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FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

EAC 02 152 52241

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:

[REDACTED]

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.

for 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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a franchised dance studio. 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 has earned 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 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 the beneficiary has earned sustained national or international acclaim at the very top level.

This petition, filed on April 4, 2002, seeks to classify the beneficiary as an alien with extraordinary ability as a "Dance Director." According to the non-technical description of the proposed employment listed under Part 6 of the Form I-140 petition, the beneficiary "will provide as part of the franchise services coaching/choreography." A letter accompanying the petition from [REDACTED] Regional Director, New England Dance Promotions, Inc., states:

[The beneficiary's] duties will be teaching competitive ballroom dancing in the International (as opposed to the American) style. The position is full-time. Other aspects of the job will be a training program to

familiarize [the beneficiary] with all aspects of operating and owning a Fred Astaire Franchised Dance Studio.

To this end, New England Dance Promotions wishes to offer permanent employment to [the beneficiary] as a Director of Dance

The petitioner submitted documentation pertaining to the beneficiary's career as a dancer. The documentation presented indicates that the beneficiary last competed professionally in the 1990's. The petitioner's initial submission included no evidence showing that the beneficiary, age thirty-three at the time of filing, remains consistently active at the national or international level as a professional dance competitor.

The regulation at 8 C.F.R. § 204.5(h) requires the beneficiary to "continue work in the area of expertise." We note, however, that the petitioner seeks to employ the beneficiary not as an extraordinary competitive dancer, but, rather, as an extraordinary Dance Director, dance coach, and choreographer. As noted in [redacted] initial letter and as indicated under Part 6 of the I-140 petition, employment as a professional competitive dancer is not the occupation in which the beneficiary seeks to continue working in the United States. In this country, the beneficiary intends to work as a "Dance Director."

While a competitive dancer and a Dance Director (dance coach/choreographer) certainly share a knowledge of ballroom dancing, they rely on very different sets of basic skills. Thus, competitive dancing and serving as a Dance Director are not the same area of expertise. This interpretation has been upheld in Federal Court. In *Lee v. Ziglar*, 237 F.Supp.2d 914 (N.D.Ill. 2002), the court stated:

It is reasonable to interpret continuing to work in one's 'area of extraordinary ability' as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field. For example, Lee's extraordinary ability as a baseball player does not imply that he also has extraordinary ability in all positions or professions in the baseball industry such as a manager, umpire or coach.

Id. at 918. The court noted a consistent history in this area. Nevertheless, this office has recognized that there exists a nexus between competing and coaching. To assume that every competitor's area of expertise includes coaching, however, would be too speculative. To resolve this issue, the following balance is appropriate. In a case where an alien has clearly achieved national or international acclaim as a competitor and has sustained that acclaim as a coach at a national level, we can consider the totality of the evidence as establishing an overall pattern of sustained acclaim and extraordinary ability. Specifically, in such a case we will consider the level at which the alien acts as coach. A coach who has established a successful history of coaching competitors who compete regularly at the national level has a credible claim; a coach of novices or intermediates does not.

This decision will consider whether the petitioner has established the beneficiary's national or international acclaim as a professional dancer. We will also examine whether the beneficiary has sustained his acclaim as a dancer through his efforts as a Dance Director, coach, or choreographer. If the petitioner has demonstrated the beneficiary's extraordinary ability as professional dancer, we will consider the level at which he has successfully coached.

We note here that the statute and regulations require the beneficiary's acclaim to be sustained. The record reflects that the beneficiary has been residing in the United States since April 2000. Given the length of time between the beneficiary's arrival in the United States and the petition's filing date, it is reasonable to expect the petitioner to have earned national acclaim in the United States during that time. The petitioner has had ample time to establish a reputation in this country.

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 pertaining to 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 evidence of awards he received while competing in dance tournaments limited to "juveniles," "juniors," "youths," "children," and "amateurs." Such awards do not reflect achievement at the highest level of professional dancing. The petitioner must show that he has earned national or international awards when competing at the highest level (against professionals), not just dancers within his own age group or skill level. The record contains no first-hand evidence showing that the petitioner has received a nationally or internationally recognized prize or award as a professional dancer.

It is noted that all of the awards submitted by the petitioner were based on the beneficiary's ability as a dancer. These awards do not establish that the beneficiary has sustained national or international acclaim as a coach. Therefore, in the present case, we must separately examine whether the petitioner has demonstrated the beneficiary's extraordinary ability as a dance coach. It is not clear that significant awards exist for dance coaches; however, nationally or internationally recognized prizes or awards won by teams or couples coached by the beneficiary may be considered as comparable evidence for this criterion under 8 C.F.R. § 204.5(h)(4). Here, it is important to evaluate the level at which the beneficiary acts as coach. A coach who has an established a successful history of coaching top dancers who win titles at the national level or above has a credible claim under this visa classification; a coach of intermediates or novices does not. In this case, the record contains no evidence showing that the beneficiary has coached a dance pair or an individual dancer to a national or international title.

