U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33040468

Date: AUG. 27, 2024

Appeal of Vermont Service Center Decision

Form I-129, Petition for a Nonimmigrant Worker (Extraordinary Ability – O)

The Petitioner, an art studio, seeks to temporarily employ the Beneficiary as an art director in the motion picture or television industry. This O-1 nonimmigrant visa classification is available to individuals who can demonstrate a record of extraordinary achievement, 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 Vermont Service Center denied the petition because: 1) the Petitioner did not satisfy the consultation requirement, and 2) the Petitioner did not show the Beneficiary received a nomination for or receipt of a significant national or international prize or award, or at least three of six possible forms of documentation. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

As relevant here, the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(D) requires written advisory opinions from the appropriate consulting entities. Evidence of a consultation shall be in the form of a written advisory opinion from a peer group, labor, and/or management organization with expertise in the specific field involved. 8 C.F.R. § 214.2(o)(5)(i)(B). The petitioner shall obtain a written advisory opinion from a peer group, labor, and/or management organization with expertise in the specific field involved, and the advisory opinion shall be submitted when the petition is filed. 8 C.F.R. § 214.2(o)(5)(i)(C). Written evidence of consultation shall be included in the record in every approved O petition. 8 C.F.R. § 214.2(o)(5)(i)(D). In the case of an individual of extraordinary achievement who will be working on a motion picture or television production, consultation shall be made with the appropriate union representing the individual's occupational peers and a management organization in the area of the individual's ability. 8 C.F.R. § 214.2(o)(5)(iii).

II. ANALYSIS

Initially, the Petitioner provided the Beneficiary's itinerary and a job offer letter claiming that it intended to hire the Beneficiary as an art director for three years for the following duties: develop the written script and scenes from the research point, coordinating lines in order to express the idea of the film; direct the films, making sure they run smoothly and using a critical eye while shaping the script on the shooting; apply studies and expertise regarding scene composition for a creative solution based on the script; direct the image caption following a careful selection of place and timing based on the desired outcome of the frames; create the storyboard based on the script to represent the aesthetics of the scenes; select the specific objects to compose the scenario according to the desired outcome; and ensure that the color palette is respected and gather props that relate to the concept.

In addition, the Petitioner submitted an email from the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) reflecting that "the job of Art Director is not one that we cover. We cover actors and those engaged on camera such as dancers, stunt performers, tv hosts etc." Moreover, the Petitioner asserted:

> Please note that we have contacted an appropriate association in the Motion Picture field and have been informed that they only provide Advisory Opinion Letters for actors and other professionals engaged on camera . . . . Therefore, we are submitting an Advisory Opinion Letter provided by a qualified expert in the field.

The Director issued a request for evidence (RFE), informing the Petitioner, in part:

> You have submitted a statement that an appropriate labor organization and management organization does not exist for this position. However, the documentation that you provided appears to establish that the beneficiary will be coming to exhibit the short student film documentary [redacted] at various U.S. film festivals. The beneficiary was the Writer and Director of the film [redacted] during his time as a student at the [redacted] The itinerary and offer of employment indicate that the beneficiary will also serve as the Writer and Director of a film also named [redacted] during his employment here in the U.S. . . . .

Furthermore, the Director indicated that the Directors Guild of America (DGA) and the Writers Guild of America, East (WGAE) may be the appropriate labor organizations for the profession of a director and writer, respectively. Moreover, the Director stated that the Alliance of Motion Picture and Television Producers (AMPTP) may be the appropriate management organization for the profession of a director and writer. Thus, the Director requested the Petitioner to provide an appropriate consultation or an explanation addressing why the named labor and/or management organization(s) is/are not appropriate, and the Director informed the Petitioner that it may submit a new consultation meeting all applicable requirements.

In response, the Petitioner's cover letter stated:

> . . . [W]e now present a Written Advisory Opinion from the [WGAE], expressly stating that the labor organization "represent[s] the occupational peers of the proposed beneficiary" and "has no objection to granting an O-1 visa to [the Beneficiary]."
>
> Additionally, please note that the Petitioner has also requested a Written Advisory Opinion from the [AMPTP]. However, for reasons beyond the Petitioner's control, this letter will not be received before the RFE's due date. We are now enclosing evidence that shows that the Advisory Opinion was indeed requested and is currently under review by the association.
>
> Finally, we also refer to the evidence presented in the underlying Petition showing that the Petitioner had already tried to contact other appropriate associations but was unsuccessful, which is why, as an alternative, we provided an Advisory Opinion Letter from a qualified expert in the field.

