



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 27966506

Date: AUG. 31, 2023

Appeal of Vermont Service Center Decision

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

The Petitioner, an artist management and booking agency, seeks an extension of petition validity for the Beneficiary as a clarinetist of extraordinary ability. To do so, the Petitioner pursues O-1 nonimmigrant classification, available to individuals 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 Vermont Service Center denied the petition, concluding that the Petitioner did not establish the Beneficiary's satisfaction of the initial evidentiary criteria applicable to individuals of extraordinary ability in the arts: nomination for or receipt of a significant national or international 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, 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." *See* 8 C.F.R. § 214.2(o)(3)(ii). Next, DHS regulations set forth alternative initial evidentiary criteria for establishing a

beneficiary's sustained acclaim and the recognition of achievements. A petitioner may submit evidence either of nomination for or receipt of "significant national or international awards or prizes" such as "an Academy Award, an Emmy, a Grammy, or a Director's Guild Award," or at least three of six listed categories of documents. *See* 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).

II. ANALYSIS

The Director declined to defer to the approval of the previous petition filed by the Petitioner on behalf of the Beneficiary, concluding that the Petitioner did not establish that the Beneficiary qualified as an individual of extraordinary ability in the field of arts.¹ Current USCIS policy provides that officers should not defer to prior approvals in cases where: there was a material error involved with previous approval(s); there has been a material change in circumstances or eligibility requirements; or there is new material information that adversely impacts the petitioner's or beneficiary's eligibility.² As stated, we are not required to approve subsequent petitions where eligibility has not been demonstrated strictly because of a prior approval.³ The circumstances presented here do not show any error on the part of the Director in applying that deference policy.

In denying the petition, the Director determined that the Petitioner did not demonstrate that the Beneficiary has been nominated for, or has been the recipient of, significant national or international awards or prizes under 8 C.F.R. § 214.2(o)(3)(iv)(A). The Petitioner does not contest this determination on appeal, nor does the record support a finding of such awards or prizes. As the Petitioner provides no evidence or arguments addressing this criterion on appeal, we consider this issue to be abandoned. *See Matter of R-A-M-*, 25 I&N Dec. 657, 658 n.2 (BIA 2012) (stating that when a filing party fails to appeal an issue addressed in an adverse decision, that issue is waived). *See also Sepulveda v. U.S. Atty. Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (finding plaintiff's claims abandoned as he failed to raise them on appeal to the AAO). Accordingly, we will not further address this criterion in our decision.

¹ Current policy guidance concerning deference to prior approvals is located at 2 *USCIS Policy Manual* A.4(B), <https://www.uscis.gov/policymanual>; *see also* USCIS Policy Alert, PA-2021-05, *Deference to Prior Determinations of Eligibility in Requests for Extensions of Petition Validity* (Apr. 27, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210427-Deference.pdf>.

² 2 *USCIS Policy Manual*, *supra*, at A.4(B)(1).

³ *Id.* *See also 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). Furthermore, 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 *3 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001).

In addition, the Director concluded that the Petitioner fulfilled only one of the alternate initial evidentiary criteria, 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)(iv)(B)(5). The Petitioner maintains on appeal that the Beneficiary fulfills two additional criteria: lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) and lead, starring, or critical role for organizations and establishments at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3).⁴ For the reasons discussed below, the Petitioner did not establish the Beneficiary meets at least three of the regulatory 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).

This criterion requires evidence of the Beneficiary's past lead or starring participation in distinguished productions or events, and the Beneficiary's prospective lead or starring participation in distinguished productions or events.⁵ The Director determined the Petitioner established the Beneficiary's past services in productions with distinguished reputations. Regarding the future component of this criterion, the Director concluded that the Petitioner did not show the Beneficiary would perform in a lead or starring role in productions or events and the distinguished reputations of those prospective productions or events.

On appeal, the Petitioner maintains the Beneficiary will perform services as a lead or starring participant as a clarinet instructor for [REDACTED].⁶ The record shows that [REDACTED] is a nonprofit organization whose mission is to connect low-income youth with professional musicians for free music instruction in schools in [REDACTED] Texas. As it relates to the Beneficiary's prospective services, the Petitioner's initial cover letter did not assert the Beneficiary would perform services as a lead or starring participant in productions or events with distinguished reputations. However, in response to the Director's RFE, the Petitioner claimed:

[REDACTED] can be considered a distinguished production because of its significant impact on providing high-quality music education to low income students. . . . The fact that all of these services are provided to students, families, schools, and districts at no cost further emphasizes the exceptional nature of [REDACTED] work.

⁴ On appeal, the Petitioner also does not dispute the Director's finding that it had not established the Beneficiary's eligibility under the published materials criterion at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2). Additionally, the Petitioner did not claim eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) or (6) before the Director or on appeal. As the Petitioner provides no evidence or arguments addressing these three alternate initial evidentiary criteria on appeal, we consider these issues to be abandoned. See *Matter of R-A-M-*, 25 I&N Dec. at 658 n.2; see also *Sepulveda v. U.S. Atty. Gen.*, 401 F.3d at 1228 n. 2; *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *9.

⁵ See generally 2 *USCIS Policy Manual*, M.4(D)(2)(appendix), <https://www.uscis.gov/policymanual>.

