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U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 04 025 54421 Office: VERMONT SERVICE CENTER Date: JAN 06 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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.

*Mari Johnson*

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 (AAO) 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 the petitioner 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 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 earned sustained national or international acclaim at the very top level.

This petition, filed on October 3, 2003, seeks to classify the petitioner as an alien with extraordinary ability as a ballet dancer. The statute and regulations require the petitioner's acclaim to be sustained. The record reflects that the petitioner has been residing in the United States since October 2000. Given the length of time between the petitioner's arrival in the United States and the petition's filing date, it is reasonable to expect her to have earned national acclaim in the United States during that time. The petitioner has had ample time to establish a reputation as a ballet dancer 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 letters from the President of the Art Ballet Kazakhstan Social Fund and the Director of the Almaty Choreographic School stating that the petitioner participated in the "World Youth and Students Festival in Moscow" in 1985 and "became the laureate of that festival." The record, however, includes no first-hand evidence of this award received by the petitioner at age fifteen. There is no evidence showing that the petitioner has received a nationally or internationally recognized award for which she would have faced competition from throughout her field, rather than her approximate age group within that field. A youth or student award offers no meaningful comparison between the petitioner and the most experienced and established ballet professionals. In this instance, the petitioner's designation as "Laureate of the World Youth and Students Festival in Moscow" fails to demonstrate that she "is one of that small percentage who have risen to the very top of the field of endeavor." See 8 C.F.R. § 204.5(h)(2). Further, there is no documentation from the awarding entity or the print media to establish that the petitioner's laureate designation is a nationally or internationally recognized award for excellence in ballet. Finally, there is no evidence showing that the petitioner has won any significant ballet awards in Kazakhstan or the United States subsequent to 1985. The absence of such awards indicates that the petitioner has not sustained whatever acclaim she may have earned as a youth during the 1980's.

*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 order for published material to meet this criterion, it must be primarily about the petitioner 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 or international distribution. An alien would not earn acclaim at the national or international level from a local publication or from a publication in a language that most of the population cannot comprehend. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>1</sup>

The petitioner submitted two articles published in the Russian-language magazine *Seagull* on January 9, 2004 and September 10, 2004. The petitioner also submitted an article published in the Russian-language publication *Jewish Life* on August 11, 2004.<sup>2</sup> These three articles came into existence subsequent to the petitioner's filing date. A petitioner, however, must establish eligibility at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45 (Comm. 1971). Aside from the issue of the date that this evidence came into

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<sup>1</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, cannot serve to spread an individual's reputation outside of that county.

<sup>2</sup> The petitioner is not the primary subject of this locally published article.

existence, there is no evidence showing that these publications have substantial readership beyond Russian language readership in the Philadelphia metropolitan area. The petitioner has failed to provide evidence showing their volume of national readership. Because the overwhelming majority of the U.S. population does not read or comprehend Russian, it has not been shown that an article appearing in such publications constitutes published material in the “major media.”

The petitioner also submitted a local article appearing in the *Delaware County Daily Times* on June 8, 2001. The petitioner, however, is not the primary subject of the article and there is no evidence showing that this publication has substantial national readership.

In this case, we find no evidence to demonstrate that the petitioner has earned sustained acclaim in the national media of the United States, Russia, or Kazakhstan.

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

On appeal, the petitioner submits letters of support from individuals affiliated with various organizations for which she has performed. These letters describe the petitioner as a talented ballet dancer, but they are not adequate to demonstrate that her artistic contributions have had a major impact on the greater field. Vague statements attesting to an alien’s standing and skill are less persuasive than specific examples of achievements. While the petitioner’s witnesses cite her various stage performances, there is no evidence showing that her individual performances attracted a large national audience or were highly acclaimed in critical reviews. Nor has the petitioner submitted evidence showing the extent to which her performances have influenced other professional ballet dancers. An individual with sustained national or international acclaim should be able to produce ample unsolicited materials reflecting that acclaim. Without extensive documentation showing that the petitioner’s work has been unusually influential or highly acclaimed at the national or international level, we cannot conclude that it constitutes a contribution of major significance.

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

The petitioner submitted various event programs from her stage performances. This particular criterion, however, is more appropriate for visual artists (such as sculptors and painters) rather than for performing artists such as the petitioner. Virtually every ballet dancer “displays” her work in the sense of performing in front of an audience. In the performing arts, acclaim is generally not established by the mere act of appearing in public, but rather by attracting a substantial audience. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. The petitioner’s stage performances are far more relevant to the “commercial successes in the performing arts” criterion.

Even if we were to address the petitioner’s performances under this criterion, she has not demonstrated that her performances have consistently been the centerpiece of major productions at prestigious venues (such as, for example, the Lincoln Center in New York). Such a standard must be set for the petitioner to establish that she enjoys sustained acclaim near the top of her field. In this case, the petitioner has submitted evidence showing that the majority of her performances have occurred in areas where she was residing at the time (such as Pennsylvania). For example, the event programs submitted by the petitioner indicate that she has

performed at places such as the Mitchell Performing Arts Center in Bryn Athen, Pennsylvania, North Penn High School in Lansdale, Pennsylvania, Abington Friends School in Jenkintown, Pennsylvania, and Northeast High School in Pennsylvania.

