U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7701074

Date: FEB. 28, 2020

Appeal of California Service Center Decision

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

The Petitioner, a music group, seeks to classify the Beneficiary, a musician, as a foreign national of extraordinary ability in the arts. To do so, the Petitioner seeks O-1 nonimmigrant 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, either a significant national or international award or at least three of six possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). The Director also determined that the Petitioner provided insufficient information regarding the Beneficiary's proposed duties in the United States. 8 C.F.R. § 214.2(o)(2)(ii).

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. 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).

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)("The evidence submitted by the petitioner is not the standard for the classification, but merely the mechanism to establish whether the standard has been met.") Accordingly, where a petitioner provides qualifying evidence satisfying the initial evidentiary criteria, we will determine whether the totality of the record and the quality of the evidence shows extraordinary ability in the arts. *See* section 101(a)(15)(o)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii), (iv).[1]

Further, the regulation at 8 C.F.R. § 214.2(o)(2)(ii) provides that petitions for O aliens shall be accompanied by the following:

(A) The evidence specified in the particular section for the classification;

(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 end 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

The record reflects that since at least 2000 the Beneficiary has worked as a keyboardist and music arranger in Venezuela. In addition, the Beneficiary received O-2 nonimmigrant classification in 2016 as an accompanying alien to [redacted] a singer who had been granted O-1 classification for employment with a different petitioner.[2] The Petitioner asserts that the Beneficiary is an "expert" pianist, keyboardist, arranger and producer.

A. Nature of Proposed Employment

We will first address the Director's finding that the Petitioner did not provide sufficient documentation to establish that it has events scheduled for the Beneficiary. We conclude that the Petitioner has provided sufficient information regarding the Beneficiary's proposed events in the United States to establish that he will be performing the services specified in the petition. As mentioned previously, the regulation at 8 C.F.R. § 214.2(o)(2)(ii)(B)-(C), which applies to all O petitions, requires a copy of any written

[1] *See also Matter of Chawathe,* 25 I&N Dec. 369, 376 (AAO 2010), in which we held that, "truth is to be determined not by the quantity of evidence alone but by its quality."

[2] *See* [redacted] with a validity period from February 17, 2016 to November 1, 2018.

contract between the Petitioner and the Beneficiary, an explanation of the nature of the events or activities, the beginning and end dates for the events or activities, and a copy of any itinerary. The petition indicates that the Petitioner is seeking to employ the Beneficiary as a keyboardist, music arranger and music producer for a period of three years, so that he may work on album development and perform with the petitioning group at various venues in Texas. The Petitioner's offer of employment, amended offer of employment, and employment agreement set forth the terms of its agreement with the Beneficiary, and detail his proposed performances during the requested period, including multi-year engagements for weekly performances at [redacted] and [redacted], and his duties developing the albums [redacted], and [redacted]. Upon review, the documentary evidence sufficiently establishes, as indicated in the petition, that the Beneficiary is coming to perform in events or activities in his field for the validity period requested.

B. The Beneficiary's Eligibility under the Evidentiary Criteria

The next issue addressed by the Director is whether the Petitioner submitted documents satisfying the initial evidentiary criteria applicable to individuals of extraordinary ability in the arts as set forth at 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). Because the Petitioner has not indicated or established that the Beneficiary has been nominated for or received a significant national or international award or prize, it must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). The Director found that the Petitioner did not met any of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). On appeal, the Petitioner asserts that it meets three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B)(*1*)-(*6*). After reviewing all of the evidence in the record, we find that the exhibits do not satisfy at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). We will analyze the evidence submitted under each of those criteria below.[3]

> *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*).

The Petitioner has provided promotional posters and photographs that indicate that the Beneficiary has been a keyboardist for several bands including [redacted] and [redacted], and the [redacted]. The record also indicates that the Beneficiary was the music arranger and performed on [redacted]'s CD [redacted], and performed on [redacted]'s CDs [redacted] and [redacted]. Several of the posters contain pictures showing that the Beneficiary is a band member. None of the posters specifically mentions the Beneficiary by name. This evidence does not establish that the Beneficiary performed services in a lead or starring role in those productions or events. In addition, the Petitioner has not submitted critical reviews, advertisements, publicity releases, publications or other evidence to establish, as required, that the events themselves have a distinguished reputation. As described above, the posters and photographs regarding events at which the Beneficiary has performed do not establish that the bands' live shows have distinguished reputations.

[3] On appeal, the Petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

Further, in order to meet this criterion, the Petitioner must establish that the Beneficiary *will perform* services as a lead or starring participant in productions or events which have a distinguished reputation upon approval of the petition. The evidence indicates that if the requested classification is granted the Beneficiary, as a musician with the petitioning band, shall participate in developing at least five albums. The Petitioner has also submitted a three-year performance schedule showing the Beneficiary will be performing with the petitioning band at various performance venues in Texas. The Petitioner has not submitted, as required, critical reviews, advertisements, publicity releases, publications or other evidence that would distinguish the Beneficiary's proposed role as leading or starring within the company's upcoming productions. The Petitioner also has not documented that its upcoming productions are considered to be events with a distinguished reputation.

Based on the foregoing, the submitted evidence does not satisfy 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*).

The Petitioner maintains that the Beneficiary satisfies this criterion based upon his past role with [redacted] in Venezuela. A lead or starring role should be apparent by its position in the overall organizational hierarchy and should be accompanied by the role's matching duties. A critical role should be apparent from a beneficiary's impact on the organization or the establishment's activities. The Petitioner provided a letter from [redacted], the founder of [redacted], who states that the Beneficiary was a teacher and "head of the piano chair" of the organization for 10 years. He praises the Beneficiary's "talent, professionalism and responsibility with his students." Although [redacted]'s recommendation letter praises the Beneficiary's talents, it does not detail that he held a starring or leadership position, or the critical nature of his role with the organization. Based on the above, the evidence submitted does not establish that the Beneficiary's past role for that establishment was in a lead, starring or critical capacity.

