



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

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

In Re: 25767371

Date: MAR. 23, 2023

Appeal of California Service Center Decision

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

The Petitioner, a heating oil company and service, seeks to classify the Beneficiary as a marketing general manager. 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 California Service Center denied the petition, concluding 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

At initial filing, the Petitioner indicated it sought to classify the Beneficiary as an individual of extraordinary ability in the sciences, education, business, or athletics (O-1A).<sup>1</sup> To do so, a petitioner may submit evidence of either "a major, internationally recognized award, such as a Nobel Prize," or at least three of eight listed categories of documents. 8 C.F.R. § 214.2(o)(3)(iii)(A)-(B). Although the Petitioner provided various documents, the Petitioner did not indicate which categories of evidence, if any, the evidence pertained.

The Director issued a request for evidence (RFE) addressing numerous deficiencies in the filing. In response, the Petitioner stated that "[a]s it is of common knowledge, a Radio Announcer cannot be classified as a Science, Business, Athletics nor Educators," and "[w]e hereby request amend of Form I-129-O to request nonimmigrant classification of O1B (Arts) instead of nonimmigrant classification of O1A."<sup>2</sup> To do so, a petitioner may submit evidence either of nomination 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. 8 C.F.R. § 214.2(o)(3)(iv)(A)-(B). The Petitioner specifically indicated that the Beneficiary qualified for the following three criteria: national or international recognition under 8 C.F.R. § 214.2(o)(3)(iv)(B)(2), major commercial successes under 8 C.F.R. § 214.2(o)(3)(iv)(B)(4), and significant recognition under 8 C.F.R. § 214.2(o)(3)(iv)(B)(5).

Although the Director granted the request to amend the petition, the Director determined the Petitioner did not demonstrate the Beneficiary's eligibility for any of the three claimed categories of evidence. On appeal, the Petitioner contends the Beneficiary not only satisfies the three previously claimed criteria, but the Beneficiary also meets the leading or starring participant in productions or events criterion under 8 C.F.R. § 214.2(o)(3)(iv)(B)(1) and submits additional documentation. However, we will not consider new eligibility claims and evidence on appeal for the first time as they were not presented before the Director. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (providing that if "the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose" and that "we will adjudicate the appeal based on the record of proceeding" before the

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<sup>1</sup> *See* page 26 of Form I-129, O and P Supplement, section 1, question 3.

<sup>2</sup> Although the RFE response letter mentioned the Beneficiary as being a radio announcer, the Petitioner resubmitted a copy of the initial job offer reflecting its intention to hire the Beneficiary as a marketing manager.

Director); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). Here, the Petitioner had the opportunity to make any additional eligibility claims and submit documentation in response to the Director's RFE.

For the reasons discussed below, the Petitioner did not establish the Beneficiary meets the following regulatory criterion:

*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).

The regulation at 8 C.F.R. § 214.2(o)(3)(iv)(B)(2) requires evidence of a beneficiary's national or international recognition for achievements evidenced by critical reviews or other published materials in major newspapers, trade journals, magazines, or other publications. In determining whether the submitted evidence demonstrates that the beneficiary has achieved national or international recognition for achievements, officers consider both the content of the published material and the level of recognition enjoyed by the publication in which it appears.<sup>3</sup> For example, favorable coverage or publication of the beneficiary's work in major media, as demonstrated by high relative circulation, readership, or viewership figures, could establish national or international recognition of the beneficiary's achievements.<sup>4</sup>

The Petitioner argues:

[The Beneficiary] was featured in MAS, a newspaper, which is popular with potentially 60% of the Salvadoran population, and which is owned by Grupo Altamirano- one of the media conglomerates that control 65% of Salvadoran print and digital media. MAS published several news articles in which its journalists visited Beneficiary at [REDACTED]. [REDACTED] The articles personally refers to Beneficiary as an important DJ at [REDACTED] specifying that he used to be on air from 6 AM to 9 AM, a very popular timeslot with his target audience. The report also highlights that Beneficiary is also on air with popular music during weekends, noon and lunch time during the week. In essence, the MAS newspaper articles publicized Beneficiary's work as a popular radio DJ in El Salvador. Because of the wide circulation in El Salvador, being featured in MAS newspaper constitutes recognition of Beneficiary's commercial success in a major newspaper.

In response to the Director's RFE, the Petitioner submitted about two dozen items from MAS regarding [REDACTED]. The Petitioner, however, did not establish how the evidence qualifies as critical reviews or other published materials by or about the Beneficiary. In fact, the documentation relates to promotional material from the radio station rather than critical reviews or other published materials by or about the Beneficiary.<sup>5</sup> For example, the items announce:

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<sup>3</sup> See 2 USCIS Policy Manual, M.4(C)(2)(appendix), <https://www.uscis.gov/policymanual>.

<sup>4</sup> *Id.*

<sup>5</sup> Some of the items never mention the Beneficiary.

- [The Beneficiary] is a broadcaster and part of the [ ] family. He invites you to tune in to [ ] in this new month of 2016, because we come loaded with prizes and promotions for loyal radio listeners. Don't forget to listen to it on [ ] from Monday to Friday, starting at 6:00 AM.
- Ready to start the weekend with you and make you dance with the best of cumbia, salsa and merengue. [The Beneficiary] invites you to listen to him this Saturday starting at noon.
- Join [the Beneficiary] in a program designed to make your body move to the rhythm of merengue, cumbia and salsa. Enjoy lunch by [ ] and only good music. We guarantee you a better weekend.

Furthermore, the Petitioner did not show how the items reflect that the Beneficiary has achieved national or international recognition for achievements. Again, the items reflect promotional material from the radio station for various radio programs rather than critical reviews or other published material by or about the Beneficiary. Moreover, the Petitioner did not demonstrate how the promotional and advertising evidence indicates the Beneficiary's national or international recognition, nor do they identify or highlight the Beneficiary's achievements. The evidence, for instance, does not discuss the Petitioner's accomplishments or achievements, nor does it show that the Beneficiary received national or international recognition for them.

Finally, the Petitioner did not establish that *MAS* qualifies as a major newspaper, trade journal, magazine, or other publication. Although the Petitioner asserts that *MAS* "is popular with potentially 60% of the Salvadoran population," the Petitioner did not offer evidence either at initial filing or in response to the Director's RFE to support its claims.

For the reasons discussed above, the Petitioner did not demonstrate that the Beneficiary satisfies this criterion.

### III. CONCLUSION

The Petitioner did not establish that the Beneficiary meets the criterion relating to 8 C.F.R. § 214.2(o)(3)(iv)(B)(2). Although the Petitioner claims the Beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iv)(B)(4) and (5), we need not address these grounds 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 in his field of endeavor. *See* section 101(a)(15)(O)(i) of the Act and 8 C.F.R. § 214.2(o)(3)(ii) and (iv).<sup>6</sup> Accordingly, we reserve these issues.<sup>7</sup> 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.

<sup>6</sup> *See generally* 2 *USCIS Policy Manual*, *supra*, at M.4(D).

<sup>7</sup> *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) ("courts and agencies are not required to make findings on issues the decision of which is 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).

**ORDER:** The appeal is dismissed.