenging, expensive and highly competitive ‘cutting’ sport.”

In the initial letter, the beneficiary’s duties are listed as, among others:

- Wean and halter break horses from six – eight (6-8) months of age; . . .
- Train two (2) year old horses to work in a round pen teaching them to go forward, and stop and turn; . . .
- Complete sixty (60) days of basic riding after working in the round pen to get the horses used to riders;
- Take three (3) year old horses to shows to ride around and be introduced to the show environment. Towards the end of the third year, the horse may start to go small shows to compete in young classes.
- Introduce the three (3) year old horses to the mechanical cow daily and even fresh cattle at some point during the week to initiate them to the cutting horse show environment.
- Introduce the four (4) year old horses to competitions and shows if the horse shows the potential to do well.

Based on the nature of the beneficiary’s intended employment in the United States, the beneficiary cannot be included among individuals engaged in the arts or a field of “creative activity or endeavor.” The beneficiary’s specific duties show that she will not create, perform, or serve as essential personnel to a “creative activity,” but instead will follow and evaluate programs to be used to prepare horses used solely for the competitive cutting horse industry, which the petitioner describes as a “sport.” According to the initial cover letter, the beneficiary previously trained horses for polo competitions and was classified as an essential personnel for “two professional international athletes.” The petitioner failed to demonstrate how the beneficiary’s duties could be considered a “creative activity or endeavor,” and more importantly, how training a horse engaged solely in the competitive cutting horse industry is a creative endeavor under the field of arts. The petitioner’s request to classify the beneficiary as an alien of extraordinary ability in the arts is, thus, improper. As the beneficiary is coming to the United States to train cutting horses, the petitioner should have requested review of the petition according to the regulatory criteria applicable to the field of business or athletics at 8 C.F.R. § 214.2(o)(3)(iii).

The regulations clearly prescribe different evidentiary criteria and standards of review for aliens of extraordinary ability in the arts, as opposed to aliens of extraordinary ability in business or athletics. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) provides, in pertinent part: “*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 (Aug. 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

The acting director appropriately reviewed the petition according to the classification requested on the Form I-129. USCIS will only consider the visa classifications that the petitioner annotates on the petition. 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).

A petitioner sponsoring an O-1 athlete or businessman cannot seek consideration of the petition under the lower standard of “distinction” by characterizing the beneficiary’s non-creative field as arts. The petitioner has not sought the correct O-1 visa classification for the beneficiary, nor has it claimed or submitted evidence to establish that the beneficiary meets the criteria and standards for individuals of extraordinary ability in business or athletics as set forth at 8 C.F.R. § 214.2(o)(iii)(A) or (B). As the beneficiary’s occupation does not fall within the O-1 classification requested on the petition, the petition must be denied for this additional reason. An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the Service Center does not identify all of the grounds for denial in the initial decision. *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). We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Accordingly, the appeal will be dismissed for this additional reason. Moreover, the fact that the petitioner seeks the wrong O-1 classification is fundamental to why the petitioner may not rely on comparable evidence.

B. Comparable Evidence

The only issue raised on appeal is whether the acting director erred in not also considering the petitioner’s submitted evidence under the “comparable evidence” regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C). The petitioner initially asserted eligibility under 8 C.F.R. §§ 214.2(o)(3)(iv)(B)(1), (3) and (5).¹ In response to the acting director’s September 25, 2013, request for evidence, the petitioner stated:

The petitioner also submits that pursuant to 8 CFR Section 214.2(o)(3)(iv)(C), if the above criteria do not readily apply to the beneficiary’s occupation or her case, the Petitioner may submit comparable evidence in order to establish the Beneficiary’s eligibility. Therefore, the petitioner respectfully requests that you kindly consider the

¹As stated above, a petitioner may establish eligibility for O-1B classification by submitting documentary evidence that meets the 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 petitioner does not assert, and the record does not reflect, eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(A). The acting director determined that the petitioner did not establish eligibility under any of the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B). Upon review, the evidence of record supports the acting director’s determination.

totality of the submitted evidence. The evidence submitted by the Petitioner far exceeds the minimum required by 8 CFR Section 214.2(o)(3)(iv), and in its totality, demonstrates that the Beneficiary is a Horse Trainer and Groom of prominence in the narrowly defined field of Horse Training for competitions and shows industry. The Beneficiary has trained and cared for horses who have won competitions, which should be considered to establish prominence in the field.

The acting director did not specifically address the comparable evidence regulation in her decision.

On the Form I-290B, Notice of Appeal or Motion, the petitioner states:

[T]he USCIS failed to consider that the beneficiary's occupation and achievements may not readily apply to the evidentiary criteria listed in Title 8 Code of Federal Regulations, sections 214.2(o)(3)(iv)(A) or 214.2(o)(3)(iv)(B), and should have been considered under the "comparable evidence" category under Title 8 Code of Federal Regulations, sections 214.2(o)(3)(iv)(C) The Beneficiary has submitted extensive evidence of her distinction that should have been considered by the USCIS under the "comparable evidence" category under Title 8 Code of Federal Regulations, section 214.2(o)(3)(iv)(C).

The petitioner has not explained why comparable evidence in this case is appropriate. Other than describing a horse trainer's duties, the petitioner has not explained why the beneficiary's field is so obscure or unusual from other fields that it could not fall under the field of athletics or business for O-1A classification.² The petitioner has not articulated any persuasive reasoning for its claim that "the beneficiary's occupations and achievements may not readily apply to the evidentiary criteria listed in Title 8 Code of Federal Regulations, sections 214.2(o)(3)(iv)(A) or 214.2(o)(3)(iv)(B)."

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) provides that the petitioner "must" demonstrate that the beneficiary possesses extraordinary ability by submitting the specific types of evidence listed therein. In contrast, the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides that comparable evidence "may" be submitted if the regulatory criteria do not readily apply. It is clear from the use of the word "must," as opposed to the word "may," that the rule, not the exception, is that the petitioner is required to submit the types of evidence specifically listed in the regulatory criteria. The petitioner is claiming that comparable evidence is appropriate because the regulatory criteria for the O-1B classification in the performing arts are not applicable to the competitive cutting horse industry, which the petitioner describes as a "sport." As discussed above, the petitioner's attempt to classify the beneficiary's field as in the arts is improper. The comparable evidence provision pertains to situations where the criteria relating to the beneficiary's field do not readily apply to the beneficiary's occupation, and not where criteria for the beneficiary's field exist, but the petitioner instead chooses to file under the provisions relating to a different field than the one in which the beneficiary works.

² The Service has explained that the comparable evidence criteria "merely allows petitioners in cases where the beneficiary is employed in an unusual or obscure field of endeavor to submit alternate, but equivalent, forms of evidence." 59 FR at 41820.

III. Conclusion

The petitioner has not established that the beneficiary's duties, which consist primarily of evaluating and training horses, or beneficiary's field of endeavor, the competitive cutting horse industry, can properly be considered as a creative activity or endeavor falling within the field of the arts. Regardless, the petitioner also failed to establish the beneficiary's eligibility under any of the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B) or the comparable evidence provision at 8 C.F.R. § 214.2(o)(3)(iv)(C).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. When we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he shows that we abused our discretion with respect to all of our 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.