U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-S-C- INC.

DATE: SEPT. 29, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a restaurant chain and food development business, seeks to temporarily employ the Beneficiary as a photographer. To do so, it seeks to classify him 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 initially approved the Form I-129, Petition for a Nonimmigrant Worker, granting the Beneficiary O-1 classification. The Director subsequently issued a notice of intent to revoke (NOIR) the approval of the petition. After reviewing the response to the NOIR, the Director issued a notice of revocation (NOR), finding that the Petitioner no longer employed the Beneficiary in the capacity specified in the petition, the statement of facts contained in the petition was not true and correct, and the approval of the petition involved gross error. 8 C.F.R. § 214.2(o)(8)(iii)(A)(*1*), (*2*), and (*5*).

On appeal, the Petitioner explains that it fully intended to pay the Beneficiary an annual salary of $70,000 at the time of filing the petition, but became unable to do so because of "numerous financial shortcomings." It contends that revocation of the petition approval constituted an abuse of discretion and was contrary to the previous determination and a prior approved petition filed on the Beneficiary's behalf for O-1 classification. It maintains that the evidence satisfies the regulatory requirements and thus the Beneficiary is eligible for O-1 classification.

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.

In addition, the regulations contain additional evidentiary requirements for O foreign nationals, including documentation relating to the terms of the proposed employment and the nature of the activities and events in which the beneficiary will participate. 8 C.F.R. § 214.2(o)(2)(ii). The regulations further state that if "material changes" are made in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition, an amended petition on Form I-129 must be filed. 8 CFR §214.2(o)(2)(iv)(D).

Finally, the regulation at 8 C.F.R. § 214.2(o)(8)(i)(B) provides that the Director may revoke a petition approval at any time, even after the validity of the petition has expired. The regulation at 8 C.F.R. § 214.2(o)(8)(iii) sets forth the grounds for revocation on notice:

> (A) *Grounds for revocation.* The Director shall send to the petitioner a notice of intent to revoke the petition in relevant part if it is determined that:
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> (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;
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> (2) The statement of facts contained in the petition was not true and correct;
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> (3) The petitioner violated the terms or conditions of the approved petition;
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> (4) The petitioner violated the requirements of section 101(a)(15)(O) of the Act or paragraph (o) of this section; or
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> (5) The approval of the petition violated paragraph (o) of this section or involved gross error.
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> (B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30

days of the date of the notice. The Director shall consider all relevant evidence presented in deciding whether to revoke the petition.

II. ANALYSIS

A. Introduction

The Petitioner filed the Form I-129, indicating on the petition that it seeks to employ the Beneficiary as a photographer at its California restaurant, at an annual salary of "$70,000+" for a three-year period. On the O and P Classification Supplement to Form I-129, the Petitioner described his proposed duties as follows: "[The Beneficiary] will be responsible for all company photography for use in advertising, brand and name recognition, image development and communication of corporate image and branding."

In its initial letter, the Petitioner explained that it operates six restaurants in California, identified in its accompanying submission as located in and The Petitioner attached its 2013 employment agreement with the Beneficiary, pursuant to which he would work at its location[1] at an annual salary of $70,000 plus "annual discretionary bonuses." The Director approved the petition for the validity period September 24, 2013 to September 15, 2016.

For the reasons discussed below, we find the Petitioner has not demonstrated that it employed the Beneficiary in the capacity specified in the visa petition, and that its evidence satisfied any of the evidentiary criteria applicable to individuals of extraordinary ability in the arts. Accordingly, we find that the Director properly revoked the approval of the petition.

B. Whether the Petitioner Employed the Beneficiary as Specified in the Petition. 8 C.F.R. § 214.2(o)(8)(iii)(A)(*1*).

The Director revoked the approval of the petition on the basis that the Petitioner had not demonstrated that it continued to employ the Beneficiary in the capacity specified in the instant petition for the duration of the validity period. We agree with the Director's determination.

After the petition's approval, the Director sent a NOIR to the Petitioner, advising it that U.S. Citizenship and Immigration Services (USCIS) had obtained new information regarding the Beneficiary's employment. Specifically, the NOIR advised the Petitioner of the following information. In January 2016, when the Beneficiary was interviewed in reference to a Form I-485,

[1] It is unclear at which of the Petitioner's restaurants the Beneficiary will work, as the petition and the employment agreement list different work locations. The regulation at 8 C.F.R § 214.2(o)(2)(iv)(A) requires an itinerary with the dates and locations of work where the Beneficiary will work at more than one location, revealing that the location where he will work is relevant. The Petitioner must resolve any discrepancies 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). The Petitioner's evidence does not resolve this discrepancy.

