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FILE:

WAC 05 107 52222

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 16 2006**

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). 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.

On appeal, the petitioner submits new evidence that counsel asserts addresses the director’s concerns. The new evidence, however, is insufficient to overcome the director’s concerns. Specifically, we concur with the director that the petitioner meets only one of the regulatory criteria, of which an alien must meet at least three to establish eligibility.

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 petitioner as an alien with extraordinary ability as a performer. 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. On appeal, counsel merely asserts that the petitioner meets six criteria without identifying which six are being claimed. We will address all ten criteria.

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

The director concluded that the petitioner had not submitted any primary evidence of awards or prizes or evidence of the significance of prizes referenced in other evidence. Counsel does not specifically address this criterion on appeal and we concur with the director's concerns. The petitioner has not established that copies of his awards are unavailable or do not exist. As such, we need not accept secondary evidence of those awards. 8 C.F.R. § 103.2(b)(2). Moreover, the regulation explicitly requires evidence that the award or prize is nationally or internationally recognized. It is the petitioner's burden to establish the recognition of any awards or prizes he may have won. Thus, the petitioner has not established that he meets this criterion.

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 initially submitted a newspaper article indicating that, at age 13, the petitioner was the youngest member of the Magic Circle "in all of Germany." Terrence R. Williams, an immigration specialist with Cirque du Soleil (US), Inc., asserts: "The Magic Circle of Germany is a club of professional magicians whose membership consists of a grueling audition and the successful completion of an exam." Mr. Williams does not explain how he has any first hand knowledge of the organization's membership requirements. The petitioner also submitted his membership card in the World Clown Association. The accompanying materials discuss the association itself, but not its membership criteria.

In response to the director's request for additional evidence, the petitioner submitted a June 12, 1994 letter from Magic Circle Düsseldorf advising him of his "mastered graduation" in the Magic Circle after participation in an 18-month seminar. The letter asserts that the petitioner "gained the required basic knowledge of the craft."

The director concluded that the record lacked evidence that either the Magic Circle of Germany or the World Clown Association require outstanding achievements of their members. On appeal, counsel submits Internet materials about Magic Circle indicating that the organization has 2,700 members and is one of the largest magic organizations. The original German language includes the phrase: "Unser Mitglieder-Spektrum reicht von (...) bis zu den Superstars Siegfried & Roy." The translation is as follows: "Our member Spectrum goes from (...) to Superstars like Siegfried & Roy." Whatever word

or phrase the ellipses replace, it would appear the word or phrase represents something on the opposite end of the spectrum from “superstars.”¹

We are not persuaded that written or practical exams designed to demonstrate “the required knowledge of the craft” are outstanding achievements. An organization that boasts of its large number of members and wide spectrum of talent does not appear to be particularly exclusive.

In light of the above, the petitioner has not demonstrated that he meets 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 petitioner initially submitted 1996 and 2002 articles about the petitioner in the *Rheinische Post*. The petitioner also submitted evidence that the newspaper is “the second largest regional subscriber newspaper in Germany.” The petitioner also submitted a 1996 article about the petitioner in the *Grenzland Post*. Finally, the petitioner submitted a photograph and caption of him performing in a library at age 11 that appeared in a 1990 issue of *Der Xantener*. The petitioner has also been featured in promotions appearing in the Las Vegas entertainment guide, *What’s On*.

In response to the director’s request for additional evidence, the petitioner submitted more materials about *What’s On*, reflecting that it is a complimentary Las Vegas guide “distributed in the hotels, casinos and executive suites.” The guide is also distributed to travel agents and limited cities other than Las Vegas, but is primarily a Las Vegas entertainment guide.

The petitioner is also pictured in *InStyle* and a Las Vegas issue of *Zink*. An article on Las Vegas in *Brigitte* contains a paragraph about the petitioner. These materials, however, postdate the filing of the petition. Similarly, [REDACTED] interviewed the petitioner for a German television news magazine, Focus TV, after the date of filing. The petitioner also submitted photographs from the television broadcast.

The director concluded that the record lacked evidence that any of the above materials appeared in major media or that Focus TV is major media. On appeal, counsel submits evidence that the 2001 book “Alles im Fluss: Menschen am Niederrhein” included a two-page biography of the petitioner. The petitioner’s biography is one of 34 biographies in the book, which appears to be limited to personalities in the lower Rhein area. Counsel also submitted some materials on Focus TV, although it is not clear from these materials that the show is broadcast nationally. Finally, counsel submits what is

¹ Assuming the original German text is an authentic and complete copy of the website previously, the website, www.zuberer-magier-faq.de/mz.htm, no longer contains the ellipses. Rather, the omitted word is “Hobbyzauberern,” which would appear to mean something akin to “amateur.” We also note that the photograph of the petitioner with Siegfried and Roy that purportedly appeared on the website is also no longer included on the webpage provided.

characterized as an interview with the petitioner on “Good Morning America.” A review of the DVD submitted, however, reveals that the piece focuses on the hostess’ participation in a performance of “O.” The petitioner appears briefly showing the hostess costumes and wigs. The petitioner is not identified. Regardless, the piece was aired after the date of filing the petition.

