U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L-M-P-LMP-S-

DATE: FEB. 2, 2018

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a music production studio, seeks to classify the Beneficiary, a composer, as an individual of extraordinary achievement in motion picture or television productions. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(i), 8 U.S.C. § 1101(a)(15)(O)(i). This O-1 classification makes nonimmigrant visas available to foreign nationals whose achievements in this industry have been recognized in the field through extensive documentation.

The Director of the California Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary met at least three of the six evidentiary criteria. Specifically, the Director found that the Petitioner did not satisfy any of the criteria. In addition, the Director concluded that the Petitioner did not submit the required written consultation from a management organization in the area of the Beneficiary's ability.

On appeal, the Petitioner offers additional evidence and claims that the Beneficiary meets three regulatory criteria. The Petitioner further asserts that the consultations provided meet the regulatory requirement.

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, with regard to motion picture and television productions, a demonstrated record of extraordinary achievement, 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 include the following definition: "*Extraordinary achievement* with respect to motion picture and television productions, as commonly defined in the industry, means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field."

Next, DHS regulations set forth the evidentiary criteria for establishing an individual's record of extraordinary achievement. First, a petitioner can demonstrate the beneficiary's nomination for, or receipt 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. 8 C.F.R. § 214.2(o)(3)(v)(A). If the petitioner does offer this information, then it must submit sufficient qualifying exhibits that satisfy at least three of the six categories of evidence listed at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*)-(*6*).

The submission of documents satisfying the initial evidentiary criteria does not, in and of itself, establish eligibility for O-1 classification. *See* 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994). In *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010), we held that, "truth is to be determined not by the quantity of evidence alone but by its quality." That decision explains that, pursuant to the preponderance of the evidence standard, we "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." *Id.* Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record shows eligibility under section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(1)(ii).

In addition, pursuant to section 214(c)(3)(A), an O-1 petition with respect to individuals seeking entry for a motion picture or television production shall be approved only after consultation with the appropriate union representing the individual's occupational peers and a management organization in the area of the individual's ability. The implementing regulation clarifies that the consultations should describe the individual's achievements in the motion picture or television field and state whether the position requires the services of an alien of extraordinary achievement. If a consulting organization has no objection to the approval of the petition, the organization may submit a letter of no objection in lieu of the above. 8 C.F.R. § 214.2(o)(5)(iii).

II. ANALYSIS

A. Introduction

According to the Beneficiary's curriculum vitae (CV), he has been working as a composer since at least 2000. The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation, seeking to employ the Beneficiary for a period of three years. In its initial letter the Petitioner explained that it seeks to have the Beneficiary perform services as a composer and arranger on approximately eight productions.

As a preliminary matter, we note that the Petitioner contends on appeal that it in fact requested to classify the Beneficiary as an individual with extraordinary ability in the arts under the requirements of 8 C.F.R. § 214.2(o)(3)(iv), instead of extraordinary achievement in the motion picture and television field pursuant to 8 C.F.R. § 214.2(o)(3)(v). However, the record does not support this assertion. Instead, the Petitioner expressly filed the petition under the motion picture and television classification, completing Section 1 of the O classification supplement, under 11.a, the subsection

for petitioners seeking classification for extraordinary achievement in motion pictures or television. The Petitioner also cited the regulations for that category in its brief accompanying the filing, and asserted that the Beneficiary had a "demonstrated record of extraordinary achievement in the motion picture and television industry." Further, it reiterated the Beneficiary's eligibility in the motion picture and television classification in response to the Director's request for evidence. Accordingly, we will examine the Beneficiary's eligibility under that requested classification.[1]

We additionally note that the Petitioner has requested, based upon a claim of ineffective assistance of prior counsel, a *nunc pro tunc* change of status from B-1 to O-1B. This request, however, relates to the denial of the Petitioner's change of status application for the Beneficiary, which is concurrent with, but separate from, the nonimmigrant petition. Under 8 C.F.R. 248.3(g), there is no appeal from such a denial. As we lack authority over this issue, we will not address either the change of status request or the attendant ineffective assistance of counsel claim.

B. Consultation

The record includes a letter from the [redacted] stating that it has no objection to the granting of an O-1 visa for the Beneficiary. Thus, the Director found the Petitioner has met the consultation requirement for a union representing the individual's occupational peers, and we agree with that finding. At issue is whether the Petitioner has provided the required consultation from a management organization in the area of the Beneficiary's ability.

On appeal, the Petitioner provides an advisory opinion from [redacted] of the [redacted] The letter states that it is the opinion of the organization that "the Beneficiary has a history of extraordinary achievement in this field of endeavor and has no objection to the granting of an O-1 visa for this beneficiary." However, the letter also states that [redacted] cannot issue a consultation for the Beneficiary because the "stated position is not included within any recognized bargaining unit." Thus, by its own statements, [redacted] is not a management organization in the Beneficiary's field.