Application to Register Permanent Residence or Adjust Status, it was determined that the Petitioner no longer employed him as specified in the instant petition. At the conclusion of the adjustment interview, USCIS issued a request for evidence verifying the Beneficiary's employment, including his three most recent pay stubs. The Beneficiary's response included a statement that paystubs were not available, and an IRS Form W-2, Wage and Tax Statement, for 2015 showing that the Petitioner paid him $9,183 in wages that tax year.[2]

In response to the NOIR, the Petitioner submitted a letter from its CEO, acknowledging that "[in] 2014-2015" it did not continue to employ the Beneficiary at the wage stated in the petition, but "was forced to change the terms of [his] employment" due to "financial hardships" and compensated him "on a project-by-project basis upon estimates accepted and agreed to by [the Petitioner]." While counsel maintained that the Beneficiary continued to perform the duties listed in the petition for the duration of the validity period, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations. Here, the Petitioner has not provided sufficient corroborating evidence. As the Director noted, the record does not demonstrate, for example, that in 2016 the Beneficiary performed any photography services for the Petitioner and that it paid him for such work.

In addition, we conclude that amending the terms of the Beneficiary's employment constituted a material change, therefore requiring the Petitioner to submit an amended O-1 petition with USCIS. As noted above, if "material changes" in the terms and conditions of employment or the beneficiary's eligibility are made, an amended petition must be filed with the service center of original jurisdiction to reflect those changes. 8 C.F.R. §214.2(o)(2)(iv)(D). On appeal, the Petitioner emphasizes that at the time of filing the petition it fully intended to pay the Beneficiary the stated annual salary of $70,000 but became unable to do so because of "numerous financial shortcomings." Regardless of original intent, however, if a material term and condition of employment or the beneficiary's eligibility changes, an amended or new petition must be filed.

C. Whether the Approval of the Petition Involved Gross Error. 8 C.F.R. § 214.2(o)(8)(iii)(A)(*5*).

The Director revoked the approval of the petition on the additional basis that it involved gross error because the Petitioner's evidence did not satisfy the evidentiary criteria set forth at 8 C.F.R. 214.2(o)(3)(iv)(A) or (B). Absent evidence of a significant national or international award or prize like the Academy Award, the Petitioner sought 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 did not satisfy any of the evidentiary criteria. On appeal, it maintains that the evidence meets the criteria at 8 C.F.R § 214.2(o)(3)(iv)(B)(*1*), (*2*), (*3*), and (*5*). As discussed below, we concur with the Director's

[2]The Beneficiary's response also provided a letter from the Petitioner's president contending that it continued to employ him, and his written contract with the Petitioner dated March 22, 2016, indicating it will pay him an hourly rate of $65 upon approval of the Form I-485.

determination that the evidence does not satisfy any of the relevant criteria at 8 C.F.R § 214.2(o)(3)(iv)(B). Accordingly, we conclude that the Director properly revoked the approval of the petition on this additional basis.

1. Evidentiary Criteria [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*).

We conclude that the Petitioner's evidence does not establish that the Beneficiary has performed services as a lead or starring participant in productions or events which have a distinguished reputation. The Petitioner maintains that the Beneficiary satisfies this criterion based upon his past work on its annual marketing campaign, providing photography for its promotional calendar, as well as those of its "partners," and It provided copies of its 2013 calendar and those of for the years 2009, 2010, and 2013, containing one-sentence captions crediting the Beneficiary with having taken the accompanying photographs. On appeal, it contends that since it is "a critically acclaimed brand and loved by consumers throughout Southern California," and its partners are all "distinguished," the annual marketing campaigns are also distinguished productions and events. The plain language of this criterion requires the submission of 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. The Petitioner did not submit the required evidence that would demonstrate that the Beneficiary's role in its annual marketing campaign as leading or starring and establish the distinguished reputation of those events. Even if the Petitioner had submitted evidence establishing its own reputation, evidence of the distinguished reputation of a marketing campaign's subject, alone, does not equate to evidence of the distinguished reputation of the marketing campaign itself.

