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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[redacted]

OCT 23 2003

File: [redacted] Office: California Service Center Date:

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[redacted]

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 Citizenship and Immigration Services (CIS) 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 O'Brien
for 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 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.

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 CIS 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 an actor. 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, he 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 was nominated for Best Performance in a Negative Role at the 2002 Indian Screen Awards for his portrayal of Captain Russell in *Lagaan, Once Upon a Time in India*. The movie itself was nominated for the Academy Award "Best Foreign Language Film." The director concluded that being nominated for an award was not the same as winning the award. Counsel does not challenge this conclusion on appeal. While these nominations are indicative of some recognition for playing a role in a distinguished film, we concur with the director that nominations are not awards or prizes and cannot serve to meet this criterion.

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 director concluded that the petitioner met this criterion and we concur that the petitioner has submitted ample published material about himself in major newspapers to meet this criterion.

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

While the petitioner never claimed to meet this criterion, the director concluded that the petitioner's appearances in films and on television cannot serve to meet this criterion. The petitioner does not challenge this conclusion on appeal and we concur with the director.

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

The petitioner was nominated for an Indian award based on his portrayal of Captain Russell in an Oscar-nominated movie. In addition, the petitioner portrayed internist Matt Slingerland on the CBS prime-time drama *Presidio Med*. It is clear that this role was one of the major characters in an ensemble cast; the petitioner is prominently featured in the promotional materials for the show. The director stated that the petitioner's "role as an actor for the various films he has been involved with does not equate into a leading or critical role for the production company, which the film is associated with." Counsel disputes the logic of this statement on appeal. The evidence establishes that the petitioner played a critical role for a film distinguished with an Academy Award nomination and for a prime-time drama for one of the three major networks in the United States. We find these roles are sufficient to meet this criterion.

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

The petitioner submitted evidence that he earned $40,000 per episode for *Presidio Med* and $110,000 "pay or play" for appearing in pilots that have yet to be accepted as series. The director noted that actors Jack Nicholson and Jim Carrey are known to command millions of dollars for movie roles and

concluded that the petitioner had not established that he earned a significantly high salary in comparison to other actors. On appeal, counsel argues that requiring a salary comparable to Jack Nicholson or Jim Carrey is too high a standard and asserts that $40,000 per episode "is absolutely star salary." 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). While we find that an actor seeking classification as an alien of extraordinary ability need not command wages comparable to Jack Nicholson or Jim Carrey, it remains that there are a total of ten criteria, only three of which must be met to establish eligibility. If a petitioner claims to meet this particular criterion, he must establish that his salary is comparable with the top performers in the field. That said, the petitioner is relying on his salary as a prime-time television actor. Thus, we find that he need only establish that his per episode salary was significantly high for prime-time television actors. While counsel asserts that $40,000 per episode is "star salary," the petitioner submits no evidence to substantiate that assertion. As such, we concur with the director's ultimate conclusion that the petitioner has not established that he meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

While neither the petitioner nor counsel ever asserted that the petitioner meets this criterion, the director concluded that the petitioner had not demonstrated that he was primarily responsible for the commercial success of his films. Counsel does not challenge this assertion on appeal. We concur with the director's conclusion as the record does not contain the box office receipts for any of the petitioner's movies and no comparable evidence of the commercial success of *Presidio Med*.[1]

For the above reasons, the petitioner meets two of the regulatory criterion but the evidence submitted falls far short of meeting any of the other criteria claimed. 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 an actor 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 an actor, 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.

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[1] It is noted that *Presidio Med* was cancelled midseason of its first season.