The record also includes a letter from [redacted] stating that it has "no objection" to the issuance of the O-1 visa. However, as noted by the Director, the letter from [redacted] does not meet the consultation requirements because it is not a management organization. The letter from [redacted] states that it is a "nonprofit arts service organization." On appeal, the Petitioner states that "the consultation from [redacted] that was provided as part of the original application is widely recognized as a management organization" and "should be sufficient to

[1] We also note, upon review, that the record does not demonstrate the Beneficiary meets three of the required criteria as an individual with extraordinary ability in the arts, which mirror the criteria for motion picture television. Nor does the record include sufficient evidence or information showing that the Beneficiary has achieved "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).

meet the management requirement." However, the Petitioner did not provide any additional information or evidence confirming that [redacted] serves as a management organization in the area of the Beneficiary's ability, composing. As such, the Petitioner has not met the consultation requirements under 8 C.F.R. § 214.2(o)(5)(iii).

C. Extraordinary Achievement in the Motion Picture or Television Industry

The next issue to be addressed is whether the Petitioner offered evidence to establish that the Beneficiary satisfies the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(v)(A) or at least three of the six categories listed at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*)-(*6*). In denying the petition, the Director determined that the Petitioner did not claim the Beneficiary met the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(v)(A), and he further found that he did not meet any of the alternative regulatory criteria.

On appeal, the Petitioner asserts that the Beneficiary meets the criteria for: lead or starring participant in productions or events with a distinguished reputation under 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*); leading or critical role for organizations and establishments that have a distinguished reputation under 8 C.F.R. § 214.2(o)(3)(v)(B)(*3*); major commercial or critically acclaimed success under 8 C.F.R. § 214.2(o)(3)(v)(B)(*4*); and, significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field under 8 C.F.R. § 214.2(o)(3)(v)(B)(*5*). As discussed below, we find that the Petitioner has not established that the Beneficiary meets three of the claimed criteria.

> *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)(v)(B)(*1*).

The Petitioner claims on appeal that the Beneficiary satisfies this criterion based upon his work "composing scores and original songs" for numerous television shows produced through [redacted] including the television series [redacted] and [redacted] and the miniseries [redacted] The record includes a film synopsis from the website [redacted] listing the Beneficiary as the music producer and arranger for each program/series. The Petitioner also avers that the Beneficiary performed as a lead or starring participant in [redacted] film [redacted] and two [redacted] projects, [redacted] and [redacted] Masterpiece." The record includes a letter from [redacted] of [redacted] stating that the Beneficiary composed and produced music for a television production [redacted] along with a letter from [redacted] head of business development at [redacted] stating that the Beneficiary "has worked for our studios as the leading music composer on several projects." He notes that the Beneficiary helped the studio create a soundtrack for a 3D "ride," though he does not further explain this project.

First, the record lacks sufficient documentary evidence regarding most of these productions to establish that the Beneficiary played a lead or starring role. On appeal, the Petitioner avers that "the Beneficiary, having played the role of a composer and arranger, was deemed to have played a leading and starring role in the production by definition." We disagree. The plain language of the criterion requires the Petitioner to establish that the Beneficiary specifically played a lead or starring role in a production or event. While the Petitioner provides several articles discussing the role of a composer generally in film and television productions, the record lacks sufficient evidence that the Beneficiary's specific role in any of the above noted productions was lead or starring. While the articles list the Beneficiary as the music producer or arranger for the projects, the record does not include sufficient evidence that this role was central to the productions.

Furthermore, the Petitioner has not established that the projects themselves have a distinguished reputation through the submission of critical reviews, advertisements, publicity releases, contracts, or endorsements. The record includes a 2000 press announcement published in that "a new morning show for kids," will air on along with articles from the newspaper from 2001, discussing ' The Petitioner also submitted an excerpt from the television section of the newspaper from 2000, listing the time slot for the series ' along with an excerpt from the website www. discussing the religious nature of ' ' The Beneficiary is not mentioned in any of the articles or press releases and, while one article does call ' "excellent," the evidence does not adequately speak to the distinguished reputation of the productions. The record includes a "daily rating" from December 16, 2001 listing the series ' with "6.5%" but the significance of this percentage is not explained.

In sum, the plain language of this criterion requires the Petitioner to submit critical reviews, advertisements, publicity releases, publications, contracts, or endorsements establishing the distinguished reputation of the productions or events in which the Beneficiary participated in a lead or starring capacity. Here, the Petitioner has not submitted sufficient evidence of the lead or starring nature of the Beneficiary's past roles. Further, it has not provided the evidence required to establish the distinguished reputation of these productions. The Petitioner offered primarily testimonial evidence pertaining to the Beneficiary's previous work as an arranger, director and musical composer, rather than the evidence required by 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*).[2] This evidence will be considered under the appropriate criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*5*).

