



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF T-H-C-A-I-A-C-H-

DATE: DEC. 16, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, self-described as a land, cattle, investments, and cutting horses business, seeks to classify the Beneficiary as a foreign national of extraordinary ability in the arts. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner requests that the Beneficiary be granted O-1B classification so that it may employ her as a horse trainer and groom for a period of three years.¹ The Director denied the petition, finding that the Petitioner did not demonstrate that the Beneficiary qualifies as a foreign national of extraordinary ability in the arts. The Director determined that the Petitioner did not establish that the Beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(A), and that the submitted evidence did not meet any of the six criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), of which the Petitioner must satisfy three.

On September 23, 2014, we dismissed the Petitioner's timely appeal on its merits, asserting that we had not received any supplemental brief or additional materials. On October 14, 2014, upon review of evidence that the Petitioner had, in fact, timely filed a supplemental brief, we reopened the Petitioner's Form I-290B appeal *sua sponte*, pursuant to 8 C.F.R. § 103.5(a)(5)(ii), to consider the merits of the Petitioner's claims contained in the supplemental brief and exhibits. The Petitioner was permitted a period of 30 days in which to provide a revised brief. The Petitioner submitted a revised brief and additional copies of the documents previously provided on appeal.

The issues presented on appeal and in the revised brief include whether the Petitioner properly filed the petition under the O-1B arts classification, whether the Beneficiary meets three of the six criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), and whether consideration of comparable evidence is appropriate.

¹ At the time of filing, the Beneficiary was in the United States pursuant to an approved P-1S petition. Prior to that, she was in the United States pursuant to approved O-2 and H-2B petitions.

I. PERTINENT LAW AND REGULATIONS

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified foreign national 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) defines the term arts:

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.

The arts have different a different standard and evidentiary criteria than athletics. *See* 59 Fed. Reg. 41818, 41819 (Aug. 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the “distinction” standard for the arts). 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 foreign nationals 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) sets forth the evidentiary criteria to establish a beneficiary’s prominence in his or her field of endeavor. First, a petitioner can provide a one-time achievement (that is, a significant national or international award). If the petitioner does not document such an achievement, then a petitioner must include sufficient qualifying material that meets at least three of the six categories listed at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1)-(6). If the petitioner shows that 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 demonstrate the beneficiary’s eligibility.

II. ANALYSIS

A. Beneficiary’s Eligibility under the Requested Classification

The Petitioner requested classification of the Beneficiary as a foreign national of extraordinary ability in the “arts” at 8 C.F.R. § 214.2(o)(3)(iv), and asserted that the Beneficiary meets the

Matter of T-H-C-A-I-A-C-H

standard of “distinction,” pursuant to the definition at 8 C.F.R. § 214.2(o)(3)(ii).² Although the Petitioner affirmed that the Beneficiary should be evaluated based upon the standard applicable to those engaged in a creative activity or endeavor, the Petitioner’s description of the Beneficiary’s job duties demonstrates that the Beneficiary is engaged, as a horse trainer, in the field of athletics. 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.” 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, this example is specifically in the context of discussing essential support personnel who may be considered as engaged in the field of arts because they are working in support of an O-1B principal. Examples might include trainers for animal acts for stage, film, and television productions and for circuses), depending on the facts presented. Other types of animal training, however, such as animals engaged exclusively in athletic endeavors that are not in a field of creative activity or endeavor, such as the sport of polo, competitive horse racing, or 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, as explained in 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 affirmed that the Beneficiary is needed to prepare horses for a “challenging, expensive and highly competitive ‘cutting’ sport.” The Petitioner also submitted the mission statement of the [REDACTED] which confirmed that the association “strives to promote cutting horses as a competitive sport” and “encourages individuals, families and companies to become involved in the sport of cutting.”

On appeal, the Petitioner asserts that “the [B]eneficiary’s duties of training a horse lead the horse to perform a creative activity, and therefore animal training for a cutting horse competition is a ‘creative activity of [sic] endeavor.’” In addition, the Petitioner maintains that, like circuses, cutting horse competitions are entertainment. However, attendance by fans for enjoyment applies to all sports, and is not determinative as to whether such activity is in a creative field. The Petitioner’s characterization of 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 initially described 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.” Where, as here, a petitioner seeks to employ a beneficiary as a horse trainer for athletic competitions, such as the sport of cutting, extraordinary ability in the arts is not the applicable classification.

² In our previous decision we found 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 a foreign national of extraordinary ability in the arts.