Without evidence showing that the beneficiary or the dancers that he has coached have won nationally or internationally recognized awards in recent years, the petitioner has failed to demonstrate the beneficiary's *sustained* acclaim as a competitive dancer or dance coach.

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 beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other *major* media. To qualify

as major media, the publication should have significant national distribution. An alien would not earn acclaim at the national level from a local publication.

The petitioner submitted an article appearing in the Japanese monthly *Dance View*. The petitioner also submitted a brief piece about the beneficiary's participation in an amateur dance competition appearing in an unknown Danish publication. The record contains no data showing that either of these publications have significant national or international distribution. Furthermore, neither piece can be accepted as supporting evidence because we are unable to discern the date of their publication and, in the case of the Danish article, the title of the publication in which the article was featured. We note here that the plain wording of this criterion requires the title and date of the publications to be submitted as evidence. It is further noted that the translations accompanying these two articles were incomplete and not certified by the translator. Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to Citizenship and Immigration Services (CIS) shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

We again note that the regulations require the beneficiary's acclaim to be *sustained*. There is no evidence showing that the beneficiary has received national media coverage since coming to the United States in April 2000. In sum, the articles presented by the petitioner fail to show that the beneficiary has sustained national or international acclaim as a dancer or dance coach.

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 he performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of the beneficiary's role within the entire organization or establishment and the reputation of the organization or establishment.

In response to the director's request for evidence, the petitioner submitted a letter from Borge Jensen, former chairman of the Danish Professional Danceteachers Organization. He states:

I acted as the organizer of the shows (broadcasted Saturdays at primetime) on behalf of the National Danish Television, (DR 1). DR 1 recorded 8 different shows in the period 1996 – 2000.

Poul Erik Anderson, the head of DR 1's sports department and I carefully selected the couples appearing in the shows. . . . [The beneficiary and his partner] were selected for their outstanding ability and competitive results, representing Denmark, and they appeared in 4 of the shows.

It has not been shown that appearing in four out of eight shows during a four-year period is tantamount to a leading or critical role for a DR 1 television production. The petitioner has not provided adequate information regarding the other dancers who were featured in the eight shows that would indicate that the beneficiary's role was more important than that of the other dance performers. For these reasons, we find the petitioner has not established that the beneficiary has performed in a leading or critical role for a distinguished organization, or that his involvement has earned him sustained national or international acclaim.

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

The initial letter from John Rothweiler indicated that the beneficiary would earn “a starting salary of \$35,000 per year/per couple.” The term “per year/per couple” leads us to conclude that the beneficiary is splitting his \$35,000 salary with his dance partner/spouse. There is no indication that this salary is “significantly high” in relation to that of other dance coaches or choreographers.

In response to the director’s request for evidence pertaining to this criterion, the petitioner submitted copies of the beneficiary’s joint tax returns (which included his spouse’s income) for 2000, 2001, and 2002. The Form W-2 Wage and Tax Statements for the beneficiary were omitted from the tax returns, therefore, the amount of the beneficiary’s portion of their joint income remains unknown. According to their tax returns, the beneficiary and his spouse earned a combined income of \$6,269 in 2000, \$66,155 in 2001, and \$89,704 in 2002.

The petitioner’s response also included a letter from John Rothweiler dated July 2, 2003. He states: “[The beneficiary and his spouse] are employees within the Fred Astaire organization for the New England area. Their current rate of pay is \$65 per hour when they are coaching, representing the school, or otherwise working within the Fred Astaire franchised curriculum.”

From this statement, it appears that the beneficiary and his spouse received \$65 per hour as a couple rather than \$65 per hour per person. Furthermore, there is no supporting evidence showing that the beneficiary and his spouse regularly earn \$65 per hour or the date that they began receiving this hourly rate. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record contains no payroll records to support John Rothweiler’s claim regarding the beneficiary’s “current rate of pay.”

We also note that there is no evidence showing that the beneficiary and his spouse were earning \$65 per hour as of this petition’s filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). At the time of filing, John Rothweiler indicated that the beneficiary and his spouse were receiving a salary of “\$35,000 per year/per couple” rather than \$65 per hour.

The petitioner’s response also included “2001 National Occupational Employment and Wage Statistics” from the U.S. Department of Labor for “Choreographers.” According to the data provided for 2001, the top ten percent of choreographers earned at least \$26.91 per hour or \$55,970 per year and the top ten percent of dancers earned at least \$27.24 per hour or \$56,660 per year. The evidence provided by the petitioner is not adequate to demonstrate that the beneficiary’s income exceeded these amounts in 2001.

On appeal, counsel cites the approval of the beneficiary’s O-1 nonimmigrant visa petition for extraordinary ability in the arts as a dancer. However, extraordinary ability 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 beneficiary 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 CIS 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 binding precedent 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 petitioner's appellate submission consisted entirely of copies of documents that were previously submitted into the record. The brief prepared by counsel discusses the beneficiary's "considerable dancing skills" and his prospective benefit to the United States, but it does not specifically address the evidence as it relates to the criteria at 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, 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 the beneficiary 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 beneficiary has distinguished himself as a Dance Director, coach, choreographer, or 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 is not persuasive that the beneficiary'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.