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[2] On appeal, the Petitioner maintains that affidavits written by present or former employers or recognized experts may be used as comparable evidence in "substitution for lack of traditional evidence." It cites 8 C.F.R. § 214.2(o)(2)(iii)(B). First, we note that the regulation at 8 C.F.R. § 214.2(o)(2)(v) does not permit the use of comparable evidence to show extraordinary achievement in the motion picture or television industry. Regardless, the provision cited by the Petitioner states that "affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability, or in the case of a motion picture or television production, the extraordinary achievement of the alien, 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." This regulatory provision does

In addition, the Petitioner must establish that the Beneficiary *will* be performing services as a lead or starring participant in productions or events with a distinguished reputation. In the initial letter, the Petitioner stated that the Beneficiary will be working on approximately eight productions while in the United States including an movie of the week, a CD production for a post production of national folk music series for the government, a Christmas CD with the and a project with the The record does not contain sufficient evidence to document the distinguished reputation of the productions or the Beneficiary's anticipated roles. The submitted deal memos do not contain information suggesting that the projects will have a distinguished reputation. For example, they do not remark on the past successes of the director, production company, or musicians, or otherwise remark on the expectations for the events.

On appeal, the Petitioner claims that "it is unreasonable to require proof of reputation of future projects due to the fact that the reputations of future projects" "are yet to be determined." The Petitioner further avers that "it should be clear that a person who has performed in a leading, starring, or crucial role will further star in such a role in future productions or events." It points to a passage of the preamble to the final rule regarding O-1 aliens, which states, "after careful consideration, the Service agrees that there is no statutory support for the requirement that an O-1 alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber."[3] The Petitioner argues that this statement absolves petitioners from having to establish that a beneficiary will prospectively perform in a lead or starring role. It avers that "the distinction of the future projects and productions that [the Beneficiary] is schedule to participate and contribute to during his requested stay with the United States cannot be taken into account" and "such action would be an abuse of discretion."

The language cited by the Petitioner, however, does not specifically relate to the criterion in question, which by its plain language requires a petitioner to establish that a beneficiary "will perform . . . services as a lead or starring participant in productions or events which have a distinguished reputation." Petitioners are required to meet three of the six possible evidentiary criteria. If a petitioner cannot establish that a beneficiary will perform services as a lead or starring participant in productions or events which have a distinguished reputation, it may opt to establish eligibility through the other criteria listed. On appeal, the Petitioner has not offered sufficient evidence that the productions on the Beneficiary's proposed itinerary have a distinguished reputation. Accordingly, for each of the reasons discussed above, we concur with the Director that the Petitioner

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not relate to the lead or starring role criterion at 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*), which specifically enumerates the types of acceptable evidence, nor does it relate to the submission of comparable evidence.

[3] Temporary Alien Workers Seeking H-1B, O, and P Classifications Under the Immigration and Nationality Act, 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994).

has not submitted documentation to satisfy the evidentiary criterion at 8 C.F.R. § 214.2(0)(3)(v)(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 evidenced by articles in newspapers, trade journals, publications, or testimonials* 8 C.F.R. § 214.2(o)(3)(v)(B)(*3*).

The record supports the Director's determination that the Petitioner has not sufficiently documented or explained how the Beneficiary has performed and will perform in a lead, starring, or critical role for organizations or establishments. Here, the Petitioner maintains that the Beneficiary performed in a lead, starring, or critical role for the studio that produced the television series ' and ' and the television miniseries ' On appeal, the Petitioner also claims that the Petitioner served in a leading role for an television network, and, in turn, through its on-demand viewing options for programming. We note that this criterion is separate from the previously discussed criterion requiring evidence of his performance of services as a lead or starring participant in a production or event. *See* 8 C.F.R. § 214.2(o)(3)(v)(B)(*1*). Accordingly, participating at the requisite level for *a production or event* is not necessarily the same as performing in a qualifying role *for an organization or establishment.*

Thus, even if the Petitioner had established the significance of his role in the productions discussed above, the record does not verify that his lead or starring participation in those events constitutes a lead, starring, or critical role for the overall production companies. The submissions do not describe the duties the Beneficiary performed for the relevant organizations in his various roles, and do not establish how his position fit within their overall hierarchies. Furthermore, the record does not contain the required documentary evidence in the form of articles in newspapers, trade journals, publications, or testimonials pertaining to the reputation of or nor does it offer evidence documenting the manner in which his work has resulted in a measurable level of success for either company.

