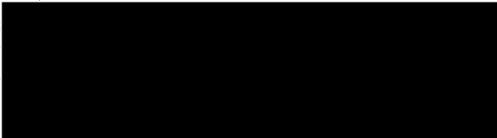




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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: [Redacted] Office: Vermont Service Center Date: JUN 21 2001

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(A)

IN BEHALF OF PETITIONER:



identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center. The Associate Commissioner, Examinations, dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a not-for-profit theater group which seeks to employ the beneficiary as a dance and language instructor. It seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established that the beneficiary enjoys sustained national or international acclaim. The Administrative Appeals Office ("AAO") affirmed the director's decision and dismissed the appeal.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

The bulk of counsel's brief on motion is essentially a duplicate of counsel's earlier appellate brief. The AAO has already addressed these arguments, and counsel does not address the AAO's prior findings in this regard. Repetition is not rebuttal.

Counsel then offers quotations from various media articles in the record. The AAO had already addressed these articles, stating:

The record contains no evidence that the publications which featured these articles consist of major media, with substantial national or international circulation. (Merely local publications, or publications which circulate only a small number of copies, cannot establish widespread national or international acclaim.)

On motion, counsel does not address the above finding in any way. The extent to which counsel chooses to quote the articles is utterly irrelevant to whether the articles derive from major national or international media.

Counsel also submits a list of previously submitted documents. Counsel does not clearly explain the purpose of this list. As noted above, the AAO considered the evidence of record when it rendered its prior decision. This evidence becomes no more persuasive by being included in a list. Counsel must explain how the AAO purportedly erred in rendering its decision; it cannot suffice for counsel simply to list the evidence and then declare that a petition supported by such evidence must be approved.

After the above recapitulation of the record and the appeal brief, counsel turns to the AAO's initial decision. Counsel states that the "AAO decision focuses on 'employer/petitioner's offer,'" whereas the classification sought does not require a job offer. While there is no statutory or regulatory requirement for a specific job offer, certainly the AAO is not compelled to ignore evidence of an existing job offer. Pursuant to section 203(b)(1)(A)(ii) of the Act and 8 C.F.R. 204.5(h)(4), the petitioner must show that the beneficiary intends to continue working in the area of claimed extraordinary ability.

In this case, the petitioner has claimed that the beneficiary's extraordinary ability is as a griot, or traditional West African storyteller. The record shows that the petitioner intends to employ the beneficiary permanently as a "dance/language instructor." The AAO, in its initial decision, noted this and observed "there is no indication that [the beneficiary] has achieved any acclaim as a dance/language instructor." Counsel contends that the record shows that "the beneficiary can continue to excel in her field of endeavor through instruction, as one means of continuing her work." The beneficiary may indeed be an able instructor, but it remains that the beneficiary has not established that she has already won sustained national or international acclaim as an instructor. While instruction and performance are related occupations, they nevertheless require different skill sets, and success in one does not guarantee success in the other.

We note that the previous AAO decision did not, in fact, "focus" on the beneficiary's duties as an instructor. Indeed, the seven-page decision devotes all of one paragraph to this issue. The beneficiary's intended future employment was peripheral, rather than focal, to the initial AAO decision.

8 C.F.R. 204.5(h)(3)(x) indicates that the petitioner can establish the beneficiary's eligibility, in part, through "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." The AAO stated, regarding the beneficiary's film career:

The record does not establish the commercial success of these films, or that the beneficiary played major roles and was otherwise responsible for the success of the films. While witnesses have asserted that these motion pictures were "major films," the wording of the regulatory criterion calls for "box office receipts or . . . video sales," and makes no allowance for the substitution of general witness statements. While first-hand evidence of the beneficiary's commercial success should, arguably, be readily available, the petitioner has not produced such evidence.

Counsel, on motion, deems the AAO's standard "incorrect and abusive." Counsel observes that 8 C.F.R. 204.5(h)(4) allows for the submission of "comparable evidence," if the enumerated regulatory criteria "do not readily apply to the beneficiary's occupation." Counsel contends that it is "virtually impossible to obtain 'box office receipts' or 'video sales' from the beneficiary's country of origin." Counsel neither offers any proof of this claim, nor cites any competent authority as a source for this claim. Nevertheless, even if box office evidence is truly unavailable, then the question must arise as to how the petitioner's witnesses are able to attest to the success of the beneficiary's films. If what counsel claims is true, then they did not base their statements on first-hand evidence of commercial success. If box office records are, for whatever reason, unavailable in Mali, then it is not clear how anyone could be in a position to attest credibly to the commercial success of a film.

Counsel then cites two purported "precedent cases," an appellate decision from 1996 and a Service Center approval from an undisclosed date. The cited cases (involving a martial arts coach and an artist detained after a smuggling operation) are not, in fact, published precedent decisions, and therefore they are not binding on the AAO or any other Service office.

Counsel lists some of the exhibits in the record and asserts that the evidence warrants approval of the petition. Counsel expresses general disagreement with the AAO's decision, but fails to address most of the specific issues raised in the initial AAO decision, which is the principal purpose of a motion to reconsider. Instead, counsel in effect requests *de novo* readjudication of the petition even though there have already been two such adjudications. Counsel has not shown that the initial AAO decision cannot stand.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of January 10, 2000 is affirmed. The petition is denied.