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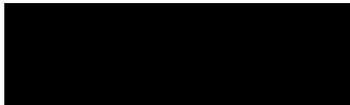
Office: CALIFORNIA SERVICE CENTER

Date: JAN 06 2006

WAC 04 088 54195

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, 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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 that she qualifies as an alien of extraordinary ability in her field of endeavor.

On appeal, counsel asserts that the director's decision is both factually and legally incorrect. We concur. The director's concept of what is inherent to the field is flawed and has the practical effect of impermissibly narrowing the petitioner's field to lead dancers in acclaimed international touring productions. As will be discussed below, the director discounts some of the evidence for the very reason it is significant. The record, however, suggests that the petitioner is no longer in the dance troupe that forms the basis of her eligibility claim. While the director noted this fact, he did not state that it was a basis of denial. Thus, we must remand the matter for the director to inquire as to how the petitioner intends to continue in her field of expertise, Irish dancing.

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).

An alien, or any person on behalf of the alien, may file for classification under section 203(b)(1)(A) of the Act as an alien of extraordinary ability in science, the arts, education, business, or athletics. Neither an offer of employment nor a labor certification is required for this classification.

The specific requirements for supporting documents to establish that an alien has achieved sustained national or international acclaim are set forth in CIS regulations at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be discussed below. It should be reiterated, however, that the petitioner must show that the beneficiary 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 Irish dancer. The regulation at 8 C.F.R. § 204.5(h)(3) presents ten criteria for establishing sustained national or international acclaim, and requires that an alien must meet at least three of those criteria unless the alien has received a major, internationally recognized award.

As noted by counsel on appeal, the director stated:

Even if the alien does fulfill at least three (or more) of the ten regulatory criteria, it does not necessarily establish that the alien has achieved sustained national or international acclaim and recognition, and does not mandate a finding of eligibility.

Counsel challenges this statement, citing *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). While we may not agree with the exact wording of the director's statement, we do not read the director's decision as concluding that the petitioner was eligible under the regulations but that the petition was not approvable. A more rational interpretation of the director's decision is that the petitioner submitted documentation that related to or addressed three criteria, but that the evidence itself did not demonstrate national or international acclaim. A petitioner cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria. In determining whether a petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it establishes that the petitioner has sustained national or international acclaim. Our review of the evidence of record, however, establishes that the petitioner has in fact met the three following criteria.

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 submitted several newspaper articles, many of which contain in depth interviews with the petitioner as opposed to general reviews that merely mention the petitioner in passing. The director stated:

It would be reasonable that the publications would focus on the two lead dancers in the troupe which comprise the musical "Riverdance." The fact that the [petitioner] was singled out for her performance in the reviews does not establish that she is one of the small percentage who have risen to the very top of her field of endeavor.

Where an accomplishment is inherent to the alien's occupation, we agree that it cannot serve to meet a given criterion. Thus, since it is inherent to the occupation of performing artist that her performances will be reviewed in papers local to the performance, such reviews cannot typically serve to meet this criterion. The director, however, took this principle to an unacceptable level. It is precisely *because* the petitioner is the lead dancer and was singled out for interviews that makes the evidence more significant than the typical review. In depth interviews in numerous newspapers all over the United States is consistent with national acclaim. Thus, we find that the petitioner has satisfactorily established that she 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 was a member of the original "Riverdance" cast in 1995 and in 2000 became the troupe's lead dancer. The show's promotional materials and programs prominently feature her and the male lead and they are the only dancers in the programs with biographies. The director dismissed this role because the petitioner has an understudy and the show "would go on" if the petitioner were to leave.

We must concur with counsel that the director's reasoning here is fundamentally flawed. The regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the alien be hired into a leading or critical role. Nothing in the regulation requires that the employer demonstrate its inability to continue in any capacity without the alien. We note that Fortune 500 companies do not typically fold when the Chief Executive Officer (CEO) retires or resigns. Yet such a position is indisputably a leading or critical role with any company. Closer to the petitioner's field, the James Bond series has had a series of actors play the role of James Bond. Once again, it cannot be credibly argued that the role of James Bond is not a leading or critical role. Even in the context of "Riverdance," we note that the production has continued after the departure of [REDACTED] who founded the troupe and was the first male lead. Yet, it cannot be credibly argued that Mr. [REDACTED] did not play a leading or critical role for the production simply because "Riverdance" continues without him.