The Petitioner also submitted a letter from WGAE stating:

> Please be advised that [WGAE] has no objection to granting an O-1 visa to [the Beneficiary] so that he may perform screenwriting services for various short films and documentaries. Since other aspects of [the Beneficiary's] services such as directing and producing are not within our jurisdiction, this advisory opinion only addresses writing services . . . .

The Petitioner also provided an email, dated December 1, 2023, from AMPTP to the Petitioner's attorney, indicating that "[o]ur turn-around time is approximately seven (7) business days after a correction has been received" and "[a]ll submissions are on a first-come first-served basis."[1]

In denying the petition, the Director concluded:

> The evidence that you submitted December 4, 2023 is insufficient. While your response did contain a consultation from [WGAE], the consultation also stated that:
>
> > Since other aspects of [the Beneficiary's] services such as directing and producing are not within our jurisdiction, this advisory opinion only addresses writing services.
>
> Your response did not contain a consultation from the DGA which would cover the beneficiary's duties as a film Director. Therefore, the record does not contain all of the required consultations for the beneficiary's labor peer groups.
>
> Additionally, your Immigration Attorney's email to the AMPTP did not satisfy the requirement that you provide a consultation from a management organization.

[1] The Director issued the RFE on September 6, 2023, with a due date of December 4, 2023.

> Your response did not contain a written advisory opinion from an appropriate labor union, DGA, and an appropriate management organization, AMPTP. Nor did you provide an explanation addressing why the name labor union and management organization are not appropriate for a[] Writer and Director of a film.

On appeal, the Petitioner argues that "we now submit the Advisory Opinion Letter from the AMPTP," and it "was not submitted with the Response to the RFE due to the organization's delay in providing it." Moreover, the Petitioner claims that "we have herein demonstrated that the first issue has been overcome as the record contains an Advisory Opinion Letter from an appropriate Labor Organization (WGAE) and an Advisory Opinion Letter from an appropriate Management Organization (AMPTP)."

We adopt and affirm the Director's decision for this issue. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 Fr.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted this issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight U.S. Court of Appeals in holding the appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case). The Petitioner did not submit the proper evidence at initial filing. *See* 8 C.F.R. § 214.2(o)(5)(i)(C). Instead, the Petitioner provided evidence from SAG-AFTRA, who indicated that it only covers actors and those engaged on camera, none of which involved the Beneficiary's position. In addition, the Petitioner's submission of an advisory opinion letter was not from the appropriate union representing the Beneficiary's occupational peers and management organization in the area of the Beneficiary's ability.

As explained in the Director's RFE and denial, the record contained evidence of the Beneficiary's involvement with writing and directing. Thus, the Director informed the Petitioner that DGA and WGAE may be the appropriate labor organizations for the profession of a director and writer, and AMPTP may be the appropriate management organization for the profession of a writer and director. In response, the Petitioner only provided a consultation letter from WGAE, which stated its no objection to the Beneficiary's screenwriting aspect but had no jurisdiction over the Beneficiary's directing and producing aspects. Moreover, the Petitioner did not establish how evidence reflecting a pending determination from a management organization or a "letter from a qualified expert in the field" meets the consultation requirements under 8 C.F.R. § 214.2(o). Furthermore, as indicated by the Director, the Petitioner did not offer evidence from DGA for the Beneficiary's directing duties, or otherwise establish that DGA is not the appropriate labor organization.

On appeal, although the Petitioner presents evidence from AMPTP, we will not consider it for the first time on appeal because the Petitioner was put on notice and given a reasonable opportunity to provide this evidence. *See* 8 C.F.R. § 103.2(b)(11) (requiring all requested evidence be submitted together at one time); *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider new evidence submitted on appeal because "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial"). Even if we accepted the AMPTP evidence, the Petitioner does not address or resolve the consulting requirement from DGA. In addition, the Petitioner has not established how the Director erred as a matter of law or policy at the time of the rendered decision.

Accordingly, the Petitioner has not demonstrated eligibility for the consulting requirements under 8 C.F.R. § 214.2(o)(2)(ii)(D), 8 C.F.R. § 214.2(o)(5)(i)(B)-(D), and 8 C.F.R. § 214.2(o)(5)(iii).

III. CONCLUSION

The Petitioner did not satisfy the written advisory opinion requirements from the appropriate consulting entities. Accordingly, we need not determine whether the Beneficiary satisfies the requirements as an individual of extraordinary achievement. Accordingly, we reserve those issues.[2] The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[2] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7. (BIA 2015) (declining to reach alternative issues on appeal where applicants do not meet their burden of proof).