U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-R-P- LLC

DATE: AUG. 10, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a banquet hall, seeks to temporarily employ the Beneficiary as a master hair designer. To do so, it seeks to classify her as an O-1 nonimmigrant, a visa classification available to foreign nationals who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i).

The Director of the California Service Center denied the petition, concluding that the Petitioner did not satisfy, as required, the evidentiary criteria applicable to individuals of extraordinary ability in the arts: a significant national or international award, at least three of six possible forms of documentation, or comparable evidence. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(C).

On appeal, the Petitioner submits additional evidence, contends that the Director did not properly consider the record, and maintains that the evidence satisfies the regulatory requirements. In addition, it contends that the Director erred in not considering comparable evidence under 8 C.F.R. § 214.2(o)(3)(iv)(C).

Upon *de novo* review, we will dismiss the appeal.

I. LAW

As relevant here, section 101(a)(15)(O)(i) of the Act establishes O-1 classification for an individual 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. Department of Homeland Security (DHS) regulations define "extraordinary ability in the field of arts" as "distinction," and "distinction" as "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." 8 C.F.R. § 214.2(o)(3)(ii).

Next, DHS regulations set forth the evidentiary criteria for establishing a beneficiary's sustained acclaim and the recognition of achievements. A petitioner must submit evidence either of "significant national or international awards or prizes" such as "an Academy Award, an Emmy, a Grammy, or a Director's Guild Award," or of at least three of six listed categories of documents. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). If the petitioner demonstrates that the listed criteria do not readily apply to the beneficiary's occupation, it may submit comparable evidence to establish eligibility. 8 C.F.R. § 214.2(o)(iv)(C). When a petitioner provides the requisite evidence, we then determine whether the record, viewed in its totality, shows sustained national or international acclaim such that the individual is prominent in the field of endeavor.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(ii), provides, in pertinent part, that all petitions for O classification must be accompanied by:

> (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 entities.

II. ANALYSIS

A. Introduction

The Petitioner seeks to employ the Beneficiary as a master hair designer for private and professional events at its banquet facility. The record shows that the Beneficiary has been employed as a hair designer specializing in hair styling and coloring. Since 2009, she has worked at a hair salon which she owns with her sister in Spain. The Petitioner provided documentation of the Beneficiary's receipt of the following provincial and regional hairstyling awards in Spain:

- (2015)
- (2013)
- (2012)
- (2012)
- (2012)
- (2011)

- [redacted] (2011)

The record also shows that the Beneficiary participated in continental and world level competitions sponsored by the [redacted] between 2010 and 2012.

B. The Beneficiary's Eligibility under the Evidentiary Criteria

The issues presented on appeal and addressed in the brief include whether the Beneficiary meets the evidentiary criteria as set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A) or (B), and whether consideration of comparable evidence is appropriate as set forth at 8 C.F.R. § 214.2(o)(3)(iv)(C). Absent evidence of a significant national or international award or prize like the Academy Award, the Petitioner seeks to demonstrate the Beneficiary's sustained acclaim and recognition of achievements through evidence corresponding to the six regulatory criteria at 8 C.F.R § 214.2(o)(3)(iv)(B). The Director determined that the Petitioner satisfied only two of the evidentiary criteria: 8 C.F.R § 214.2(o)(3)(iv)(B)(*2*) (published materials) and 8 C.F.R § 214.2(o)(3)(iv)(B)(*5*) (significant recognition for achievements). On appeal, the Petitioner maintains that the evidence also meets the criteria at 8 C.F.R § 214.2(o)(3)(iv)(B)(*1*), (*3*), (*4*), and (*6*). As discussed below, we conclude that the record satisfies only one of the relevant criteria, 8 C.F.R § 214.2(o)(3)(iv)(B)(*5*).

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*).

On appeal, the Petitioner contends that the Director erred in not considering its submitted exhibits under the "comparable evidence" regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C), because it claims that this regulatory criterion is not applicable to hair design. Specifically, it claims that the testimonials it provided from recognized experts in the hair design industry satisfy this criterion. We determine that the Petitioner has not demonstrated that the letters submitted are comparable to the objective requirements of this regulatory criterion.

The Petitioner provided a letter from [redacted] world president of [redacted] an international hairdressing body. He confirms that the Beneficiary has taught in his organization and competed at many international hairstyling championships, including [redacted] competitions. The record also contains letters from [redacted], president of the [redacted] and [redacted] president of the [redacted] of the [redacted] who attest that the Beneficiary has won awards in provincial and regional hairdressing competitions, and represented Spain at [redacted] competitions. They describe her as an expert in the field with extraordinary skills.