"Riverdance" is a large troupe. The petitioner is singled out in the reviews, the promotional materials and the program as the leading female. The very fact that she has an understudy serves to emphasize the critical nature of the role she fills. It is simply indisputable that her role with "Riverdance" sets her apart from the rest of the troupe. The record further establishes that "Riverdance" enjoys a distinguished reputation nationally and, in fact, internationally. Thus, the evidence unequivocally establishes that the petitioner 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.

Initially, counsel noted how "Riverdance" has grown from its initial debut. The director concluded that the commercial success of "Riverdance" is attributable to the whole troupe and then considered evidence of the petitioner's work after the date of filing. On appeal, counsel asserts that while the show's success may be based on the skill of the troupe as a whole, "the principal lead dancers carry extensive responsibility for each show's image and personality."

We find counsel's assertion persuasive. "Riverdance" was a commercial success prior to the petitioner's assumption of the leading role. That said, she continued in that role for three years. She promoted the show by giving interviews and is predominantly featured with the male lead dancer on "Riverdance's" promotional materials. Had the show's commercial success not continued, she would not have remained as the lead dancer for three years. Thus, we are satisfied that "Riverdance" enjoyed commercial success during her time as lead dancer and that she was responsible for the show's continued commercial success during that time, if not its initial commercial success.

Although the above discussion reveals that the petitioner meets at least three of the regulatory criteria, the director's analysis of the remaining criteria claimed also bears some discussion as the director will need to issue a new decision in this matter.

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

Initially, counsel asserted that the petitioner won the following awards:

1. The American National Championships,
2. The All-Ireland Championships,
3. The Great Britain Championships, and
4. The World Championships.

Counsel asserted that the petitioner was submitting her “bio” in Riverdance brochures as evidence of these awards. In the director’s request for additional evidence, he did not request evidence of the actual awards. Rather, he requested evidence of their significance and the names of winners during the past three to five years. The relevance of the latter request is not apparent to us. The petitioner complied with the director’s request. The petitioner also submitted letters from the Vice Chairman of the Irish Dancing Commission and a judge at the All-Irish Championships attesting to the petitioner’s awards. In his final decision, the director did not question that the petitioner had won the awards claimed. The director quoted from materials relating to the significance of the awards and reached no conclusion regarding whether or not the petitioner meets this criterion.

We find sufficient evidence that the awards listed are significant. The regulation at 8 C.F.R. § 204.5(h)(3)(i), however, requires evidence of the awards. Primary evidence of awards or prizes are copies of the awards or prizes themselves. The regulation at 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The record contains no evidence that the awards themselves are not available. While the lack of the awards appears to us to be the most obvious flaw in the record, the director never requested copies of the awards or noted their absence. Without better evidence of the awards or prizes themselves, we cannot conclude that the petitioner 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.

Counsel initially asserted that the petitioner meets this criterion with little discussion. In response to the director’s request for additional evidence, counsel asserted that the petitioner’s seven-year history with “Riverdance” serves to meet this criterion. The petitioner submitted an e-mail message from an official at

“Riverdance” asserting that those interested in auditioning for the troupe must be at least 16 years old and dancing at the championship level.

The director acknowledged the above evidence and concluded that having “obtained championship achievements fails to establish that the petitioner is a member in associations in the field for which classification is sought.” On appeal, counsel asserts that the director’s logic is “inherently inconsistent.”

We find that more relevant than the requirements to audition is the nature of “Riverdance” as an entity. Specifically, we must inquire whether it is an “association” of which one can be a “member.” We find that it is not. Nevertheless, we will also consider whether performing with “Riverdance” is comparable evidence to meet this criterion under the regulation at 8 C.F.R. § 204.5(h)(4). Supplementary information at 56 Fed. Reg. 60899 (November 29, 1991) states:

The Service disagrees that all athletes performing at the major league level should automatically meet the “extraordinary ability” standard. . . . A blanket rule for all major league athletes would contravene Congress’ intent to reserve this category to “that small percentage of individuals who have risen to the very top of their field of endeavor.”