In addition, the record does not demonstrate that the Beneficiary will prospectively serve as such a participant. At the time of filing, the Petitioner attached its 2013 employment agreement with the Beneficiary, pursuant to which he would work as a photographer at its location. According to the petition, his duties will include being responsible for all company photography for use in advertising, brand and name recognition, image development and communication of corporate image and branding. On appeal, the Petitioner contends that the Beneficiary will "head up all photography for [its] annual calendar." It did not, however, offer evidence that would denote his

[3] We have reviewed all of the evidence and will address those criteria the Petitioner avers that the Beneficiary meets or for which the record includes relevant and probative evidence.

[4] The evidence indicates that the Beneficiary may have worked for these companies without first obtaining the required authorization from USCIS. The regulation at 8 C.F.R. 214.2(o)(2)(iv)(B) states that if a beneficiary will work for more than one employer within the same time period, each employer must file a separate petition, unless an agent files the petition pursuant to 8 C.F.R. § 214.2(o)(2)(iv)(E). The Petitioner in this matter filed as an employer, not as an agent.

role as leading or starring within those upcoming events, and demonstrate their distinguished reputation.

> *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 copies of the Beneficiary's photography work and articles pertaining to him, published in Brazilian surfing magazines. We conclude that it has not established that the evidence meets the plain language of this criterion. The Petitioner submitted two articles from magazine -- one written by the Beneficiary in the edition ' and one written about his photography career in the edition ' It also submitted pages from and magazines containing one-sentence captions crediting the Beneficiary with having taken the accompanying photographs. First, the record does not contain probative evidence showing that the publications and qualify as a "major" newspaper, trade journal, or other publication. [5] The circulation statistics submitted indicate that they do not have significant national or international distribution. In addition, the Petitioner has not established that publication of the Beneficiary's photographs, article, and biography in a surfing magazine is evidence of national recognition for his achievements in the field of photography. The Petitioner has not established that the above-noted publications enjoy any readership outside of the surfing community.[6]

> *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 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. It has not offered information that would elucidate where his past position fell in the Petitioner's overall hierarchy, or demonstrate how his position impacted the organization. In addition, the record does not establish that the Petitioner enjoys a distinguished reputation. Although individual customers highly praise its restaurants, these reviews do not establish the Petitioner's reputation in the field. The Beneficiary's resume also lists his past work for organizations in Brazil, including the magazines and The record lacks employment verification letters from representatives of and establishing that the Beneficiary has held a lead or critical role with respect to those establishments.

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[5] 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.

[6] While the record also includes cover images from the magazines and that the Petitioner contends were taken by the Beneficiary, it has not provided information from those publications crediting him as the photographer, and the record lacks circulation or distribution information relating to and

While the evidence does indicate that the Beneficiary held a leading role with respect to magazine,[7] the submitted materials do not establish that and described in the record as surfer publications, enjoy a distinguished reputation in his area of expertise.

Further, the evidence does not establish that the Beneficiary's prospective role with the Petitioner would satisfy the requirement that he will be performing in a lead, starring, or critical role for the organization. It has not offered information that would elucidate where his proposed position falls in the overall hierarchy of its organization or his proposed impact on the company.

> *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).

Under this criterion, the Petitioner provided evidence submitted in support of prior petitions, including several testimonial letters and evidence of the Beneficiary's receipt of two awards. We determine that the submitted materials do not satisfy this criterion.

The record contains a letter from CEO of a California company, discussing preparations for the a documentary film event. He identifies the Beneficiary, then working for as the project coordinator. Other promotional materials describe the five-month project as "the first human ' but do not indicate that this project was completed. The Petitioner provided a letter from president of a California marketing company, stating that he has known the Beneficiary for 15 years and describing him as "an extraordinary graphic artist and photographer."[8] The Petitioner also submitted a letter from president of the eyewear company indicating that he worked with the Beneficiary for several years and that he is one of the top professionals in the fields of graphic design, photo editing and action photography. The evidence further includes a letter from president of explaining that he has utilized the Beneficiary's services through the company and praising his talents as a designer.

