



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

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

MATTER OF D-

DATE: OCT. 5, 2015

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant and nightclub, 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, California Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

After issuing a request for evidence (RFE) and then considering the response, the Director found that the Petitioner did not establish that the Beneficiary satisfies 8 C.F.R. § 214.2(o)(3)(iv)(A), or 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 show the Beneficiary's eligibility. On appeal, the Petitioner submits a brief and additional material. The brief asserts that the Director erred because he did not consider the submitted documentation under the provisions pertaining to comparable evidence.<sup>1</sup> For the reasons discussed below, upon review of the entire record, 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 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.

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), in pertinent part, provides the following:

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<sup>1</sup> Although the Petitioner cites the comparable evidence regulation at 8 C.F.R. § 204.5(h)(4) and the evidentiary criteria at 8 C.F.R. § 204.5(h)(3) relating to the extraordinary ability immigrant classification, we will consider the evidence under the regulations at 8 C.F.R. § 214.2(o)(3)(iv), which relates to the nonimmigrant classification sought.

*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 satisfaction of 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 [P]etitioner failed to submit evidence of a consultation" in response to his RFE and did not "establish[] that an appropriate peer group or labor organization does not exist." 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

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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 regulation at 8 C.F.R. § 214.2(o)(5)(ii)(G) provides that an advisory opinion is not required "where it is established by the petitioner that an appropriate peer group, including a labor organization, does not exist."

On appeal, the Petitioner asserts that in response to the RFE, it provided "an affidavit . . . from the [B]eneficiary which explained that there are no such organizations for peer review." According to the Beneficiary's statement, "[w]e have been unable to build up internationally recognized groups for our arts and our culture." The Petitioner did not, however, establish that an appropriate peer group does not exist. 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 (Assoc. Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner also asserts that a letter from [REDACTED] is "in lieu of the peer group evaluation, as there are no such peer groups that evaluate Assyrian singers." [REDACTED], who owns a piano store and indicates that he is a "piano teacher, active performer, music scholar, and the head judge" of an Assyrian singing competition on [REDACTED] does not provide sufficient evidence to establish his expertise or his knowledge of the Beneficiary as required by 8 C.F.R. § 214.2(o)(2)(iii). In addition, the letter, while complimentary, does not "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," as required by the regulation at 8 C.F.R. § 214.2(o)(5)(ii)(A). As found by the Director, the petition does not contain the required advisory opinion and thus, the petition may not be approved.

#### B. Evidentiary Criteria

Although the Petitioner did not specifically address any of the evidentiary criteria in its initial petition or in response to the RFE, a review of the Director's decision reveals that he addressed each of the criteria at 8 C.F.R. § 214.2(o)(3)(v)(B)(1)-(6) and the record at length. The Petitioner does not reference the significant national or international award requirement at 8 C.F.R. § 214.2(o)(3)(iv)(A) or the alternative criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1)-(4), or provide any explanation as to how the Director erred in his findings for these criteria. Accordingly, the Petitioner has abandoned these claims. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *see also Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at \*1, \*9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO). Further, a passing reference without substantive arguments is insufficient to raise that ground on

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appeal. *Desravines v. U.S. Atty. Gen.*, 343 Fed.Appx. 433, 435 (11<sup>th</sup> Cir. 2009). On appeal, the Petitioner generally addresses the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(5) and (6). The Petitioner asserts that a letter from [REDACTED] is evidence “of significant recognition from experts in the field” and that contracts for performances show that the Beneficiary “is highly paid for his services.”

Regarding the high salary criterion, the Director’s RFE provided multiple options which the Petitioner could submit to satisfy this criterion. The Director’s decision discussed the relevant documents and found that the Petitioner “provided no evidence to establish this remuneration is considered ‘high’ in relation to others [] in the field.” On appeal, the Petitioner responds only that there is “little if any basis for comparison.” As the Petitioner did not submit any evidence to support its claim that the Beneficiary is highly paid for his performances at weddings and events in comparison with other wedding singers or club performers, it has not met its burden of demonstrating that the Beneficiary meets this criterion. *Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. at 190).

Regarding the letter from [REDACTED] which the Petitioner submits on appeal, it states that the Beneficiary “has become quite prolific in our community for his skill in being able to sing in our language with such grace and skill” and that he “is a saving grace to our people and one of very few people who has the requisite skill to make people feel pride in our culture.” [REDACTED] also affirms that the Beneficiary is “sought out by individuals for weddings and parties, as well as by nightclubs and restaurants as live entertainment.” To satisfy this evidentiary criterion, the Petitioner must submit evidence that the Beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which he is engaged. Any testimonials must be in a form which confirms the author’s authority, expertise, and knowledge of the Beneficiary’s achievements.

The letter does not address any specific achievements by the Beneficiary consistent with the plain language of the regulation. Further, the author, who owns a piano store and indicates that he is a “piano teacher, active performer, music scholar, and the head judge” of a competition on [REDACTED] of undocumented significance, does not provide sufficient information to establish his expertise or how he is acquainted with the Beneficiary as required by the regulations at 8 C.F.R. § 214.2(o)(2)(iii)(B) and 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

The Petitioner, on appeal, states that the Beneficiary “has won a Best Singer of the Year in a competition organized by the [REDACTED] in [REDACTED], Australia.” Except for a copy of the Beneficiary’s resume, the Petitioner did not submit any evidence to support his receipt of the award, or its significance. As previously discussed, going on record without supporting documentation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165.

