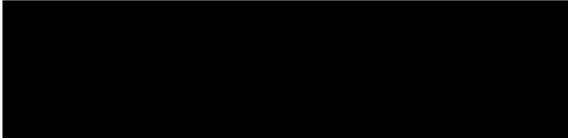




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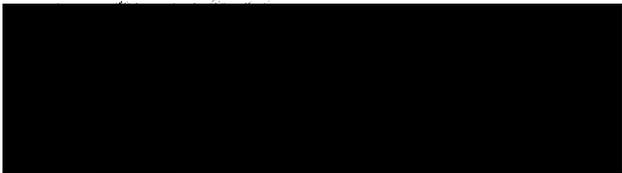
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FILE: WAC 03 152 52745 Office: CALIFORNIA SERVICE CENTER Date: **OCT 21 2005**

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)

ON BEHALF OF PETITIONER:



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.

Maia Johnson

9 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 that the petitioner had not established the sustained national or international acclaim requisite to classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part:

(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 into the United States will substantially benefit prospectively the United States.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "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).

In this case, the petitioner seeks classification as an alien with extraordinary ability in the arts as an actor. The petitioner initially submitted numerous supporting documents and subsequently submitted additional materials in response to the director's Request for Evidence (RFE). On appeal, counsel submits a brief. Counsel's contentions do not overcome the deficiencies of the petition and the appeal will be dismissed. We address the evidence submitted and counsel's claims in the following discussion of the regulatory criteria relevant to the petitioner's case.

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

The petitioner initially submitted evidence that several television productions in which he performed had won or been nominated for various awards, but no evidence that he had individually won any awards or prizes for his acting. In his RFE response, the petitioner submitted a copy of an entry form for the 25th Annual Genie Awards – Dramatic Theatrical Feature-Length Films on which his name is handwritten along with four other actors. A handwritten note on the bottom of this document reads, “2005 Genie Award Nomination.” As the director noted, the record contains no corroborative evidence of the petitioner’s official nomination. Even if his nomination was adequately documented, it would not meet this criterion for two reasons. First, a nomination for an award is not equivalent to actual receipt of an award. Second, the petitioner’s alleged nomination took place in 2005, two years after his petition was filed, and consequently cannot be considered. The 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 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Accordingly, the petitioner does not meet this criterion.

(ii) 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.

The petitioner did not initially claim eligibility under this criterion. With the RFE response, counsel submitted and cited a letter evidencing the petitioner’s membership in ACTRA. The letter identifies ACTRA as “the professional national organization of approximately 20,000 Canadian performers working in the English-language recorded media: Film, Television, Video, Commercials and all other recorded media. ACTRA is affiliated with the Canadian Labour Congress and the International Federation of Actors.” The letter verifies that the petitioner has been a “full member” of ACTRA since 2001, but it does not state that outstanding achievements are prerequisite to full ACTRA membership. Accordingly, the petitioner does not meet this criterion.

(iii) Published material 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 several articles that mention or discuss the petitioner’s work, but the record does not demonstrate that these articles were printed in major media. An article printed on April 14, 2002 in the Pittsburgh *Post-Gazette* discusses the “MythQuest” series and identifies the petitioner as a co-star. An interview with the petitioner about his work on “MythQuest” is contained in a printout from the website of the Calgary Public Library and dated April 18, 2002. The petitioner is also featured in an article entitled “Myth Quest Entertains Whole Family,” published in the August 22, 2001 edition of *Bowdens TV Week Halifax*. The submitted copy indicates that this publication is a magazine from Halifax, Nova Scotia with a circulation of 116,393. A review of the film “Get Over It,” from the submitted excerpt of the July 19, 2001 online edition of *Jigsaw Lounge*, briefly praises the petitioner’s “small role” in one sentence. A column from the May 17-23, 2002 edition of the *Vancouver Sun* TV Times section answers a reader’s question about the petitioner’s work. The record also contains an interview with the petitioner published in 2002 in *GoBig*, which counsel identifies as “Canada’s leading arts and entertainment magazine.” The record contains no evidence regarding the alleged prominence of *GoBig*. Without documentary evidence to support the claim, the assertions of counsel will not

satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence that any of the above mentioned publications are circulated throughout Canada or otherwise constitute major media.

The petitioner submitted one black and white and one color copy of an article entitled "The Wamback Story" that contain a photograph of the petitioner in a co-starring role. We cannot determine if this article is about the petitioner's work because the text of the article is illegible in both of the submitted copies. An article from the *Globe and Mail* entitled "Auditions for All" contains a photograph of the petitioner, but the submitted copy cuts off the two paragraphs of the article's text which apparently discuss the petitioner. A second *Globe and Mail* article favorably reviews the petitioner's theatrical performance, but the submitted copy obstructs a portion of the text with a photograph of the petitioner and does not include a second photograph of the petitioner that is referenced in the first photograph's caption. Without full, legible copies of these articles, we cannot determine if they satisfy this criterion. In addition, both *Globe and Mail* articles were published in 1998, five years before this petition was filed, and do not reflect sustained acclaim. Finally, a printout dated January 5, 2002 from the website of the Canadian Broadcasting Company quotes the petitioner concerning his role and experiences in filming, "Canada: A People's History." Promotional material from a television company's own website, such as this printout, does not meet this criterion.