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

The petitioner submitted a letter from S. Tikhonov, Chief Ballet-Master, State Academic Theater of Dancing, The Republic of Kazakhstan, who states:

[The petitioner] graduated from Almaty Choreographic School named after A.V. Seleznev in 1998, and, as the perspective ballerina, was invited to work at the State Academic Theater of Opera and Ballet named after Abai.

She participated in the performances of the State Company of Classic Dance of the Republic of Kazakhstan on repeated occasions in the following performances: "Carmen Suite," music of Zh. Bize, arrangement of [REDACTED] "Valpurgis Night" of Sh. Gouneaux.

The petitioner also submitted a letter from [REDACTED] Artistic Leader of Ballet Troupe, "Kazakh Academic Theater of Opera and Ballet named after Abai," who states:

[The petitioner] was admitted at Kazakh Academic Theater of Opera and Ballet named after Abai after graduation from "Choreographic School named after [REDACTED]" in 1988, where she had worked up to 1998 as the ballet dancer.

While being a student of younger forms, as the most talented student, she performed the children parts of: small Masha in ballet "The Nutcracker" of [REDACTED] and [REDACTED] in the ballet "[REDACTED]" of [REDACTED]. Her ingenious [REDACTED] had a success in the theater's guest performances in Moscow on the scene of "Bolshoi Theater" and in Sent [sic] Petersburg in "Mariinka Theater."

We do not find that such "guest performances" are tantamount to a leading or critical role for those theaters.

[REDACTED] letter lists several "leading parts" performed by the petitioner at the Kazakh Academic Theater of Opera and Ballet named after Abai. [REDACTED] concludes by stating: "Each role played by [the petitioner] on the theater's scene used to become the prominent event in the theatrical life leaving the indelible impression in the minds of her audience and colleagues."

We accept that the petitioner performed in leading role at the Kazakh Academic Theater of Opera and Ballet named after Abai, but there is no evidence showing that this organization has earned a distinguished national reputation. Nor is there evidence demonstrating that the Philadelphia Dance Conservatory, where the petitioner began working in 2001, has earned a distinguished national reputation when compared to other ballet companies throughout the United States. Furthermore, there is no letter of support from an official at

the Philadelphia Dance Conservatory discussing the petitioner's specific responsibilities for that organization or her individual importance to its overall success.

In this case, the petitioner has not established that she performed in a leading or critical role for a distinguished organization, or that her involvement has earned her sustained national or international acclaim.

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

This criterion calls for commercial success in the form of "sales" or "receipts"; simply submitting event programs from one's stage performances cannot meet the plain wording of the regulation. The record includes no evidence of documented "sales" or "receipts" showing that the petitioner's performances drew record crowds, were regular sell-out performances, or resulted in greater audiences than other similar performances that did not feature the petitioner.

In this case, the petitioner has failed to demonstrate that she 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.

Beyond the regulatory criteria at 8 C.F.R. § 204.5(h)(3), the petitioner submitted a June 14, 2001 advisory opinion letter from [REDACTED] of the American Guild of Musical Artists, who states:

The American Guild of Musical Artists has reviewed the draft I-129 Petition and supporting documentation regarding [the petitioner].

Based on the applicable statutory and regulatory requirements regarding extraordinary ability in the arts as a Dancer, [the petitioner] appears to meet the standard of distinction set forth at 8 C.F.R. § 214.2(o).

[REDACTED] does not indicate that he was aware of the petitioner's reputation as a ballet dancer prior to reviewing the draft I-129 petition. An advisory opinion is required for a nonimmigrant O-1 petition, but is not required in this proceeding.<sup>3</sup>

Documentation in the record indicates that the alien was the beneficiary of an approved O-1 nonimmigrant visa petition filed on June 23, 2001 and valid from December 14, 2001 to August 5, 2002. However, extraordinary ability in the nonimmigrant 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 the 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.

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<sup>3</sup> The regulation at 8 C.F.R. § 214.2(o) relates to the "nonimmigrant" extraordinary ability classification.

While Citizenship and Immigration Services (CIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude CIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or 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 Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner's appeal was filed on January 20, 2005. On appeal, counsel indicated that a brief and/or evidence would be submitted to the AAO within 30 days. On February 25, 2005, the petitioner submitted a letter from counsel dated February 17, 2005 and evidence in support of the appeal (which has been addressed throughout this decision). In his February 17, 2005 letter, counsel states: "Undersigned counsel hereby respectfully requests an additional 30 days to file a brief in support of [the petitioner's] appeal."

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) states "[t]he affected party may make a written request to the AAU for additional time to submit a brief. The AAU may, for good cause shown, allow the affected party additional time to submit one." In this instance, the petitioner initially requested and received 30 days in which to submit a brief and/or evidence. The regulations do not state or imply that the petitioner may request future extensions. Nevertheless, as of this date, more than nine months after receiving counsel's request for a second 30-day extension, the AAO has received nothing further.

Review of the record does not establish that the petitioner has distinguished herself as a ballet dancer to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.

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**ORDER:** The appeal is dismissed.