In addition, the Petitioner must establish that the Beneficiary will, prospectively, provide services in a lead, starring, or critical role for organizations or establishments that have a distinguished reputation. As previously stated, the petition and the deal memo indicate that the Beneficiary will work for the Petitioner over a three year period. The record does not include evidence explaining how the Beneficiary's role as an arranger or composer rises to the level of a lead, starring, or critical role for either the petitioning production company or the organizations for whom he intends to do work. The submitted evidence does not describe how he will contribute to the overall companies, or how his proposed positions fit within the hierarchy of those organizations.

Finally, the Petitioner did not provide sufficient evidence demonstrating that the Petitioner enjoys a distinguished reputation. As previously noted, the plain language of this criterion requires the submission of evidence in the form of newspapers, trade journals, publications, or testimonials. In

light of the above, the Petitioner has not established that the Beneficiary satisfies the requirements of this evidentiary criterion.

> *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)(v)(B)(*4*).

The Director determined that the Petitioner's evidence does not satisfy this evidentiary criterion. In support of his eligibility, the Petitioner provided pages of television broadcast royalties statements issued to the Beneficiary by for the year 2001. It did not explain the significance of these payments or provide evidence that they constitute a record of commercial or critically acclaimed successes. Without further evidence, submitting documentation indicating that the Beneficiary composed music for television shows and received royalty payments as a result of his work does not meet the requirements of this regulatory criterion. The record does not establish, for example, that the royalties are high relative to others in his field to show major commercial success, or that the Beneficiary's musical recordings have generated substantial sales in Israel or elsewhere.

On appeal, the Petitioner avers that the Beneficiary satisfies this criterion because he rendered services as a musician and composer for the television show which appeared on a Top Ratings Chart for December 16, 2001. However, he has not demonstrated that television show ratings on a single day in 2001 constitute a record of major commercial or critically acclaimed successes.[4]

Furthermore, the record does not include evidence that such critical or commercial success was memorialized in trade journals, major newspapers, or other publications. In light of the above, the Petitioner has not established that the Beneficiary satisfies the plain language requirements of this evidentiary criterion.

> *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)(v)(B)(*5*).

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[4] The Petitioner refers to *Matter of Price*, 20 IRN Dec. 953 (AAU 1994), contending that, in that case, the Petitioner was listed as one of the top 10 golfers in the world, which was sufficient evidence of his sustained national or international acclaim. It avers that, like in *Matter of Price*, here, the Beneficiary composed songs for a television show that was rated one of the top 10 shows on a ratings chart for December 16, 2001. However, we do not find that placing among the top ten golfers in the world is comparable to composing a soundtrack for a television program that enjoyed top ten ratings in Israel on a given day.

The issue for this regulatory criterion is whether the Beneficiary has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Here, we find that the record includes sufficient documentary evidence showing that the Beneficiary has received such recognition. The Petitioner has offered letters from recognized expert musicians, composers, and producers attesting to his innate talent, work ethic, personal traits, and artistry as well as recognizing his specific achievements as an arranger or composer.

For example, the Petitioner provided several letters from colleagues with whom the Beneficiary worked on various arrangements and projects as well as leaders in the field. a film producer, states that "[the Beneficiary's] deep understanding of storytelling and drama gives him a unique advantage over other film composers," and "his talent for writing memorable and expressive melodies is a quality which is truly rare among composers in the film industry." Similarly, a novelist and lyricist, comments that the Beneficiary composed the song " which became a "major hit" and "Israeli classic" when performed by ' She goes on to describe how the Beneficiary composed a song, "The Sweet Dreams" which was recorded by many "iconic" Israeli singers and later became the theme song for a television mini-series. Similarly, chairman of the also notes that the Beneficiary's composition " is "known to virtually every Israeli." vice president of content and production, who worked with the Beneficiary at describes his contributions to the programming as "tremendous." Accordingly, we find that the Petitioner has established that the Beneficiary meets the requirements of this criterion.

For the reasons discussed above, the Petitioner has not met the plain language requirements of at least three criteria. In addition, we note that in the aggregate, the evidence does not distinguish the Beneficiary as a music composer who has demonstrated a record of achievement to the extent that he can be deemed to be recognized as outstanding, notable, or leading in the motion picture and television field. 8 C.F.R. § 214.2(O)(3)(ii). The documentation submitted in support of a claim of extraordinary achievement must clearly demonstrate that the Beneficiary has achieved "a very high level of accomplishment" in the television or motion picture industry. *Id.*

III. CONCLUSION

The Petitioner has not submitted qualifying evidence under 8 C.F.R. § 214.2(o)(3)(v)(A) or at least three criteria at 8 C.F.R. § 214.2(o)(3)(v)(B). Furthermore, the Petitioner has not provided a consultation from a management organization in the area of the Beneficiary's ability as required under 8 C.F.R. § 214.2(o)(5)(iii).

ORDER: The appeal is dismissed.

Cite as *Matter of L-M-P-LPM-S-*, ID# 384925 (AAO Feb. 2, 2018)