The petitioner must demonstrate eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Any recognition in the media he may have garnered after the date of filing is not evidence of his eligibility as of that date. The materials that predate the date of filing consist of coverage in regional German media and local Las Vegas guides. While “Alles im Fluss” is available on Amazon.com, the record contains no evidence of its sales numbers.² As the book appears to focus on local personalities, it is not clear that the book would have notable sales outside of the lower Rhein area.

In light of the above, the petitioner has not demonstrated that he meets this criterion.

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.

On appeal, counsel does not specifically challenge the director’s conclusion that the petitioner had submitted no evidence relating to this criterion. Counsel does reference a letter submitted on appeal from [REDACTED] director of the performing arts academy Die Etage. The petitioner studied at Die Etage from February 2000 through January 2003, according to the letter. During this time, the petitioner “was prominent in his Main study by teaching as a tutor as well as an assistant professor to students in other areas of study in the basic techniques of Pantomime/Mime. He was even active as a consultant for the examination committee.” Serving as a teaching assistant while a student is not indicative of or consistent with national or international acclaim, the statutory standard for the classification sought. The record contains no evidence that the petitioner has served as a judge of mimes outside of the academy where he himself was a student. Thus, the petitioner has not demonstrated that he meets this criterion.

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

The director concluded that the record contains no evidence relating to this criterion. Counsel does not specifically challenge this conclusion on appeal. We acknowledge reference letters praising the petitioner’s skill. Skill in one’s field, however, is not necessarily indicative of a contribution of major significance. The record lacks evidence that the petitioner has influenced or impacted the field of mime or magic as a whole.

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

² The book’s “verkaufsrang,” or sales rank, is only 1,055,403.

On appeal, counsel does not challenge the director's conclusion that the petitioner had submitted no evidence relating to this criterion.

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

The director concluded that the petitioner's performances are not artistic exhibitions or showcases. Counsel does not contest the director's analysis.

This criterion applies to visual artists. The petitioner is a performing artist. It is inherent to his occupation to perform. Not every performance is an artistic exhibition designed to showcase the performer's art. Thus, we concur with the director that the petitioner has not established that he 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 director concluded that the petitioner meets this criterion and we concur. The petitioner is the silent ringmaster for "O," the third top show in Las Vegas according to Key2LasVegas' website.

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 initially submitted his contract reflecting wages of \$199.43 per performance and a letter from Cirque du Soleil asserting that the petitioner performs 10 times per week and earns an annual salary of \$89,090. The initial index of evidence claims that since each performance is one and a half hours, the petitioner earned \$132.95 per hour at the time the petition was filed. The petitioner also submitted evidence from hotjobs.com reflecting that the 75th percentile for wages for an actor/performer was \$57,272 in Las Vegas and \$53,726 nationally. In the request for additional evidence, the director asserted that the statistics related to Las Vegas only. In response, the petitioner submitted a letter attesting to his increased annual salary of \$94,929.

The director concluded that the petitioner had not demonstrated that his salary was significantly high. On appeal, counsel submits materials from the Department of Labor's Occupational Outlook Handbook reflecting that the top ten percent of actors earn more than \$56.48 per hour.

The petitioner has not provided statistics that are comparable to how he is compensated. As such, we are unable to determine whether his remuneration is significantly high in relation to others in his field. Specifically, the petitioner is paid per performance. We cannot extrapolate an hourly wage from this payment schedule because the petitioner has not established how many hours he works per performance. We will not presume that the petitioner only works the hour and a half the show is on. The petitioner has not established that no rehearsal or preparation (costumes and makeup) time is

required for each performance. Without such information, we cannot determine the petitioner's actual hourly salary to compare with the 90th percentile hourly wage provided in the Occupational Outlook Handbook. While we acknowledge the annual wage information from hotjobs.com, the highest percentile is 75th. We will not presume that one in four performers earns a significantly high wage in the field. Thus, the information from hotjobs.com is not useful for comparison purposes.

In light of the above, 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.

Counsel does not directly challenge the director's assertion that the petitioner had not submitted evidence relating to this criterion. Counsel submits a letter [REDACTED] who directed the petitioner in "Fata Morgana," a theatrical circus. [REDACTED] asserts that the show "sold 3000 tickets in Germany." Without box office receipts for this or other shows prominently featuring the petitioner, the petitioner cannot establish that he meets this criterion.

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 a performer 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 a performer, 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.