



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **JAN 06 2015** Office: VERMONT SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

[REDACTED]

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 Acting 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 seeks to classify the beneficiary, a dancer, 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 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 submits a brief and additional evidence. For the reasons discussed below, upon review of the entire record, we will uphold the acting 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, “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. Analysis

### A. Evidentiary Criteria<sup>1</sup>

*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.*

The acting director determined that the submitted evidence did not meet the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). It is the petitioner’s burden to establish that the evidence submitted on behalf of the beneficiary meets every element of this criterion. Not only must the petitioner demonstrate that the beneficiary has performed, and will perform, as a lead or starring participant in productions or events, the petitioner must also demonstrate that the productions or events have a distinguished reputation.

The acting director discussed the submitted evidence and stated that “the beneficiary’s work primarily has occurred at a student level.” The acting director found that, based upon a review of the submitted evidence, “the beneficiary has not played a leading or starring role in productions or events with distinguished reputations.” A review of the record supports the acting director’s finding. On appeal, the petitioner asserts that three of the beneficiary’s “performances were overlooked.” Notably, with one exception, the petitioner did not submit “critical reviews, advertisements, publicity releases, publications contracts, or endorsements” as required by the regulation. Rather, the petitioner relies primarily on programs and letters. While the petitioner did submit a review of [REDACTED] the record does not establish that the beneficiary performed in a lead or starring role for this production. Rather, she performed as one of seven vampires. The petitioner also submitted an article in [REDACTED] about the beneficiary leaving Brazil and a blog post about shopping at thrift stores in New York City. Neither of these documents are critical reviews of the beneficiary’s performances.

Regarding the beneficiary’s March 22-24, 2012 performances in [REDACTED] according to the submitted program, the beneficiary was a member of the [REDACTED] [REDACTED] that performed at the event. In addition, [REDACTED] was one of several dances

<sup>1</sup> The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

featured in [REDACTED]” The petitioner also submitted a copy of Ms. [REDACTED]’s biography from her website and a printout from the website [www.c\[REDACTED\]](http://www.c[REDACTED]) While Ms. [REDACTED] has received some attention for her prior works, none of the submitted evidence establishes that [REDACTED] or [REDACTED] as a production or event enjoyed a distinguished reputation.

Regarding the beneficiary’s December 7-9, 2009 performances in [REDACTED], while the beneficiary played the lead role, there is no evidence that these performances at the [REDACTED] have a distinguished reputation.

Regarding the beneficiary’s May 19, 2007 performance for the [REDACTED], there is no evidence that this performance has a distinguished reputation.

The petitioner also submitted a copy of the contract it has with the beneficiary and three letters from [REDACTED] the Artistic Director for the petitioner. Two of the three letters the petitioner submitted with the initial petition are on the petitioner’s letterhead and [REDACTED] signed them. The third letter, however, is unsigned and is not on the petitioner’s letterhead and therefore, has no evidentiary value. Regardless, neither the contract nor the letters indicate that the beneficiary will perform as a lead or starring participant in the petitioner’s productions or events, as required by the plain language of the regulation. According to the job duties listed in Section 1, Part 5 of the O and P Classification Supplement to Form I-129, the beneficiary will “[t]ake company classes, attend rehearsals, participate in the company’s educational programs, assist in public relation efforts, and perform in Birmingham and on tour.” Without evidence that the beneficiary will perform as a lead or starring participant in productions or events which have a distinguished reputation, the petitioner has not established that the beneficiary meets this criterion.

The petitioner also submitted a number of programs upon appeal. The programs all postdate the filing of the petition. While the criterion requires evidence that the beneficiary “will” perform in a lead or starring role, such evidence must be in addition to evidence that she has already done so. Regardless, only the petitioner’s performance in a “[REDACTED]” was leading and there is no evidence that this event had a distinguished reputation. As with most of the initial evidence, the petitioner relies on programs without submitting the required “critical reviews, advertisements, publicity releases, publications contracts, or endorsements.”

As the petitioner has not established that the beneficiary has performed, and will perform, as a lead or starring participant in productions or events which have a distinguished reputation, the petitioner has not established the beneficiary’s eligibility under the plain language of 8 C.F.R. § 214.2(o)(3)(iv)(B)(1).