As stated previously, the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) provides that comparable evidence "may" be submitted if the criteria in 8 C.F.R. § 214.2(o)(3)(iv)(B) do not readily apply to the

beneficiary's occupation. It is clear from the use of the word "must" in 8 C.F.R. § 214.2(o)(3)(iv), as opposed to the word "may" in 8 C.F.R. § 214.2(o)(3)(iv)(C), that the rule, not the exception, is that the petitioner is required to submit evidence to meet at least three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Thus, the use of comparable evidence does not change the standard for the classification; a petitioner relying upon comparable evidence must still establish the beneficiary's eligibility by satisfying at least three separate evidentiary criteria as required under the regulations. The six criteria in the regulations at 8 C.F.R. § 214.2(o)(3)(iv)(B) are designed to cover different areas; not every criterion will apply to every occupation. It is the Petitioner's the burden to articulate why the criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B) do not readily apply and how the evidence submitted is "comparable."

Here, the Petitioner has not established that winning a hair design competition is comparable to a lead or starring role for a production or event. In the performing arts, for instance, directors cast artists in leading or starring roles prior to the production or event. The promotional materials leading up to the production or event typically feature the lead or starring artists. Conversely, a competitor receives his or her ranking at the competition and the record does not demonstrate that the Beneficiary's participation was featured in promotional materials or highlighted in media coverage of the events. We also note that we have examined the evidence relating to the Beneficiary's receipt of awards in these competitions below, in our discussion of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*). For these reasons, the Petitioner has not established that achieving a favorable result in a hair design competition is comparable to providing services in a lead or starring capacity for an artistic production or event.

Based on the foregoing, the Petitioner has not submitted evidence that the Beneficiary has served as a lead or starring participant in productions that have a distinguished reputation. In addition, the record does not demonstrate that she will prospectively serve as such a participant. At the time of filing, the Petitioner submitted a job offer letter indicating that her duties as a master hair designer for its private and corporate events will include hair cutting, coloring, waving, straightening, and oiling. It did not, however, offer evidence that would distinguish her role as leading or starring within those upcoming events, and did not specifically claim or submit evidence to establish the distinguished reputation of those events.

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*2*).

To meet this criterion, the Petitioner provided several articles and press releases pertaining to the Beneficiary published in the newspapers [redacted] and [redacted] The Director determined that the Petitioner met this criterion. We conclude that the Petitioner has not established that the evidence meets the plain language of this criterion, and we will withdraw the Director's

[1] The record indicates that [redacted] is the successor publication to [redacted].

favorable determination. The record does not contain probative evidence showing that either publication qualifies as a "major" newspaper, trade journal, or other publication. The circulation statistics submitted for [redacted] indicate that it does not have significant national or international distribution but only serves the particular locality of [redacted] in [redacted] province, Spain.[2] The record further lacks circulation or distribution information relating to [redacted]. We therefore withdraw the Director's favorable determination relating to this criterion.

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*3*).

On appeal, the Petitioner contends that the Director erred in not considering its submitted exhibits under the "comparable evidence" regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C), asserting that this regulatory criterion is not applicable to hair design. Specifically, it claims that the testimonials it submitted from recognized experts in the hair design industry, who attest to her awards at hairdressing competitions, satisfy this criterion. As noted above, we examine the evidence relating to the Beneficiary's receipt of these awards in our discussion of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*). Further, it is the Petitioner's burden to articulate how the documentation in the record is comparable. The Petitioner has not established that winning a hair design competition is comparable to a lead or starring role for an organization or establishment.

In addition, while the Beneficiary's CV lists her past work for salons in Holland, including [redacted] and [redacted] the record lacks employment verification letters from representatives of those companies establishing that she has held a lead or critical role with respect to those establishments. Further, although the Beneficiary's salon has won customer awards in [redacted] province, the record does not demonstrate that the organization has a distinguished reputation in the field.

Based on the foregoing, the Petitioner has not submitted evidence that the Beneficiary has held a lead or critical role with respect to an organization or establishment that has a distinguished reputation. In addition, the record does not demonstrate that she will prospectively serve as such a participant for the petitioning organization. The Petitioner's offer of employment notes that she will be working in the role of master hair designer. It has not offered, however, information that would elucidate where her proposed position falls in the overall hierarchy of its organization or demonstrate her proposed impact on the organization. Finally, the Petitioner did not specifically claim or submit evidence to establish that its organization has a distinguished reputation.

---

[2] To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*4*).

The Director determined that the Petitioner's evidence does not satisfy this evidentiary criterion. In the Beneficiary's field, evidence satisfying this criterion would reasonably include evidence of business revenue. Although the Petitioner has submitted articles published in [redacted] and [redacted] mentioning the Beneficiary's results in the above-referenced provincial and regional competitions and her participation in [redacted] sponsored continental and world competitions, these materials do not report, for example, her business revenues, which would constitute evidence equivalent to "box office receipts" or "motion picture or television ratings" as referenced in the regulation, or otherwise provide any factual indicators to establish whether she has achieved "major commercial or critically acclaimed success" in the hairdressing industry.

