U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-B-TV LLC

DATE: NOV. 8, 2019

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a television production business, seeks O-2 nonimmigrant visa classification for the Beneficiary as an accompanying individual to [redacted], a television producer and director of talent acquisition, whose petition for O-1 classification was filed concurrently. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(O)(ii), 8 U.S.C. § 1101(a)(15)(O)(ii).

The Director of the California Service Center approved the O-1 petition, but denied the Petitioner's request to extend the Beneficiary's O-2 status for three years. The Director determined that the record did not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the artistic performance of the O-1 individual, as required by section 101(a)(15)(O)(ii)(I) of the Act. The Director's decision ultimately found that issue to be dispositive for the case, and did not address the issue of the Beneficiary's skills and experience with the O-1 artist or with respect to a specific production.[1]

On appeal, the Petitioner submits a brief and additional documentation, arguing that the evidence satisfies the statutory and regulatory requirements and, thus, the Beneficiary is eligible for O-2 classification.

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

I. LAW

[1] The Director also concluded that the Beneficiary did not maintain his previous O-2 status. As noted by the Director, a Form I-140, Immigrant Petition for Alien Worker, filed on the Beneficiary's behalf by a different employer, was supported by an ETA Form 9089, Application for Permanent Employment Certification, in which the Beneficiary indicated that his employment with the Petitioner terminated on September 25, 2017. This issue was also the addressed in the Director's Notice of Intent to Deny (NOID) the instant petition. On appeal, the Petitioner provides arguments and evidence to establish that the Beneficiary was employed by the Petitioner for the duration of the prior petition's validity dates. The issue of whether the Beneficiary maintained his O-2 status lies outside our appellate jurisdiction. An application for extension is concurrent with, but separate from, the nonimmigrant petition. There is no appeal from the denial of an application for extension of stay filed on Form I-129, Petition for a Nonimmigrant Worker. 8 C.F.R. § 214.1(c)(5). Because the Beneficiary's maintenance of status issue is an extension issue, rather than a petition issue, we lack authority to decide this question.

Section 101(a)(15)(O)(ii) of the Act provides classification to a qualified alien who:

> (I) seeks to enter the United States temporarily and solely for the purpose of accompanying and assisting in the artistic or athletic performance by an alien who is admitted under clause (i) for a specific event or events;
>
> (II) is an integral part of such actual performance,
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> (III) has critical skills and experience with such alien which are not of a general nature and which cannot be performed by other individuals . . . .
>
> (IV) has a foreign residence which the alien has no intention of abandoning.

The regulations at 8 C.F.R. § 214.2(o)(4) provide, in pertinent part, the following requirements for an O-2 accompanying alien:

> (i) General. An O-2 accompanying alien provides essential support to an O-1 artist or athlete. Such aliens may not accompany O-1 aliens in the fields of science, business or education. Although the O-2 alien must obtain his or her own classification, this classification does not entitle him or her to work separate and apart from the O-1 alien to whom he or she provides support. An O-2 alien must be petitioned for in conjunction with the services of the O-1 alien.
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> (ii) Evidentiary criteria for qualifying as an O-2 accompanying alien –
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> * * *
>
> (B) Alien accompanying an O-1 alien of extraordinary achievement. To qualify as an O-2 alien accompanying O-1 alien involved in a motion picture or television production, the alien must have skills and experience with the O-1 alien which are not of a general nature and which are critical based on a pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post- production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.
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> (C) The evidence shall establish the current essentiality, critical skills, and experience of the O-2 alien with the O-1 alien and that the alien has substantial experience performing the critical skills and essential support services for the O-1 alien.

II. ANALYSIS

The Petitioner seeks to extend the Beneficiary's O-2 nonimmigrant status and has offered him continuing employment in the position of television producer. The Beneficiary was previously granted O-2 classification as an accompanying individual to [redacted] for the period from May 8, 2015 to November 19, 2017. The Director determined that the Petitioner did not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the O-1's artistic performance as a director of talent acquisition and executive producer. As discussed below, we agree with the Director's determination.

In its initial letter, the Petitioner explained that it is a talent agency that represents performing artists and produces television programs. It stated that it will continue to employ the O-1 artist as its Director of Talent Acquisition and Executive Producer.[2] It contended that the O-1 artist will require the "critical and indispensable support" of the Beneficiary, his "fellow producer," who "will assist and support the O-1 Artist during events, productions and artistic representation." It further indicated that the Beneficiary has previously worked for the O-1 artist, and described him as "uniquely qualified to work on the upcoming productions and with the O-1 Artist."