We find that performing in “Riverdance” is analogous to competing in the major leagues. While we have considered the petitioner’s leading and critical role above, we are not persuaded that her employment with “Riverdance” alone can serve to meet the membership criterion. Employment with a competitive dance troupe is still employment and is not comparable to a membership in an exclusive association. Thus, the petitioner has not established that she meets this criterion.

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

In response to the director’s request for additional evidence, counsel asserted that the petitioner meets this criterion through her performances with “Riverdance,” on Máire Clerkin’s “A Celtic Christmas” and on Jean Butler’s Irish dancing instructional DVD. The letter from Ms. Butler reflects that the DVD was filmed in December 2004, eight months after the petition was filed.

The director repeated his reasons for discounting the published materials submitted, which we have rejected for the reasons expressed above. The director does not explain how his discussion of the published materials relates to this criterion. On appeal, counsel relies on events that took place after the date of filing.

As stated above, accomplishments that are inherent to the petitioner’s occupation have limited evidentiary value. It is inherent to the performing arts to perform onstage. The record lacks evidence that, as of the date of filing, the petitioner had performed in exclusive artistic showcases, as opposed to performing as a dancer in a large touring dance production. The remaining claims relate to performances by the petitioner after the date of filing and cannot be considered evidence of her eligibility as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, while the director’s reasoning is not persuasive, we find that the petitioner has not established that she meets 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.

In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] Contract Manager for Abhann Productions, the corporate producer of "Riverdance," confirming that the petitioner earned \$3,485 per performance week for 44 weeks per year, amounting to an annual remuneration of \$153,340. The petitioner also submitted local wage data for dancers in New York and California and evidence that the top 10 percent of dancers nationally earned more than \$53,350 in 2002.

Once again, we concur with counsel that the director's discussion under this criterion significantly diverges from the relevant issues: the petitioner's remuneration and how it compares with the top dancers nationally. Specifically, the director notes the existence of another "Riverdance" touring production and appears to draw a negative inference from the absence of documentation regarding the credentials of and selection process for the other production's leading dancer. We note that the director never requested such evidence and the relevance of such documentation is not immediately apparent to us. Curiously, the director does not inquire into this other dancer's remuneration. We fail to see how the credentials of or selection process for another dancer in a separate production relates to whether or not this petitioner's wages are comparable with the top dancers nationally.

We will not limit our comparison to regional wages. Rather, the petitioner must demonstrate that her remuneration is comparable with top dancers nationally. While the top 10 percent of dancers nationwide earned more than \$53,350 in 2002, that figure only demonstrates the lower limit of the top 10 percent. More persuasive would be the *average* wages of the top ten percent of dancers nationally, which would take into account the upper limit.

In light of the above, while the director's reasoning under this criterion is not persuasive, the record does not satisfactorily establish that the petitioner meets this criterion.

While we find that the director erred in concluding that the petitioner had not established her national or international acclaim, another issue remains unresolved. As quoted above, section 203(b)(1)(A)(ii) of the Act requires that the alien seeks to enter the United States to continue work in the area of extraordinary ability.

The director correctly noted that the petitioner stopped dancing with "Riverdance" in June 2003, eight months prior to filing the petition. The petitioner's separation from "Riverdance" is highly relevant as her documented dance appearances after that date appear minimal. We note that the court in *Russell v. INS*, 2001 WL 11055 *2, (N.D. Ill. Jan. 4, 2001), found that because the alien had retired from his area of expertise, he could no longer contest the denial of his petition seeking classification as an alien of extraordinary ability.

While the director noted the petitioner's separation from "Riverdance," the director did not state the petitioner's lack of intent to pursue Irish dance in the future was a basis of denial. Thus, we must remand the matter to the director for consideration of whether the petitioner seeks to enter the United States to work in her field of expertise, Irish dance.

In addressing this issue on remand, the director should consider that the principle that competing or performing is not the same as coaching or teaching has been upheld in *Lee v. I.N.S.*, 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. Thus, the director should address whether the petitioner's intended work is not only within her field of performing arts, but also within her expertise as a performing dancer.

The director should allow the petitioner an opportunity to respond to an April 2005 interview with the petitioner in *Irish Dancing & Culture Magazine*, available on the Internet at www.antoniopacelli.co.uk. In that interview, the petitioner indicated that she was studying to be an actress and only dances when she teaches. A copy of the interview has been added to the record of proceeding.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.