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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-00-062-50115

Office: Vermont Service Center

Date: 28 JAN 2002

IN RE: Petitioner:
Beneficiary:



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:



Public Copy

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification 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 the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner submits copies of previously submitted documentation. Counsel argues that the director's decision is "incredible and ridiculous" since the petitioner was previously awarded a non-immigrant O-1 visa as an alien of extraordinary ability. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts* are dramatically different. 8 C.F.R. 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as simply "distinction," which is further defined as follows:

Distinction means 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. 204.5(h)(3), however, sets forth ten criteria as evidence of sustained national or international acclaim, of which a petitioner must meet at least three. While these ten criteria appear in 8 C.F.R. 214.2(o), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. The distinction between these fields and the arts, which appears in 8 C.F.R. 214(o) does not appear in 8 C.F.R. 204.5(h). As such, the petitioner's approval for a non-immigrant visa under the lesser standard of "distinction" is not evidence of his eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations which apply to the benefit sought. Thus, the petitioner's eligibility will be evaluated under the ten regulatory criteria discussed below.

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.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service regulation at 8 C.F.R. 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a dancer. The regulation at 8 C.F.R. 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability.

The director stated:

It would seem that three of the ten categories listed in 8 C.F.R. 204.5(h)(3) have been satisfied. That evidence, however, does not necessarily establish that the beneficiary is an alien of extraordinary ability. In addition to meeting three of the ten criteria above, it has to be established that the beneficiary is one of a small percentage who has risen to the very top of his field. . . . The evidence submitted, however, does not clearly establish that he is at the very top of his field; that his accomplishments can be compared with the leading ballet dancers in the leading ballet companies.

These statements are admittedly very poorly worded. It would be nonsensical, however, for the director to conclude that the petitioner met the regulatory requirements but was not eligible for the classification sought. Thus, a more rational interpretation of the director's decision is that the petitioner submitted documentation which *related to or addressed* three criteria, but that the evidence itself did not demonstrate national or international acclaim. A petitioner cannot establish eligibility for this classification merely by submitting evidence which addresses at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it establishes that the petitioner has sustained national or international acclaim.

While at no point has counsel specifically argued how the petitioner meets at least three criteria, the petitioner has submitted evidence which appears to address the following criteria.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The record contains the petitioner's certificate for the Pericles Gold Prize for Master of Break Dance and Modern Ballet dated April 30, 1988. The prize was issued by OIPEC, which, according to counsel, is the Italian National Dance Association. As evidence of the significance of this prize, counsel refers to a letter from Silvio Spaccesi, an Italian actor and director. Mr. Spaccesi states:

I would like to stress that in 1985,¹ [the petitioner] (who was only then fifteen years old) received the most outstanding and prestigious prize "Gold Pericles" as a dancer and teacher.

This brief statement is insufficient evidence of the significance of the prize. Mr. Spaccesi provides no information regarding the competitors for this prize. Nor does the record contain evidence that the contest receives significant national press coverage. Counsel asserts, "although [the petitioner] was only fifteen years old when he obtained this medal, the medal is granted to leading dancers of all ages, including adults." The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Finally, it is not clear that a prize awarded to the petitioner 11 years prior to the date of filing is evidence of *sustained* national acclaim.

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The record contains a copy of the cover of the weekly magazine, *Television Radio Courier*, which features the petitioner as part of an ensemble cast. The record includes a translation of the caption, "Number One, In the Shop of Baudo," but the petitioner did not provide a translation of the accompanying article as required by the regulations. A review of the Italian reveals that the petitioner's name does not appear in the article. The record also contains other Italian articles without accompanying translations. These articles also fail to mention the petitioner by name. Articles primarily about a production in which the petitioner performs are insufficient to meet this criterion. The published materials must be primarily about the alien himself.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

In response to the director's request for additional documentation, counsel asserted:

¹ The actual award is dated 1988, which would make the petitioner 18 at the time.

[The petitioner] has introduced the American method of ballet to Italy, and is also a leading expert of the Russian style of ballet, which is dominant through Western Europe. The uniqueness of [the petitioner's] outstanding abilities is that he has created a fusion of the Russian and American ballet methods, leading to a hybrid type of performance.

As stated above, the assertions of counsel do not constitute evidence. Id. The record does not support counsel's assertions.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

Manuela Caelli, artistic director for Stationery of Television Channel 59 certifies that the petitioner took part in several productions on that network. Ms. Caelli does not specify the reputation of those shows or the petitioner's role in those productions. In another letter, Ms. Caelli asserts that the petitioner was the choreographer for a highly rated broadcast program. It is not clear that the petitioner's work in choreography is evidence of his acclaim as a dancer.

The record also includes programs which reflect that the petitioner performed the following roles: Viola and Luna in "The Courage to be Free" performed at the Center of Experimental Theater, Eureka; Bogdanowitsch in "The Merry Widow," at the Courtyard of the San Clemente Basilica in the 1992 Rome Festival Opera Season; Pritschitsch in the same opera performed at the Opera-Brancaccio of Rome in 1993; and a dancer in "Gala Johann Strauss" at the Auditorio di Via della Conciliazione. The programs do not reflect whether the petitioner's roles were leading or critical roles. The petitioner's name does not appear more prominently than other names. The record also contains little evidence as to the reputation of the troupes in which the petitioner performed.

Carlo Picone, a professional journalist in Italy who covers art and entertainment writes:

I had have [sic] the opportunity to appreciate among others the work of [the petitioner]. This occurred over the course of various artistic events in which [the petitioner] was an integral and important part of many productions. I refer in particular to the television transmission "No. 1" presented as the leading Italian program with the great Italian director, Pippo Baudo, in the 1996-1997 seasonal beyond that in various Roman theatrical productions at Brancaccio, Dei Cocci, and Manzoni theaters which were held to display over the course of various years outstanding music and dance events; classical works were presented in the theaters such as "The Merry Widow," of F. Lehar, "The Wizard of Oz," and "Swan Lake" by Tsaiclowsky [sic].

In all of this [sic] important events, [the petitioner] took part as an important soloist, displaying his outstanding and versatile talent interpreting various types of music including light and lyrical operas and classic dance.

The phrase "important soloist" is not a clear indication that the petitioner performed a leading or critical role for the troupe or production. The petitioner has also not clearly established the reputation of the television program "No. 1." Regardless, even if we were to determine that the petitioner minimally meets this criterion it is only one criterion.

The petitioner also was a guest dancer at the 1997 Final Academic Year Show at the Academic Center for Dance and Sport in Chieti, Italy. This performance does not appear to constitute a leading or critical role for a distinguished organization. He also assisted with choreography for the Servant's Theater in 1996. Work as a choreographer is not evidence of the petitioner's acclaim as a dancer. Finally, the petitioner also appeared in a performance of "Giubileo to Youth" in Saint Peter Square before the Pope, but it appears that the performance occurred after the date of filing and is not evidence of his eligibility at the time of filing.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The record includes an Italian-language contract with no accompanying translation. The record contains no evidence regarding how the salary reflected in the contract compares with that of other ballet dancers in Italy.

Finally, the record includes several letters from others in the field attesting to the petitioner's abilities. The subjective opinions of experts in the field cannot substitute for meeting at least three of the objective criteria set forth in 8 C.F.R. 204.5(h)(3).

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as a dancer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a dancer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.