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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 22 2004

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Marie Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner 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 beneficiary 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 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 beneficiary as an alien with extraordinary ability as a ballet 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 petitioner has submitted evidence that, it claims, meets the following criteria

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.*

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner claims that the beneficiary meets this criterion based on his membership in the American Guild of Musical Artists (AGMA). The AGMA is a labor union representing "musical artists in opera, concert, and dance." It is an advocacy group for these performing artists and does not require its members to demonstrate outstanding achievements as a condition to joining. The beneficiary's membership in this labor union does not meet the requirements of 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.*

To meet this criterion, published materials must be primarily about the beneficiary and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted an article from the October 27, 2002 edition of the *Deseret News* that is about the petitioner but does not mention the beneficiary, although he is identified as one of several dancers in a picture that accompanies the article. A September 22, 2002 edition of the same paper identifies the beneficiary as a cast member in one of the petitioner's upcoming productions and contains a short biography of him. He is also briefly mentioned in the September 30, 2002 edition of the *Salt Lake Tribune* in an article discussing the alternative cast of this same production. An article, which the petitioner identifies as a piece from the September 30, 2002 edition of "Red Magazine," which, according to the petitioner, is a magazine supplement to the University of Utah's newspaper, the *Utah Daily Chronicle*, also briefly mentions the beneficiary as part of the cast in the production.[1] None of these articles is primarily about the petitioner and does not satisfy the requirements of this criterion. The petitioner asserts that "Red Magazine's" mention of the petitioner in the solo role is important as it "simply serves to substantiate the fact that he performed the role, and the performance was reviewed." Nonetheless, the article is not about the beneficiary as required by this criterion. The petitioner also does not submit evidence that the articles appeared in professional or major trade media or other major media as required by this criterion.

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[1] The petitioner also submitted evidence that the beneficiary's performance in "The Nutcracker" had been mentioned in the *Salt Lake Tribune*. However, this performance occurred in December 2003, after the date the petition was filed. Therefore, it cannot be used to establish visa preference eligibility. The petitioner must establish eligibility at the time of filing. A petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The petitioner submitted a copy of an article written about the beneficiary from the December 5, 2002 edition of the *Utah Weekly*. A copy of an article from the May 11, 2001 edition of the *Anshan Daily* focuses on the beneficiary as one of the author's subjects. The petitioner asserts that these articles appear in major media in satisfaction of this criterion; however, no evidence that these newspapers have a significant national distribution or otherwise qualify as major media was submitted. The record does not establish that the beneficiary meets this criterion.

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

To establish that the beneficiary meets this criterion, the petitioner submits letters of recommendation from fellow dancers and artistic directors. While they all speak highly of the beneficiary's abilities, none indicate that he has made a significant contribution to ballet. They describe him as an "excellent dancer" who shows great "potential." Wendy Whelan, Principal Dancer at the New York City Ballet, who also danced with the beneficiary, states that the beneficiary has "superb technique." Mr. Thomas Jamerson of the AGMA[2] states generally that, because of the "specialized and multi-faceted" aspects of the dance profession, any professional dancer is an individual of extraordinary ability. This appears to be the sentiment of the authors of the petitioner's letters of recommendation, as almost every one states the petitioner has extraordinary ability. However, their opinions are not corroborated by other evidence in the record. While not without weight, the opinions of experts in the field 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 unsolicited materials reflecting that acclaim. The evidence submitted is insufficient to establish that the beneficiary meets this criterion.

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

The petitioner states that in the ballet world, the beneficiary's "artistic exhibitions are the performances in which he dances," as evidenced by the news articles and reviews of his performance. We note that the wording of this criterion strongly suggests it is for visual artists such as sculptors and painters. The purpose of dancing professionally is to perform before audiences, and every professional dancer will exhibit his or her work in this manner. The evidence does not establish that the beneficiary's dance or dance style has been showcased in a performance beyond that normally expected of any professional dancer. The evidence does not establish that the beneficiary meets this criterion.

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

The petitioner submits evidence that the beneficiary has been featured as the Principal Soloist in one of the petitioner's productions. Wang Caijun, Ballet Master of the National Ballet of China and Sun Jie, Principal and Head of the Dancers of the National Ballet of China, state that the beneficiary danced in lead roles and *pas de deux* for the company. Mr. Frank Andersen, Artistic Director of the Royal Danish Ballet, and Mr. Rudi van Dantzig, Artistic Director of the Dutch National Ballet, both state they cast the beneficiary in leading roles while he was affiliated with their ballets. While the beneficiary may have been featured as lead dancer in

[2] Neither Mr. Jamerson nor the petitioner identifies Mr. Jamerson's position within the AGMA.

several productions, the evidence does not establish that he played a leading or critical role for the various ballet companies. The record reflects that the principal dancer is the top dancer within the ballet company. The record does not reflect that the petitioner was a principal dancer of any of the ballets, or that his performance was essential in any way to the success of the companies involved. We note that the petitioner expresses difficulty in finding qualified American male dancers to perform with the petitioner. However, the evidence of record reflects that the beneficiary is one of several male dancers employed by the petitioner, and while he has had roles in several productions, the evidence is not persuasive that his role has been a leading one or has been critical to the success of the ballet company.

On appeal, the petitioner states that CIS approved visa preference petitions for two other dancers who held positions similar to that of the beneficiary. The petitioner asserts that, as these artists satisfied the regulatory criteria, then so too does the beneficiary. Each visa petition is evaluated on its own merits. It does not follow that simply because different individuals followed similar career paths that each would meet the necessary criteria in order to receive visa preference classification as an alien of extraordinary ability. Each must establish that he or she meets at least three of the regulatory criteria in order to be granted visa preference classification. Further, if the previous nonimmigrant petitions were approved based on the same or similar unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N 593, 597 (Comm. 1988).

The petitioner also implies that as the beneficiary has been approved for O-1 visa classification, he has already established that he is an alien of extraordinary ability. However, an alien qualifying for visa classification under section 101(a)(15)(O) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 (a)(5)(O), as an alien of extraordinary ability in the arts must demonstrate only that he or she has achieved *distinction* in his or her field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). Therefore, an alien who has an approved O-1 visa has not shown that he or she is one of the small percentage of persons who have risen to the very top of his or her field of endeavor.

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 his field of endeavor.

Review of the record, however, does not establish that the beneficiary has distinguished himself as a ballet 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 beneficiary shows talent as a ballet dancer, but is not persuasive that the beneficiary'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.