The Petitioner must also 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 evidence indicates that the Beneficiary will work as a musician for the petitioning band, developing at least five albums and performing at various venues in Texas. The Petitioner has submitted three letters from its president, [redacted], including a new letter on appeal. He asserts that the Beneficiary's "extensive" experience as a pianist, arranger and producer "is of vital importance to the shows offered by our group" which is "constantly working for both the Hispanic and American market." Here, [redacted]'s letters do not describe how the Beneficiary will contribute to the petitioning organization as a whole, or how his position fits within the overall hierarchy of the company. His letters do not explain how, in his proposed role as a musician for the petitioning group, the Beneficiary will be responsible for the Petitioner's success or standing to a degree consistent with the meaning of a "critical role."

In light of the above, the Petitioner has not established that the Beneficiary satisfies 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)(iv)(B)(*5*).

The Petitioner provided several testimonial letters in support of the petition from music professionals and those working in the field of music, stating that the Beneficiary has extraordinary skills in the field of music.[4] We determine that those testimonials do not satisfy this criterion. Upon review, we note that the letters submitted are from the Beneficiary's own current and former colleagues and, therefore, do not demonstrate the Beneficiary's significant recognition outside of that circle. In addition, the letters primarily discuss the Beneficiary's innate talent and artistry rather than his achievements as a musician. The authors did not address any specific achievements of the Beneficiary and do not explain how the Beneficiary's achievements to date have received significant recognition from organizations, critics, government agencies or other recognized experts in the field.

For instance, [redacted], a flutist, states that between 2010 and 2015 the Beneficiary was a member of his band, [redacted] as a pianist and musical arranger, and describes him as "disciplined." [redacted] a professional guitarist, indicates that the Beneficiary has played keyboard with his jazz quartet for more than 15 years, including on two albums, and praises his professionalism. [redacted] an audio engineer who has worked with the Beneficiary since 2000, states that the Beneficiary is "in demand" for his understanding of the "complexity" of Latin music rhythms. [redacted] a singer, indicates that between January and June 2017 the Beneficiary was the pianist and musical arranger of her band, [redacted] on the show [redacted] and she praises his "professionalism." Other authors praise the Beneficiary's artistry and versatility.

In addition, the Petitioner has submitted the aforementioned three letters from its president, [redacted] He provides that the Beneficiary has performed with the petitioning group and played a role "in the development of important shows" on numerous occasions. He asserts that the Beneficiary's "extensive experience as a pianist, arranger and producer" allows him to "handle diverse musical genres ranging from Salsa, Cumbia, Merengue . . . Pop, Jazz, and Rock." He also notes that the Beneficiary is able to produce musical arrangements that "adapt and merge the different current musical trends."

On appeal, the Petitioner also provides a letter from [redacted] the singer who the Beneficiary accompanied as an O-2 nonimmigrant. He indicates that for 18 years the Beneficiary worked with him and his band [redacted] as a pianist, music arranger, and director, including playing in "more than 800 concerts." He describes the Beneficiary as an "expert" musician of "extraordinary abilities," able to "manage different genres and rhythms."

Further, we acknowledge that the Petitioner provided a "no objection" labor consultation letter from [redacted] of the American Federation of Musicians (AFM), stating that "the Draft I-129 Petition and supporting documentation . . . . clearly establishes that [the Beneficiary] is a musician of

[4] Although we discuss a sampling of letters, we have reviewed and considered each one.

extraordinary ability, which has been demonstrated by sustained international acclaim" and "meets the recently revised standards of distinction in the arts to qualify for an O-1 visa." While the letter satisfies the Petitioner's burden to submit a written advisory opinion from an appropriate consulting entity pursuant to 8 C.F.R. § 214.2(o)(2)(ii)(D), it cannot be used for the dual purpose of satisfying the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B). Consultations are advisory and are not binding on USCIS. *See* 8 C.F.R. § 214.2(o)(5)(i)(D). Regardless, the letter does not constitute a letter from an expert attesting to the Beneficiary's receipt of significant recognition for achievements, as [redacted] does not explain how AFM reached this conclusion based on the evidence submitted with the petition.

We may, in our discretion, use as advisory opinion statements offered as expert testimony. *See Matter of Caron Int'l*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, we are ultimately responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought. *Id.* The submission of letters of support from the Beneficiary's personal contacts is not presumptive evidence of eligibility; we may evaluate the content of those letters as to whether they support the foreign national's eligibility. *Id.* at 795-796. The reference letters all praise the Beneficiary's talent and abilities. Such letters can provide useful information about a foreign national's qualifications or help in assigning weight to certain documents. Here, they do not explain how the Beneficiary's achievements to date have received significant recognition from organizations, critics, government agencies, or other recognized experts in the field for those achievements. Overall, while the Beneficiary has earned the respect of his colleagues in the field of music, the exhibits are insufficient to demonstrate that he has received significant recognition for achievements in the field

For these reasons, the Petitioner did not show that the Beneficiary satisfies this criterion.

III. CONCLUSION

The record does not satisfy, as required, the evidentiary criteria applicable to individuals of extraordinary ability in the arts: a significant national or international award or at least three of six possible forms of documentation. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). Consequently, the Petitioner has not established that the Beneficiary is eligible for the O-1 visa classification as an individual of extraordinary ability. 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.