The Petitioner submitted a summary of the terms of its employment agreement with the Beneficiary, an itinerary, a letter from the O-1 artist describing the Beneficiary's essentiality to the performance of his duties, and two consultations, one from an appropriate union and one from an appropriate management organization, pursuant to the regulation at 8 C.F.R. § 214.2(o)(2)(ii). The Petitioner also provided the Beneficiary's undated biography, which states that he has been working for five years as a "producer and entrepreneur," and has produced the television shows [redacted] and [redacted] the video for the [redacted], and has been part of the productions [redacted], [redacted], [redacted], and [redacted]. The biography further indicated the Beneficiary previously ran his family's import-export business and had opened his own business.

The Director issued a request for additional evidence ("RFE") in which she requested, *inter alia,* evidence establishing that the Beneficiary has not been working "separate and apart from the O-1 whom he or she supports," including the following: (1) copies of the Beneficiary's 2015 and 2016 W-2, 1099-MISC or other documents evidencing wages paid to him; and (2) copies of the Beneficiary's 2015 and 2016 Form 1040, U.S. Individual Income Tax Returns. Within the Petitioner's RFE response, it provided a copy of the Internal Revenue Service Form 1099 it issued to the Beneficiary for 2016, and a copy of the Beneficiary's U.S. Federal Income Tax Return for 2016. That tax return indicates he received income from self-employment from two sources: as an "artistic director" with the Petitioner, and from [redacted]. The Director denied the petition, concluding that "[e]ven if the [B]eneficiary is supporting the endeavors of the O-1 artist, the [B]eneficiary does not appear to be in the U.S. solely to support the O-1 based on his income derived from [redacted]

On appeal, the Petitioner acknowledges that the Beneficiary "received income from [redacted] in Venezuela," but asserts that the Beneficiary "worked exclusively for [the Petitioner] in the

[2] The records at the Florida Division of Corporations indicate that the O-1 artist is the owner-member of the petitioning limited liability company.

United States" and that he "was not operating a foreign business in the United States." It provides a letter from [redacted], an accountant from the firm that prepared the Beneficiary's 2016 Federal Income Tax Return, which states that the "income reported on Schedule C is for self-employed consulting income earned in Venezuela." This evidence does not sufficiently address the issue of whether the Beneficiary worked separate and apart from the O-1 artist during his authorized O-2 employment with the O-1 artist. The Petitioner has not provided evidence pertaining to the details of the Beneficiary's self-employment as a consultant, such as documentation identifying the services he provided, where and when he provided those services, the clients he served, the duration of the employment, and whether the employment was in a full-time or part-time capacity. The Petitioner must resolve any inconsistencies in the record with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the Petitioner has not done so.

The evidence submitted by the Petitioner does not establish that the Beneficiary seeks to enter the United States solely for the purpose of accompanying and assisting in the artistic performance by the O-1 artist, as required. The record indicates that during the period of the Beneficiary's authorized O-2 employment with the O-1 artist the Beneficiary worked separate and apart from the O-1 artist. The O-2 classification does not entitle the Beneficiary to work separate and apart from the O-1 artist to whom he provides support. *See* 8 C.F.R. § 214.2(o)(4)(i). In light of the above, the appeal will be dismissed.[3]

III. CONCLUSION

The Petitioner has not shown eligibility to classify the Beneficiary as an O-2 accompanying individual to an O-1 artist, because it has not established that he is entering the United States temporarily and solely for the purpose of accompanying and assisting in the artistic performance by the O-1 artist. 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-B-TV LLC*, ID# 3072272 (AAO Nov. 8, 2019)

[3] As previously mentioned, we conduct appellate review on a *de novo* basis. *See Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). Here, the Petitioner has not established that the Beneficiary is coming to the United States solely for the purpose of accompanying and assisting in the artistic performance of the O-1 individual, in accordance with the applicable statutory and regulatory provisions. Accordingly, the appeal will be dismissed. Given that this issue is dispositive for the case, we reserve the remaining issues. That is, as the ground discussed above is dispositive of the Petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues that we observe in the record of proceeding.