*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 as evidenced by articles in newspapers, trade journals, publications, or testimonials.*

The acting director determined that the submitted evidence failed to meet the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3). It is the petitioner’s burden to establish that the evidence submitted on behalf of the beneficiary meets every element of this criterion. Not only must the petitioner demonstrate that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments, the petitioner must also demonstrate

that the organizations and establishments have a distinguished reputation. In contrast to the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), it is the beneficiary's lead, starring or critical role for organizations and establishments, not productions or events, which the petitioner must demonstrate.

The acting director found that "[t]he evidence provided with the initial filing is student based." The acting director also thoroughly discussed the new evidence submitted in response to the acting director's request for evidence and found that the record did not establish that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation. The record supports the acting director's finding.

On appeal, the petitioner counsel asserts that the beneficiary "participated in [redacted] performance of [redacted] which received significant acclaim." As stated above, however, the submitted evidence only establishes that the beneficiary was one of seven [redacted] in one production and did not perform in a lead or starring role for that production. Similarly, the petitioner has not established that the beneficiary performed in a lead, starring or critical role for the [redacted] that produced [redacted]. While the petitioner submitted reviews and promotions of [redacted] this evidence is more probative of how local critical received the production than the overall reputation of [redacted].

The petitioner also asserts on appeal that the beneficiary "has performed for [the petitioner] which is an esteemed dance company," and specifically references the beneficiary's roles in "The [redacted]. The petitioner did not establish, however, or even claim that the beneficiary has performed or will perform in a lead, starring or critical role for their organization. Further, although the petitioner submitted information from its website, the petitioner did not submit independent, objective information which establishes the distinguished reputation of the petitioner. Not every ballet company has a distinguished reputation. The information submitted by the petitioner regarding its 2013-2014 season states that it is "one of only seven ballet companies in the world permitted by the [redacted] to perform [redacted]." According to materials in the record, the association with the [redacted] means that the trust sends a repeteur to the petitioner to assist with maintaining consistency with the [redacted] production. The petitioner did not provide any information to establish how many ballet companies seek such a collaboration or how the trust selects those with which it collaborates. Accordingly, the petitioner has not established that the collaboration with the [redacted] is indicative of the petitioner's distinguished reputation.

As the petitioner has not established that the beneficiary has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation, the petitioner has not established the beneficiary's eligibility under the plain language of 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).

*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.*

The acting director determined that although the petitioner "provided a number of testimonials...from faculty at the beneficiary's former schools or from those familiar with the beneficiary's work as a student" which "speak highly of the beneficiary[,]...[t]he testimonials did not demonstrate the beneficiary had received significant recognition." The director's decision also stated that the petitioner could not rely on a positive finding for this criterion from a previously denied nonimmigrant petition to establish that the beneficiary meets this criterion.

Regarding the reference letters, the regulation at 8 C.F.R. § 214.2(o)(2)(iii)(B) provides that affidavits written by present or former employers or recognized experts certifying to the alien's 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.

A review of the reference letters supports the acting director's findings for this criterion. The letters from [REDACTED] who taught the beneficiary at the [REDACTED], founder and Artistic Director for [REDACTED], Artistic Director of [REDACTED] a pianist for the [REDACTED] for example, respectively praise the beneficiary's "incredible interpretive skills and acting ability when playing a role," her "exceptional talent," "tremendous versatility," and "highest level of professional commitment and artistry," but do not demonstrate that the beneficiary has received significant recognition for her achievements consistent with the plain language requirements of this criterion.

