U.S. Department of Justice

Immigration and Naturalization Service

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: WAC 01 215 51970 Office: California Service Center Date: FEB 27 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Elizabeth Hayward
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office 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 as a fashion designer. The director determined the petitioner had not established that he qualifies for classification as an alien of extraordinary ability.

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, filed on April 24, 2001, seeks to classify the petitioner as an alien with extraordinary ability as a fashion designer. The statute and regulations require that the petitioner's acclaim be sustained. The record reflects that the petitioner has been residing in the United States since 1996, but the majority of the documentation submitted relates to the petitioner's activities in his native Sri Lanka during the early 1990's.[1] Given the length of time between the petitioner's arrival in

[1] Service records reflect that the petitioner entered the United States in 1996 on an F-1 (student) nonimmigrant visa. The petitioner attended Los Angeles Trade Technical College and received his associate's degree in fashion in 2002. At the time he filed the petition, the petitioner was present in the U.S. under O-1 nonimmigrant visa status.

the United States and the filing date of the petition, the petitioner has had ample time to establish a reputation as a fashion designer outside of Sri Lanka, where he has not resided or worked since 1996.

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 petitioner has submitted evidence that, counsel claims, meets 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 petitioner submitted two "Dress Designer '92" award certificates presented by the Lions Club of Cinnamon Gardens, District 306 C. The name of the presenting organization suggests that this award is institutional or regional in nature, rather than national or international. The certificates reflect that the petitioner received an award in both the "Warm Clothes" and "Oriental Elegance" categories at "the Dress Designer of the Year '92 Contest at Le Galadari Meridien, Colomobo" on November 8, 1992. Counsel asserts that the two certificates constitute "nationally recognized awards." The assertions of counsel, however, do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The significance and importance of these awards are not self-evident. The two certificates are "form" documents with the petitioner's name and award category entered into blank spaces. It is not apparent how many of the featured designers received awards at this event, but the existence of "form" certificates suggests multiple winners.

The petitioner also submitted an event program from the Dress Designer '92 contest, stating:

> This event has attracted young and upcoming designers to prove their talents in Dress Designing... For the ninth consecutive year, the Lions Club of Cinnamon Gardens is organizing this show with a dual purpose. Firstly, to give an opportunity for the talented young people of our country to take up Dress Designing as a career. Secondly, it is a fund raiser for the many worthy causes the club supports.

The wording of the event program demonstrates that the petitioner's awards from the Dress Designer '92 contest do not reflect achievement at the very top of the field of fashion design, nationally or internationally. The event program specifically states that the primary purpose of the contest was to recognize individuals who sought "to take up Dress Designing as a career." It appears that more experienced, established fashion designers did not participate in the competition.

In response to the director's request for evidence, the petitioner submitted a letter from "a past Zone

Chairman of the Lions Club International District 306 C," stating:

> The contestants for the Dress Designer organized by the Lions Club of Cinnamon Gardens are selected from thousand of applicants who respond to the call of the *Sunday Observer*, the leading national newspaper in Sri Lanka. Almost all of the past winners of this contest have become extremely successful both nationally and internationally. The winners of the contest are chosen by an expert panel of local and foreign judges who are well recognized in the fashion industry.

Also submitted was a letter dated December 27, 2001 from the Consul General of the Sri Lankan Consulate in Los Angeles, stating: "[The petitioner] is the recipient of many prestigious national awards as the Best Winter Design, and Best Oriental Elegance in Dress Designer of the Year."

We note here that Section 203(b)(1)(A)(i) of the Act demands extensive documentation of sustained national or international acclaim. Pursuant to the statute, the petitioner must provide credible evidence to establish that his awards enjoy significant national or international stature. It has not been shown through first-hand, contemporaneous evidence that the petitioner's awards were significant beyond the context of the 1992 contest where they were presented. We note, for example, the absence from the record of contemporaneous national or international media coverage about the petitioner's receipt of the awards or the event where they were presented. [2] The Lions Club Chairman noted that the *Sunday Observer* solicited participants for the contest, but the petitioner has offered no evidence showing that that newspaper covered the petitioner's receipt of the awards during the 1992 event. Contemporaneous first-hand evidence (such as the event program) carries far greater weight than the brief, vague statements of witnesses selected by the petitioner.

The petitioner's evidence fails to demonstrate that the two award certificates presented enjoy significant national or international stature. Furthermore, we cannot ignore the statute's demand for "sustained" national or international acclaim. The record in this case contains no evidence showing that the petitioner has received any fashion design awards in Sri Lanka or the United States since 1992.