In light of the above, the petitioner has not submitted qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iv)(A) and the submitted documentation does not satisfy at least three criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B).

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### C. Comparable Evidence and Totality of the Record

The Petitioner states for the first time on appeal that the Director should have considered the submitted material as comparable evidence. It is the Petitioner's burden to explain why the regulatory criteria are not readily applicable to the Beneficiary's occupation and how the documentation is "comparable" to the objective options required at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) through (6). The Petitioner asserts that the Beneficiary is "extraordinary" because he "sings in the Assyrian language," which "very few individuals . . . are capable of reading or writing. . . , much less singing," and that it is because of this "unique niche" that most of the regulatory criteria do not apply. More specifically, the Petitioner affirms that there is a lack of "distinguished events, awards, organizations, promotions, and writings about Assyrian music." In support of this position, the Petitioner submits material reflecting that the website *Wikipedia* does not have an entry specific to Assyrian music and that the [REDACTED] folk music entry does not discuss any recent music. The Petitioner did not explain why the absence of a dedicated page to the Beneficiary's music style on this single website demonstrates that any one of the criteria do not readily apply to the Beneficiary's occupation. For example, even assuming there are no trade journals or other media that are dedicated to reviewing the Beneficiary's style of music, that fact does not mean that more general forms of music media would not review an Assyrian singer.

Even if the Petitioner had established that the criteria do not readily apply to the Beneficiary's occupation, the Petitioner does not sufficiently explain how the evidence of record is "comparable" to the criteria at 8 C.F.R § 212.2(o)(3)(iv)(B). For example, the Petitioner asserts that a letter from the [REDACTED] about the Beneficiary's performance at a fundraiser which provided "there are no other singers like you among our fine Assyrian people" is indicative of "his level of extraordinary ability," but did not provide any information to show how this attestation is comparable to the regulatory criteria. The Petitioner submitted a number of Internet printouts, including information on the Aramaic language, Assyrian Singers, and the Assyrian people, in support of its position that the Beneficiary is unique and to demonstrate the plight of the Assyrian people, but does not explain how this information satisfies any of the statutory or regulatory requirements of the requested classification. The Petitioner also provided a copy of a paragraph and photograph with one English translation which indicates that it is from the [REDACTED] newspaper and another which states "Special [REDACTED]" The original foreign language document bears no indicia of having been downloaded from the publication's website or copied from a newspaper or magazine. Regardless, the Petitioner had not provided any information pertaining to the circulation or distribution of this newspaper. Moreover, the article merely identifies the Beneficiary as one of two singers who "[a]rrived at the [REDACTED] for the Assyrian, [REDACTED] [and] [REDACTED] for the celebration of the [REDACTED] New Year.

The reliance on comparable evidence does not relieve the Petitioner of the requirement that the Beneficiary satisfy a minimum of three evidentiary criteria as required under the regulations. Regardless, whether one relies on the standard regulatory criteria or on comparable evidence, the burden is still on the Petitioner to show that the Beneficiary has a high level of achievement through 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 as required by 8 C.F.R.

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§ 214.2(o)(3)(ii). Here, a review of the totality of the record does not show that the Beneficiary has attained this level of achievement or is renowned, leading, or well-known in the field, which is necessarily broader than his limited niche of Assyrian singers. *Cf. Buletini v. INS*, 860 F.Supp. 1222, 1229 (E.D. Mich. 1994) (finding that the petitioner's field was medical science rather than nephrology and that "medical science already narrows his field down from the more general field of 'science'"). The record contains photographs of the Beneficiary performing at the petitioning restaurant, a promotional flier for an upcoming album by the Beneficiary, the Beneficiary's existing albums, fliers for events where he performed, materials from the Beneficiary's [REDACTED] page, printouts confirming that some of the Beneficiary's performances are available on [REDACTED] letters from those who have hired the Beneficiary perform at weddings, and a wedding booking contract. The record does not document, however, the prestige of the events where the Beneficiary performed, or include the sales data for his albums. The Petitioner has also not explained the significance of maintaining a [REDACTED] fan page or the availability of his performances on [REDACTED] a website that allows users to upload their own videos. While the letters and contracts reflect that the Beneficiary has satisfied customers, that fact alone cannot establish that the Beneficiary is renowned, leading or well-known in his field. Based upon a review of the entire record, including the evidence submitted on appeal, the Petitioner has not met its burden.

### III. CONCLUSION

The record shows that the Beneficiary is a singer who focuses on Assyrian music and performs at weddings and events. In addition, the Beneficiary has released a few albums and appears on [REDACTED]. Upon review of the totality of the evidence submitted, the Petitioner has not established that the Beneficiary has extraordinary ability as a singer, which has been demonstrated by sustained national or international acclaim and that his achievements have been recognized in the field through extensive documentation, as required by section 101(a)(15)(O)(i) of the Act.

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, 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.

Cite as *Matter of D-*, ID# 13836 (AAO Oct. 5, 2015)