[REDACTED] a member of the faculty at the [REDACTED] asserts more specifically that the beneficiary has "the rare ability to dance the most difficult roles with ease, and has a lovely, ineffable quality about her when she dances that sets her apart from any other dancer." [REDACTED] Head of the [REDACTED] asserts that the beneficiary's "acting quality is what makes her stand out from other dancers." Other references, however, explain that the beneficiary's talents are merely those that allow a dancer to work in what is a competitive field. For example, [REDACTED] asserts: "[The beneficiary's] talent and natural beauty has transitioned her from a training program to a position in a professional company." [REDACTED] an artistic director at the [REDACTED] concludes that the beneficiary "is well on her way to being a professional dancer. She shows promise of being a principal dancer in this country and I hope to be able to witness her talents on stage soon." Recognition as having the necessary talent to work in the field, even a competitive field, is not the type of achievement contemplated by the regulation, which states that the beneficiary must have received "significant recognition" from "organizations, critics, government agencies, or other recognized experts in the field" for her achievements. While the letters praise the beneficiary's talents, their testimony fails to describe with any specificity the beneficiary's recognition and achievements in factual terms. USCIS need not accept primarily conclusory assertions. *1756, Inc. v. United States Att'y Gen.*, 745 F. Supp. 9 (D.C. Dist. 1990).

As the petitioner has not established that the beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field, the petitioner has not established the beneficiary's eligibility under the plain language of 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

*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.*

The acting director determined that the petitioner's contract with the beneficiary was not sufficient to establish that the beneficiary meets this criterion. The acting director's request for evidence provided multiple examples of evidence which the petitioner might submit to support the petitioner's claim that the beneficiary meets this criterion. The request for evidence specifically stated that "U.S. Department of Labor (DOL) prevailing wage rate information alone does not generally establish the salary or other remuneration is 'significantly' higher than others in the field" and instructed the petitioner that it "should submit additional evidence showing that the wage rate is high relative to others working in the field" if the petitioner "submit[s] DOL prevailing wage rate information."

The petitioner asserts that the beneficiary meets this criterion based on her contract with the petitioner and the DOL Level 4 prevailing wage, but did not provide any additional evidence as requested by the acting director to support this claim. The contract states that the beneficiary will receive \$450 per week or \$23,400 per year. The submitted DOL Level 4 prevailing wage is \$23,962 per year. Contrary to counsel's assertions on appeal, the beneficiary is not "being paid a [L]level 4 [w]age." In addition, the fact the beneficiary is being paid slightly above the mean wage does not establish that the beneficiary's salary is high in relation to others in the field. According to the contract, the petitioner will also receive additional remuneration, such as benefits and per diem travel costs. If the petitioner wishes consideration of the additional remuneration, then the petitioner must establish that the beneficiary's salary, in combination with the additional remuneration, is high in relation to others' total remuneration in the field, including benefits and travel expenses.

As the petitioner has not established that the beneficiary either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, the petitioner has not established the beneficiary's eligibility under the plain language of 8 C.F.R. § 214.2(o)(3)(iv)(B)(6).

#### B. Comparable Evidence

The initial unsigned letter purported to be from the petitioner asserts that the beneficiary meets four of the six regulatory criteria, but also asserts that the beneficiary's acceptance into three dance schools should be considered as comparable evidence. The regulation at 8 C.F.R. § 214.2(o)(3)(C) permits the petitioner to submit comparable evidence if the criteria "do not readily apply to the beneficiary's occupation." In her request for evidence, the acting director discussed the submitted evidence and explained that to rely on comparable evidence, the petitioner must "[e]xplain how the regulatory criteria is [sic] not applicable to the beneficiary's occupation; and [e]xplain why the evidence you submitted is 'comparable' to the applicable regulatory requirement." The petitioner did not contest the findings of the acting director or offer additional arguments on appeal. Therefore,

the petitioner abandoned this issue. See *Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885, at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (finding the plaintiff’s claims to be abandoned as he failed to raise them on appeal).

### C. Summary

The submitted evidence demonstrates that the beneficiary is a talented dancer, but fails to distinguish her from other professional dancers. The evidence does not establish that the beneficiary has a high level of achievement in the field of dance, as evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that she is renowned, leading, or well-known in her field, as required by section 101(a)(46) of the Act and 8 C.F.R. § 214.2(o)(3)(ii).

### III. Conclusion

The petitioner failed to establish the beneficiary’s eligibility pursuant to the regulatory criteria under 8 C.F.R. § 214.2(o)(3)(iv)(B). Therefore, the petitioner has not established the beneficiary’s eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

The appeal will be 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.