> *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.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or

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[2] The record contains two articles about the petitioner, published a few years later, stating that the petitioner "was the fourth runner up at the Dress Designer Contest '92." While it is a recognition of one's talents to be selected as fourth runner up, the regulation clearly requires the receipt of a nationally or internationally recognized "prize or award." It is not clear whether the petitioner's selection as fourth runner up was related in any way to the two award certificates provided.

other *major* media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. An alien would not earn acclaim at the national level from a local publication or from a publication in a language that most of the population cannot comprehend.

The petitioner submitted a November 15, 1996 article from the *Sri Lanka Express*, stating: "[The petitioner] is an up and coming fashion designer about to enter the world of American fashion designing. An art designer of *Elle* magazine had a meeting with him and requested him to present his creations." We note here that the record contains no evidence showing that *Elle* magazine ever featured the petitioner's fashions.

Two articles were submitted from *The Lankan Tribune*. The first article (November 1996) entitled, "[The petitioner] – A Promising Designer," states: "[The petitioner] has come to Los Angeles! *The Lankan Tribune* is proud and excited to announce the installment of a new column. The column will offer fashion and beauty tips brought to you by [the petitioner]." The second article (December 1996) was entitled "Fashion Tips by [the petitioner]." It appears that *The Lankan Tribune* is a local paper distributed in Los Angeles to a small ethnic segment of the city's population.

A fourth article appearing in *A Place in the Sun* (undated) describes the petitioner as "among the up and coming fashion designers seeking to establish himself in his chosen career."

A fifth article from an unnamed publication, dated May 11, 1994, quotes the petitioner as stating: "I have a dream and that is to work with an internationally reputed fashion design house either in the East or West – and gather more experience. This is vital if I am to go places in my field. If I am to develop the small talent I possess."

The petitioner in this case seeks a highly restrictive visa classification, intended for aliens already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. Articles stating that the petitioner has a promising future do not establish eligibility, for the regulations clearly call for evidence that the petitioner already enjoys national or international acclaim.

The petitioner also submitted several articles with accompanying translations from Singhalese to English. The articles, appearing in *Tharuni* (*Women's Weekly*) and *Kumari* (*Young Women's Weekly*) from 1990 to 1993, reflected the petitioner's part time work as a fashion consultant and monthly fashion illustration columnist. The articles presented the petitioner's designs and advised the general public as to which styles would be most appropriate for the individual and occasion.

The extent of the distribution of the publications has not been provided. A few of the petitioner's witnesses have asserted that the petitioner's work appeared in "the most prestigious fashion magazines in Sri Lanka," but the petitioner has provided no objective numeric data or specific information from the publications themselves to confirm their national circulation. Without

evidence of significant national distribution, the petitioner has failed to show that the publications detailed above qualify as major media. Furthermore, we cannot ignore the absence of articles from 1996 to the petition's filing date.

In addressing the petitioner's documentation submitted under this criterion, the director's decision stated:

> This documentation has fallen far short of establishing your expertise as a designer. There is no evidence to show that you have acquired a sustained level of expertise that is significantly above that ordinarily encountered in the field which would indicate that you are now one of the few who have reached the very top in their field.

On appeal, the petitioner submits two articles from June of 2002 appearing in *The Island* and the *Sunday Observer*. This evidence came into existence subsequent to the petition's filing. *See Matter of Katigbak*, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. It has not been shown that either of these publications have significant national distribution.

Counsel states that the director's decision "ignore[d] the fact that [the petitioner] is an up and coming fashion designer in the United States not in Sri Lanka" and that the "regulations do not require the showing of sustained acclaim in more than one country." We agree that the petitioner is not required to make a showing of sustained national acclaim in more than one country. The regulatory and statutory language clearly allows for the submission of published materials that would demonstrate sustained national acclaim in a country other than the United States. In this case, however, we find that the petitioner's evidence fails to establish *sustained* national acclaim in either Sri Lanka or the United States. We cannot ignore the absence of published articles from 1996 to the petition's filing date. Furthermore, it is the petitioner who submitted published materials from the United States; therefore, it is certainly reasonable to consider the petitioner's acclaim here, particularly when the petitioner has offered no documentary evidence showing sustained acclaim in Sri Lanka from 1996 to 2001. Finally, the petitioner offered no evidence (other than the subjective claims of various witnesses) showing the extent of the distribution of his publications; therefore, it has not been shown that the publications featuring the petitioner qualified as major media.

In sum, the evidence submitted under this criterion fails to show that the petitioner has attracted the sustained attention of the national press or major media in Sri Lanka or the United States.

> *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.*

Counsel argues that the petitioner's fashion columns, which have already been addressed under the previous criterion, also satisfy this criterion. The plain wording of the regulation, however, clearly calls for "evidence of the alien's authorship of scholarly articles in the field." The

petitioner's articles and illustrations for various fashion columns were targeted to the general public rather than to other professionals or experts in the petitioner's field.