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. The record lacks documentary evidence showing that the Beneficiary has received such recognition.[9] The authors of the above-referenced letters mention the Beneficiary's talent as a

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[7] A letter from publisher, states that the Beneficiary is the magazine's photo editor and is on its board of directors. In addition, other evidence indicates that he is responsible for its advertising in and is on the board of directors of its publisher,

[8] letterhead indicates that is a division of a company that filed a previous Form I-129 petition on the Beneficiary's behalf.

[9] We also note that all of the letters submitted are from the Beneficiary's own current and former colleagues and employers, and therefore do not demonstrate significant recognition outside of that circle.

photographer but do not explain in factual terms his "achievements" in the field. Without further information and evidence, those letters are not sufficient to demonstrate that the Beneficiary's achievements have received significant recognition. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding a foreign national's eligibility for the benefit sought. Further, regarding the submitted letters from and the Petitioner has not shown that those authors, as administrative staff of an eyewear and a snowboard company are recognized experts in the field of photography. 8 C.F.R. § 214.2(o)(2)(iii)(B). Although they praise the Beneficiary's artistry, they do not establish their credentials as recognized experts in the field.

Finally, the Petitioner maintains that the Beneficiary's receipt of two awards satisfies this criterion. The Beneficiary won the magazine award for in 2001. In addition, it submitted evidence that a second-place award at the show in was attributed to the Beneficiary, although not awarded to him individually, for an automotive product's package design. Upon review, the Petitioner has not established the significance of these awards in the Beneficiary's field of expertise.[10]

The record contains a letter from the publisher of magazine, discussing the Beneficiary's magazine award.[11] He described as having been Brazil's "leading magazine in the surf industry" until its closure in 2003. He explained that the award was voted by the magazine's publishing group, readers, and subscribers. Although the magazine's publisher and its readership recognized the Beneficiary's skills and abilities, the Petitioner has not established that receipt of the award constitutes significant recognition in the field of photography. The Petitioner also provided a letter from CEO of stating that the packaging created by the Beneficiary helped his automotive product win runner-up for the award at 2012 show in According to the evidence submitted, the awards are open only to and members. While the show appears to be a high-profile national automotive event, the Petitioner has not established that receipt of the award constitutes "significant recognition for achievements from organizations . . . in the field," pursuant to the plain language of the criterion.

2. Summary

In sum, based on the above, the Petitioner's evidence 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).

[10] While the Petitioner also refers to the Beneficiary's receipt in 1996 of two additional photography awards, the evidence of record does not establish either his actual receipt of those awards or the significance of the awards in the field of expertise.

[11] indicates that when ended, "part of the group became the current "

We note that the Petitioner contends revocation of the petition approval constituted an abuse of discretion, because USCIS previously approved a petition for O-1 classification filed on the Beneficiary's behalf.[12] We are not required, however, to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See Matter of Church Scientology Int'l, 19 I&N Dec. 593, 597 (Comm'r 1988); see also Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987). Further, we are not bound to follow a contradictory decision of a service center. La. Philharmonic Orchestra v. INS, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000). For the reasons previously discussed, we do not find that the Director's revocation of the petition approval constituted an abuse of discretion.

D. Whether the Statement of Facts Was True and Correct. 8 C.F.R. § 214.2(o)(8)(iii)(A)(*2*).

As an additional ground for revocation, the Director concluded that, based upon the description of his duties listed on the O and P Classification Supplement to Form I-129, the Beneficiary was not continuing to work in the area of extraordinary ability, as indicated in the petition. *See* Section 101(a)(15)(O); 8 C.F.R. § 214.2(o)(1)(ii)(A)(*1*). Specifically, the Director found that the duties of "corporate image and branding" were outside of the photography field. However, as the Petitioner has not established the Beneficiary's extraordinary ability, we need not reach the issue of whether he was continuing to work in the area of extraordinary ability.

III. CONCLUSION

For the reasons discussed above, the record supports the Director's determination that the Petitioner did not employ the Beneficiary according to the terms and conditions of the petition, and that the record does not establish his eligibility for the O-1 visa classification as a foreign national with extraordinary ability in the arts. Accordingly, the Director properly revoked the approval of the petition.

ORDER: The appeal is dismissed.

Cite as *Matter of T-S-C- Inc.*, ID# 463084 (AAO Sept. 29, 2017)

[12] As previously noted, USCIS records reflect that a previous petition for O-1 status filed by different petitioner was approved.