Matter of T-H-C-A-I-A-C-H-

A petitioner sponsoring an O-1 athlete cannot seek consideration of the petition under the lower standard of “distinction” by characterizing the beneficiary’s non-creative field as falling within the field of arts. The Petitioner has not sought the correct O-1 visa classification for the Beneficiary, nor has it claimed or documented that the Beneficiary meets the criteria and standards for individuals of extraordinary ability in 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 may be denied for this reason alone. *Brazil Quality Stones, Inc. v. Chertoff*, 286 F. App’x 963, 965 (9th Cir. 2008). Moreover, the fact that the Petitioner seeks the wrong O-1 classification is fundamental to why the Petitioner may not rely on comparable evidence, as discussed below.

B. Evidentiary Criteria

In addition to our finding that the Beneficiary is not engaged in the field of arts, we conclude that the Director appropriately reviewed the petition according to the classification requested on the Form I-129. USCIS will only consider the visa classification that a petitioner annotates on the petition. *Id.* at 965.

The Petitioner does not assert, and the record does not reflect, eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(A), which requires nomination for or receipt of a significant national or international award or prize. Accordingly, the Petitioner must establish the Beneficiary’s eligibility under at least three of the six evidentiary criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), or, if these criteria do not readily apply to the Beneficiary’s occupation, submit comparable evidence under 8 C.F.R. § 214.2(o)(3)(iv)(C). *See also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (USCIS must examine each piece of evidence “individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.”).

The Petitioner claims to have satisfied the criteria listed at 8 C.F.R. § 214.2(o)(3)(iv)(B) subparagraphs (1), (3) and (5). These criteria require items to show (1) a performance as a lead or starring participant for a production or event with a distinguished reputation, (2) a performance in a similar role for organizations or establishments with a distinguished reputation, and (3) significant recognition for achievements from organizations, critics, government agencies, or other recognized experts. In denying the petition, the Director determined that the evidence submitted met none of the six evidentiary criteria.

After careful review of the record and for the reasons discussed herein, the Petitioner has not shown the Beneficiary’s eligibility under any of the evidentiary criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B). The Petitioner relies on the Beneficiary’s past accomplishments working in the polo industry. Specifically, she relies on her roles for athletic competitions, jockeys, and polo clubs as well as testimonials from those involved in polo. For example, the record contains an August 16, 2010, letter from [REDACTED] Governor of the [REDACTED] which supported a prior petition on behalf of the Beneficiary as essential support personnel for a polo athlete. In his letter, [REDACTED] stated that polo is a competitive sport. Accordingly, irrespective of whether the proposed employment in the cutting industry is an art, the Beneficiary’s past achievements have all been

Matter of T-H-C-A-I-A-C-H-

within the sport of polo and providing services to polo competitors, whom the Petitioner initially characterized as “professional international athletes.” The Petitioner has not established that the Beneficiary’s past experience in the polo industry is indicative of or relevant to the issue of whether she is eligible for an O-1B (arts) classification or enjoys distinction in the field of arts. In light of the above, the Petitioner has not confirmed the Beneficiary’s eligibility under at least three of the six regulatory criteria listed at 8 C.F.R. § 214.2(o)(3)(iv)(B).

The Petitioner also asserts that the Director erred in not also considering the Petitioner’s submitted exhibits under the “comparable evidence” regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C). The Petitioner is claiming that such material 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 and the relevant oversight association, [REDACTED] describe as a “sport.” As discussed above, the Petitioner’s attempt to classify the Beneficiary’s field as within the arts is improper. The comparable evidence provision for the O-1B (arts) classification pertains to situations where the evidentiary criteria to show prominence in the arts do not readily apply to the Beneficiary’s occupation. This provision is inapplicable to the facts of this case since the Petitioner has not established that the Beneficiary has or will work in an artistic field. The Petitioner cannot avoid the higher eligibility standard to qualify the Beneficiary as a foreign national of extraordinary ability in athletics by claiming the Beneficiary works in the arts and then relying upon the comparable evidence provision by arguing that the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) do not readily apply. In this case, the fact that none of the evidentiary criteria apply to the Beneficiary’s occupation supports the conclusion that the Beneficiary has been and will be employed in the field of athletics rather than the arts.

III. CONCLUSION

The Petitioner has not shown that the Beneficiary’s duties, which consist primarily of evaluating and training horses for the competitive cutting horse industry, can properly be considered as a creative activity or endeavor falling within the field of the arts. Regardless, the Beneficiary’s past achievements as essential personnel for athletes do not confirm her eligibility as a foreign national of extraordinary ability in the arts.

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.

Cite as *Matter of T-H-C-A-I-A-C-H-*, ID# 10527 (AAO Dec. 16, 2015)