For example, the article from the *Lankan Tribune*, entitled "Fashion Tips By Kokila," offers basic fashion advice for selecting Christmas colors and does not rise to the level of authorship of a "scholarly article." Furthermore, as noted previously, the *Lankan Tribune*, which appears to be a local paper distributed in Los Angeles to a small ethnic segment of the city's population, would not qualify as a "professional or major trade publication or other major media."

In sum, the petitioner has not demonstrated the "authorship of scholarly articles in the field" or that his articles were featured in major trade publications or other major media.

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

Allowing any designer that entered his or her work in a fashion show to satisfy this criterion would defeat the restrictive nature of Section 203(b)(1)(A) of the Act, thus rendering the criterion meaningless. The petitioner must show that his fashion exhibitions elevate him to the very top of his field at the national or international level.

Counsel asserts that articles accompanying the petition demonstrate that the petitioner's fashions have been showcased at "five star hotels in Sri Lanka." An article appearing in the *Sunday Observer* (1995) states: "The fashions depicted here are the creations of an up-and-coming young fashion designer... His specialty is American hand painted attire... Hand painted impression on Tee Shirts, blouses, waistcoats and two-piece ensembles will be on display on March 29 at the Colombo Hilton." A promotional flier (year unknown) entitled "Different Ways" states that "[a] fashion show organized by three up-and-coming young designers will be held at the Suisse Hotel, Kandy on July 11 at 7:00 p.m." An undated article appearing in and unnamed publication states that "[a] trio of dress designers who were placed as runners-up at the Dress Designer of the Year contest last year have teamed up to present a gala fashion show" at Hotel Suisse, Kandy, entitled "Different Ways."

Counsel also asserts that the petitioner's "works have been showcased at the Dress Designer Contests." The record, however, contains evidence of the petitioner's participation in only one Dress Designer Contest – Dress Designer '92. The wording of the event program for Dress Designer '92 demonstrates that participation in the event was not limited to those at the very top of the field of fashion design. The event program specifically states that the primary purpose of the contest was to create an opportunity for the talented young people of Sri Lanka "to take up Dress Designing as a career." A fashion show for novices in fashion design does not satisfy this criterion.

Two articles provided on appeal (June 2002) indicate that the petitioner was selected by the Sri Lankan consulate in Los Angeles to represent Sri Lanka at the World Peace Fashion Show in Los Angeles. *See Matter of Katigbak, supra*. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

In this case, the record indicates that the petitioner has always displayed his fashions among other designers and it has not been shown that either the petitioner or those other designers enjoyed national or international reputations. The petitioner has not submitted evidence to demonstrate his participation in a show or exhibition devoted solely or largely to the display of his fashions alone. In sum, the petitioner has not shown that his fashion shows enjoy a national or international reputation or that participation in those shows was a privilege extended to only top designers in his field.

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

In order to establish that the alien performed a leading or critical role for an organization or establishment with a distinguished reputation, a petitioner must establish the nature of the alien's role within the entire organization or establishment and the reputation of the organization or establishment.

On appeal, counsel states: "The petitioner served as Chief Fashion Designer and Consultant for Sri Lanka's most notorious fashion companies and magazines including three of the Velona Group of Companies, Harrod's of Sri Lanka, *Women's Weekly* and *Teen Women's Weekly* magazines." The assertions of counsel, however, do not constitute evidence. *See Matter of Laureano, Matter of Obaigbena, and Matter of Ramirez-Sanchez, supra.*

A letter from Sumana Saparamadu, Editor, *Women's Weekly*, offers little information about the petitioner's role at the magazine. Sumana Saparamadu states: "[The petitioner's] fashion column in the years 1992-1994 was very useful and popular, as attested by the numerous queries and comments received from readers. Needless to say his column helped increase our circulation." Sumana Saparamadu, however, does not indicate the magazine's actual circulation or the amount that it increased after the commencement of the petitioner's column. Nor has it been shown that the claimed increase in the magazine's circulation was directly attributable to the petitioner or that the petitioner's role there was leading or critical in the same manner as, for example, that of an editor-in-chief. Information provided by the petitioner himself specifically states: "[The petitioner] performed part-time work as a fashion consultant for *Women's Weekly*." Serving part-time as fashion consultant and columnist does not rise to the level of a leading or critical role. The claims from various witnesses regarding the distinguished nature of *Women's Weekly* and *Teen Women's Weekly* do not carry the same weight as would independent documentary evidence of their reputations.