The record establishes that only three articles that mention or discuss the petitioner's work were published in professional, major trade publications or other major media. An undated article entitled "Stuck in the Past" published in the *Starweek* magazine of the *Toronto Star* discusses "MythQuest," includes a photograph of the petitioner, and simply states, "Newcomer Christopher Jacot co-stars." A three-paragraph article entitled "Mythical Man" from the May 25-31, 2002 edition of the Canadian *TV Guide* features a photograph of the petitioner and discusses his work on "MythQuest." An article entitled "Down by the Bays" published in the February 3, 2003 edition of *Maclean's* briefly praises the petitioner's performance in the film "The Bay of Love and Sorrows:" "Jacot is like a walking firecracker." Although favorable, these three brief citations of the petitioner's work do not demonstrate the requisite sustained acclaim. With his RFE response, the petitioner submitted three additional articles that we cannot consider because they were published after the petition was filed. Again, the petitioner must establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Accordingly, the petitioner does not meet this criterion.

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

The petitioner did not initially claim to meet this criterion. In her RFE response, counsel claims the petitioner meets this criterion because he was "asked to be on the jury for the 2004 Gemini Awards, Best Youth Performance." The record contains no evidence of the petitioner's invitation or actual service as a judge for this award. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Ramirez-Sanchez*, 17 I&N Dec. at 506. Consequently, the petitioner does not meet this criterion.

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

The petitioner did not initially claim eligibility under this criterion. In her RFE response, counsel claims the petitioner meets this criterion, but simply states, "See Exhibit to the Petition and herein below." The petitioner submitted 13 support letters from television and film industry professionals who have worked with him. We cannot consider three of these letters (from [REDACTED] because they state that they are recommending the petitioner based on collaborations that occurred after the petition was filed. Again, the petitioner must establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. While testimonials such as the remaining ten letters provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in his field beyond the limited number of individuals with whom he has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has sustained national or international acclaim. Accordingly, we review the letters as they relate to other evidence of the petitioner's contributions.

Tim Southman, a film and television director, praises the petitioner's performance in Southman's film, "The Bay of Love and Sorrows." Mr. [REDACTED] states that the film received excellent reviews in Canada and the United Kingdom, "many of which single out Christopher's outstanding portrayal of the film's principal character 'Silver.'" The record contains only one critical review of this film, the *Maclean's* article discussed above under the third criterion, which just briefly mentions the petitioner's performance. Mr. [REDACTED] concludes by stating, "I am confident that [the petitioner] will make a remarkable contribution to world cinema." [REDACTED] the petitioner's co-star in "MythQuest," praises the petitioner's talent and abilities and states that she looks "forward to seeing his rise in the industry." [REDACTED], a theater and television writer, explains that he first interviewed the petitioner about his role in the play "Easy" in 2000, later profiled him for *GoBig* magazine, and has "no doubt that given the opportunity," the petitioner will join the ranks of Canadian actors who have become famous in the United States. Anna Stratton, a feature film producer who worked with the petitioner on "The Bay of Love and Sorrows," praises the petitioner's performance in that film and notes that he "is at ease on the stage, on film and on television. . . . It is rare for a young actor to have such range, confidence and willingness to continually stretch his abilities." Similar praise of the petitioner's talent and skills are found in the letters of [REDACTED] [REDACTED] [REDACTED] and [REDACTED]. These letters attest to the petitioner's talent, accomplishments, and promise, but they do not specifically identify any original contributions of major significance that he has already made to his field.

The record contains no other evidence that the petitioner has made original and major contributions to his field. The media articles discussed above under the third criterion indicate that the petitioner has received only limited recognition of his work. The record contains no critical reviews that substantively discuss any of the petitioner's individual performances or his career in depth. While the petitioner submitted evidence that he performed in award-winning productions, the record is devoid of any evidence that the petitioner has won any awards or other substantial critical acclaim for his individual performances. Accordingly, the petitioner does not meet this criterion.