On appeal, the Petitioner contends that the Director erred in not considering under the "comparable evidence" regulation at 8 C.F.R. § 214.2(o)(3)(iv)(C) the above-referenced testimonial letters, because it claims that this regulatory criterion is not applicable to hair design. Specifically, it argues that the provided testimonials from recognized experts in the hair design industry, as well as newly submitted reference letters from numerous clients who use the Beneficiary's services, satisfy this criterion. While we will examine this evidence below in our discussion of the criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*), we determine that the Petitioner has not demonstrated that these letters are comparable to the objective requirements of this regulatory criterion. The letters from [redacted], [redacted] and [redacted] while attesting that the Beneficiary has won awards in provincial and regional hairdressing competitions and represented Spain in [redacted] competitions, do not indicate that winning and participating in the those competitions is comparable to a record of major commercial or critically acclaimed successes in the field. In addition, although individual clients highly praise the Beneficiary's skills and abilities, these letters do not establish her record of successes in the field.

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*5*).

To meet this criterion, the Petitioner provided several testimonial letters and certificates confirming the Beneficiary's receipt of awards in provincial and regional competitions and her participation in [redacted] competitions at the continental and world level. We agree with the Director's determination that the awards received by the Beneficiary constitute significant recognition for achievements from organizations. Based on these awards, the Petitioner has satisfied this criterion.

> *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.* 8 C.F.R. § 214.2(o)(3)(iv)(B)(*6*).

On appeal, the Petitioner contends that it satisfies this criterion. It did not submit material relating to the Beneficiary's past salary or remuneration, such as letters from former employers, income tax forms, or pay statements. Instead, on the Form I-129, the Petitioner indicated it will pay her an annual salary of $36,000 for the proffered position of master hair designer. It also explained it will pay her other compensation in the form of a "[c]omission of five percent (5%) of business net income if the business gross income reaches $1 million." We note that the Petitioner's job offer letter does not state that the Beneficiary has the opportunity to earn a commission in addition to her salary. It has not submitted documentary evidence to resolve this discrepancy regarding the Beneficiary's compensation. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without such clarification, we are precluded from making an accurate assessment of her eligibility under this criterion.

Assuming that the Beneficiary's compensation will be $36,000 per year as stated in the job offer letter, the record establishes that this salary is not considered high in relation to others in the field. The Petitioner provided comparative wage data relating to average or median wages of "Hairdressers, Hairstylists, and Cosmetologists" in Arizona, the [redacted] metropolitan area from the Foreign Labor Certification (FLC) Data Center's Online Wage Library (www.flcdatacenter.com), reflecting that the Level 4 prevailing wage is $28,912 per year. While the Beneficiary's salary exceeds the Level 4 prevailing wage for the Petitioner's area, the prevailing wage only reflects the *average* wage paid to all similarly employed workers in the same occupation in the same area. 20 C.F.R. § 655.10. This evidence does not sufficiently demonstrate that the Beneficiary's proffered salary in the position of master hair designer is a "high salary."

In sum, based on the foregoing, the record does not contain evidence of the Beneficiary's nomination for or receipt of a significant national or international award or prize, at least three of six listed categories of documents, or that consideration of comparable evidence is appropriate. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(C).

C. Contract Requirements

Although not addressed in the Director's decision, the Petitioner has not provided the contractual agreement that specifies the wage and the other terms and conditions of the Beneficiary's employment, or a summary of the terms of the oral agreement between the parties. The regulation at 8 C.F.R. § 214.2(o)(2)(ii)(B), which applies to all O petitions, requires a copy of any written contract between the Petitioner and the Beneficiary. If a written contract does not exist, U.S. Citizenship and Immigration Services (USCIS) will accept evidence summarizing the terms of the oral agreement under which the Beneficiary will be employed, including the wage offered, and confirming that the Beneficiary has accepted that offer. An oral contract, as corroborated by the summation of the elements of the oral agreement, is enforceable and USCIS will accept the summation as evidence of an oral agreement. *See generally* 8 C.F.R. § 214.2(o)(2)(ii)(B) (stating that a summary of the terms

of the oral agreement under which the foreign national will be employed must be provided when there is no written contract between the parties). Here, the Petitioner has not fulfilled this requirement. While the record contains its job offer to the Beneficiary, it does not contain a written contract between the parties or a summary of the terms of the oral agreement between the parties. In addition, as previously discussed, the Petitioner has provided inconsistent information regarding the terms of the Beneficiary's compensation in the proposed position.

III. CONCLUSION

For the reasons discussed above, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as a foreign national with extraordinary ability in the arts.

ORDER: The appeal is dismissed.

Cite as *Matter of A-R-P- LLC*, ID# 482925 (AAO Aug. 10, 2017)