The petitioner offers no other direct evidence from any other of the entities listed above to support his claim that he satisfies this criterion. A review of the documentation provided reveals no evidence to establish that the petitioner has ever supervised or overseen other individuals within those organizations. Further, the record does not indicate that the petitioner has consistently exercised substantial control over creative or business decisions executed on behalf of those organizations.

Teres McClen identifies herself as "a couture clothing and fashion designer located in Ladera Heights, California. Her fashion business employed the petitioner in the late 1990's. She states:

> I have studied fashion design in Paris and I have graduated with honors in Fashion Design. I have participated in fashion shows with such designers as Donna Karan, Tommy Hilfiger, and Da Da, just to name a few. My clientele include Michael Jordan, Eddie Murphy, Jamie Fox... and many other entertainers just to name a few.
>
> [The petitioner] has traveled and worked with me for three years. [The petitioner] prepares all of my beading for my couture garments... My customers are overwhelmed when they see the work that the petitioner has done with my couture garments.

A simple comparison of Teres McClen's achievements with those of the petitioner shows that the petitioner has not yet reached the top of his field. A review of Teres McClen's educational achievements, fashion shows, clientele, and business success shows that her accomplishments as a fashion designer far exceed those of the petitioner.

Other letters from witnesses in the United States attest to the petitioner's character and skill but do not indicate that the petitioner enjoys national acclaim in this country. Mary Charles states that "it is only a matter of time before [the petitioner] will catch the attention of the world." The assertion that the petitioner has a promising future does not establish eligibility, for the regulations clearly call for evidence that the petitioner already enjoys major success and acclaim. Such attestations cannot meet the extremely high threshold of extraordinary ability. Section 203(b)(1)(A)(i) of the Act requires extensive documentation of sustained national or international acclaim. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition would carry greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce ample unsolicited materials reflecting that acclaim.

On appeal, counsel argues that the "INS must consult with peer groups in the petitioner's field prior to determining eligibility" under this classification. A consultation is required for a non-immigrant O-1 petition, but is not required in this proceeding. Throughout this proceeding, counsel has repeatedly cited the approval of an O-1 nonimmigrant visa petition as evidence that the petitioner has already been found to be an alien of extraordinary ability. Extraordinary ability in the arts in the non-immigrant context means distinction, which is not the same as sustained national or international acclaim. Section 101(a)(46) of the Act explicitly modifies the criteria for the O-1 extraordinary ability classification in such a way that makes nonimmigrant O-1 criteria less restrictive for a petitioner in the arts, and thus less restrictive than the criteria for immigrant classification pursuant to section 203(b)(1)(A) of the Act.

The approval of an O-1 nonimmigrant visa petition on behalf of a given alien does not in any way compel the Service to approve a subsequent visa petition under section 203(b)(1)(A) of the Act on

behalf of that same alien. Each petition must be adjudicated on its own merits based on the evidence submitted to support that petition. Furthermore, there is no statute, regulation, or case law that requires the approval of an immigrant visa petition under section 203(b)(1)(A) of the Act when the alien already holds an O-1 nonimmigrant visa.

The regulatory and statutory language clearly call for evidence of *sustained* national or international acclaim. The most generous analysis of the available evidence indicates that the petitioner enjoyed some media attention as a novice fashion designer and fashion columnist in Sri Lanka from 1992 to 1995. In that context, the Sri Lankan media repeatedly referred to the petitioner as an "up-and-coming" fashion designer rather than already being established at the top of the fashion industry. When the petition was filed in 2001, the petitioner had resided in the United States for nearly five years, during which time he has not shown a degree of success or acclaim approaching the very exclusive threshold of extraordinary ability. From the available evidence, it appears that any acclaim enjoyed by the petitioner in Sri Lanka has not been sustained. After six years in the United States the petitioner is still not among the most successful U.S. fashion designers.

The fundamental nature of this highly restrictive visa classification demands comparison between the alien and others in the field. The regulatory criteria describe types of evidence which the petitioner may submit, but it does not follow that every fashion designer whose works have been displayed at a hotel fashion show, or whose fashions have appeared in print, is among the small percentage at the very top of the field. While the burden of proof for this visa classification is not an easy one to satisfy, the classification itself is not meant to be easy to obtain; an alien who is not at the top of his or her field will be unable to submit adequate evidence to establish such acclaim. This classification is for individuals at the rarefied heights of their respective fields; an alien can be successful, and even win praise from well-known figures in the field, without reaching the top of that field.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim, is one of the small percentage who has risen to the very top of the field of endeavor, and that the alien's entry into the United States will substantially benefit prospectively the United States. In this case, the petitioner has failed to demonstrate that he meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability.

Review of the record does not establish that the petitioner has distinguished himself as a fashion designer 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 is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at the national or international level. 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.