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

This criterion generally applies to the visual, not performing, arts. However, because counsel claimed that the petitioner meets this criterion and cited numerous documents in the record, we have considered the relevant materials as comparable evidence of the petitioner's eligibility pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). The record documents the petitioner's performance in "Easy" at the Theatre Viscera as part of

the 2000 Toronto Fringe Theatre Festival ("Toronto Fringe"). An article from the December 28, 2000 online edition of *Eye* identifies the petitioner as a "rising star" for his performance in "Easy." The submitted printout from the Toronto Fringe's website states that the Toronto Fringe is the third largest Fringe festival in Canada and embraces the "Fringe philosophy" of providing "all artists, emerging and established, with the opportunity to produce their play no matter the content, form or style, and to make the event as affordable and accessible as possible for the members of the community." This evidence indicates that the Toronto Fringe is a prominent and notable theatrical festival, but it does not demonstrate that the Toronto Fringe or the Theatre Viscera are critically acclaimed theatrical venues that enjoy prominence throughout Canada such that the petitioner's performance would reflect national acclaim.

In her RFE response, counsel states that the film "The Bay of Love and Sorrows" was screened at the Montreal World Film Festival and the Atlantic Film Festival in Halifax, but the submitted printouts from these festivals' websites do not corroborate that statement nor do they establish the national or international significance of these festivals. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, the record contains only one brief favorable mention of the petitioner's performance in this film (from the aforementioned *Maclean's* article). The evidence thus does not establish that the petitioner performed in theatrical or film festivals or showcases in a manner consistent with the requisite sustained acclaim. Accordingly, he does not meet this criterion.

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

The petitioner claims to meet this criterion because he appeared in some episodes of three award-winning television series. The record shows that the petitioner appeared in two episodes of "Twice in a Lifetime" in 1999. This series won five awards between 2000 and 2002, but none are attributed to or mention the petitioner. The petitioner appeared in two episodes of "The Famous Jett Jackson" in 1998, but the only award allegedly won by this series was for the actress Kerry Duff. Similarly, the petitioner allegedly made a guest appearance in "The Zack Files" in 2001, but the only awards allegedly won by this series were for sound mixing and another actor's performance. The record contains no evidence that any productions in which the petitioner played a leading or critical role received wide critical acclaim or were otherwise recognized for their distinguished reputations at the time this petition was filed. Accordingly, the petitioner does not meet this criterion.

(ix) 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 contains copies of the petitioner's contracts, October through December 2003 Canadian sales tax return, and income statements. In addition, the aforementioned letter from ACTRA states that the petitioner "is among the highest paid in our membership, has commanded top dollar for his acting services, and has been paid substantially above our union minimums." The record contains a table of the minimum ACTRA fees for actors and other performers for various time periods between 2004 and 2006, but no evidence of the minimum fees for the dates corresponding to the contracts submitted with the petition. In his RFE response, the petitioner submitted additional contracts that we cannot consider because they were signed after the petition was filed. The petitioner must establish eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. In addition, the record contains no evidence of the salary or remuneration of top actors in Canada

from which we could determine whether or not the petitioner's documented compensation meets this criterion. The ACTRA letter does not provide examples of remuneration provided to leading Canadian actors and does not state whether it is uncommon for an actor to be compensated above the minimum rates. The record thus does not establish that, at the time of filing, the petitioner's salary was significantly higher than other Canadian television and film actors or was comparable to such actors at the very top of their field. Accordingly, the petitioner does not meet this criterion:

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

Ron Schmidt, a producer who worked with the petitioner on "Hellraiser: Hellworld," states, "I can attest to [the petitioner's] extraordinary contribution to this film and his part ensuring artistic and commercial success." Yet the record indicates that this film was released on video in 2004 and the submitted printout from IMDbpro regarding the "Hellraiser" series does not list any gross income for "Hellraiser: Hellworld." The petitioner also submitted evidence of the box office gross earnings in the United States and the United Kingdom for the film "Get Over It," in which he played a minor supporting role. Yet the record contains no evidence that the stated income constitutes a commercial success in the film industry given the movie's reportedly \$10,000,000 budget or that any commercial success was directly attributable to the petitioner's role in the film. On appeal, the petitioner submits evidence of the box office returns for the film "Going the Distance," in which he played a starring role. However, we cannot consider this evidence because the film was released after this petition was filed. Again, the 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 8 C.F.R. § 103.2(b)(12), *Katigbak*, 14 I&N Dec. at 49. Accordingly, he does not meet this criterion.

An immigrant visa will be granted to an alien under section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), only if the alien can establish extraordinary ability through extensive documentation of sustained national or international acclaim demonstrating that the alien has risen to the very top of his or her field. The evidence in this case indicates that the petitioner is a successful actor who has gained limited recognition in Canada. However, the record does not establish that the petitioner had achieved sustained national or international acclaim placing him at the very top of his field at the time of filing. He is thus ineligible for classification as an alien with extraordinary ability pursuant to section 203(b)(1)(A) of the Act, 8 U.S.C. § 1153(b)(1)(A), and his 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. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed. This decision is rendered without prejudice to the filing of a new petition under section 203(b)(1)(A) of the Act with the requisite supporting evidence.

ORDER: The appeal is dismissed.