⁶ The Petitioner does not pursue its previous claim that the Beneficiary's proposed roles as an extra/substitute clarinetist at [REDACTED] Symphony Orchestra and as a clarinet private instructor at [REDACTED] Middle School, [REDACTED] High School, [REDACTED] Middle School, [REDACTED] Middle School, and [REDACTED] High School satisfy the future component of this criterion.

However, this criterion differs from the third criterion, which is specific to organizations and establishments.⁷ Further, the Petitioner has not demonstrated that every upcoming production from a distinguished organization automatically establishes the distinguished nature of those productions.⁸

Notwithstanding, the Petitioner presented an itinerary at initial filing, indicating that Beneficiary's duties for [REDACTED] will include teaching clarinet for approximately 12 hours weekly and performing as a clarinetist at the organization's "End of Year Show (May 2023/2024)." In addition, the Petitioner submitted a letter from a representative of [REDACTED] who indicates that the Beneficiary will continue to teach "weekly lessons to 8-10 students every year at \$50 per hourly lesson." The letter explained that her responsibilities will include teaching private lessons, master classes, and clinics to clarinet students in the program; coaching them to perform the regular concerts with the [REDACTED] [REDACTED] and assisting them in the preparation of repertoire for competitions.

Further, the Petitioner initially provided a program for the 2017 [REDACTED] annual student-mentor showcase at [REDACTED] at which the Beneficiary performed with middle and high school student bands. The submitted performance program lists the Beneficiary as one of 12 guest artists. Upon review of the program, it appears that this annual performance serves as a showcase for [REDACTED] student musicians, and it cannot be determined based on the program alone that the Beneficiary's provided services will be in a lead or starring role in this pre-professional production.

Moreover, to meet this criterion, the Petitioner must submit evidence in the form of critical reviews, advertisements, publicity releases, publications, contracts, or endorsements.⁹ Advertisements, publicity releases, and endorsements are promotional materials.¹⁰ Endorsements are public facing and serve a marketing purpose.¹¹ This exhaustive list does not include unpublished testimonial or recommendation letters.¹² Nevertheless, the above letter does not explain how the Beneficiary will perform services as a lead or starring participant.¹³ Nor does the letter specifically identify any proposed "productions or events which have a distinguished reputation."¹⁴ Instead, the letter references the Beneficiary's skills and abilities as a clarinet instructor and mentor.

Furthermore, although the Petitioner presented an itinerary at initial filing, similar to the foregoing discussion the Petitioner did not demonstrate how an itinerary meets any of the categories of evidence

⁷ See also generally 2 USCIS Policy Manual, *supra*, at M.4(D)(2)(appendix).

⁸ For instance, a recognized studio may release a movie garnering negative reviews with critics or "bombs" at the box office, which would not be indicative of a distinguished movie.

⁹ See generally 2 USCIS Policy Manual, *supra*, at M.4(D)(2)(appendix).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See generally 2 USCIS Policy Manual, *supra*, at M.4(D)(2)(appendix) (instructing that in evaluating whether the beneficiary's participation in a past or future event or production qualifies as lead or starring, officers may consider, for example, whether the beneficiary's role is highlighted or featured in advertisements, publicity releases, critical reviews, or other materials, and the contractual terms offered to the beneficiary may also be relevant to establishing the lead or starring nature of the beneficiary's participation, especially with regard to a prospective event or production).

¹⁴ *Id.* (providing that with regard to demonstrating the distinguished reputation of a prospective event, a petitioner may submit documentation such as advance publicity, endorsements, or other evidence regarding the level of anticipation of the relevant event or production; however, as the available evidence relating to the reputation of a prospective production or event will often be limited, officers may also consider factors such as the reputation of similar past events or productions by the same individuals or entities).

under this regulatory criterion. Regardless, as it pertains her proposed role with [] the itinerary does not establish the Beneficiary will serve as a lead or starring participant in productions or events, or reflect productions or events with distinguished reputations.

Because the Petitioner did not comply with the evidentiary requirements under the regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1), the Petitioner did not show that the Beneficiary 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. Accordingly, the Petitioner did not show the Beneficiary meets this criterion.

III. CONCLUSION

We find that the Petitioner did not demonstrate that the Beneficiary meets the criterion relating to lead or starring participant in productions or events at 8 C.F.R. § 214.2(o)(3)(iv)(B)(1). Although the Petitioner claims the Beneficiary's eligibility for an additional criterion on appeal, relating to lead, starring, or critical role for organizations or establishments at 8 C.F.R. § 214.2(o)(3)(iv)(B)(3), we need not reach this additional ground, because it cannot fulfill the initial evidentiary requirement of at least three criteria.

We also need not provide a totality determination to establish whether the Beneficiary has sustained national or international acclaim, has received a high level of achievement, and has been recognized as being prominent, renowned, leading, or well-known in the field of arts. *See* section 101(a)(15)(O)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii) and (iv).¹⁵ Accordingly, we reserve these issues.¹⁶ Consequently, the Petitioner has not demonstrated the Beneficiary's eligibility 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.

¹⁵ *See generally* 2 *USCIS Policy Manual*, M.4(D), <https://www.uscis.gov/policy-manual>.

¹⁶ *See INS v. Bagamasbad*, 429 U.S. 24, 25-6 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach); *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 an applicant is otherwise ineligible).