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FILE: LIN 06 080 52234 Office: NEBRASKA SERVICE CENTER Date JAN 03 2008

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:



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
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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, counsel submits a brief. For the reasons discussed below, while we withdraw the director’s determination that the petitioner has not met the artistic display criterion at 8 C.F.R. § 204.5(h)(3)(vii), we concur with the director that the petitioner has not met at least three of the ten regulatory criteria as required for eligibility for the classification sought.

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

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). 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 miniatures artist. 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. Those criteria will be addressed below. At the outset, it is necessary to address counsel's assertions regarding the weight to be accorded the reference letters in this matter and evidence relating to achievements after the date of filing.

First, the petition must be filed with the initial evidence required by regulation. 8 C.F.R. § 103.2(b)(1). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2).

The benefit sought in the present matter is not the type for which documentation is typically unavailable and the statute specifically requires "extensive documentation" to establish eligibility. See section 203(b)(1)(A)(i) of the Act. The regulations governing the present immigrant visa determination have no requirement mandating that CIS specifically accept the credibility of personal testimony, even if not corroborated. The regulations provide that eligibility may be established through a one-time achievement or through documentation meeting at least three of ten criteria. The commentary for the proposed regulations implementing this statute provides that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (1991). The criteria require specific documentation beyond mere testimony, such as awards and published material about the alien.

We note that in *Matter of Price*, 20 I&N Dec. 953 (Assoc. Comm. 1994), the petition was not only supported by impressive reference letters, but an "Official Statistics Profile" and "numerous articles" in national publications. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Thus, while we will consider the letters below *as they relate to the ten regulatory criteria*, vague assertions of ability or acclaim are insufficient.

Second, *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971), on which the director relies for rejecting evidence of achievements after the date of filing, has been incorporated into CIS regulations, 8 C.F.R. § 103.2(b)(12), which requires that evidence submitted in response to a request for evidence establish “filing eligibility at the time the application or petition was filed.” Moreover, we find that the reasoning behind *Matter of Katigbak*, 14 I&N Dec. at 49 is more widely applicable. That decision provides:

If the petition is approved, he has established a priority date for visa number assignment as of the date that petition was filed. A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

Section 204 of the Act requires the filing of a visa petition for classification under section 203(a)(3). The latter section states, in pertinent part: “Visas shall next be made available to *qualified immigrants* who *are members* of the professions.” (Emphasis added.) It is clear that it was the intent of Congress that an alien be a recognized and fully qualified member of the professions at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

Id. The Regional Commissioner continued this reasoning in *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Regl. Commr. 1977). That decision reemphasizes the importance of not obtaining a priority date prior to being eligible based on future experience. In fact, this principle has been extended beyond the alien’s eligibility for the classification sought. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Regl. Commr. 1977). That decision provides that a petition should not become approvable under a new set of facts. Recognizing that *Matter of Katigbak*, 14 I. & N. Dec. at 49 was not “foursquare with the instant case” in that it dealt with the beneficiary’s eligibility, *Matter of Great Wall*, 16 I&N Dec. at 145 still applies the reasoning. The decision provides:

In sixth-preference visa petition proceedings the Service must consider the merits of the petitioner’s job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily. It follows that such consideration by the Service would necessarily be focused on the circumstances at the *time of filing* of the petition. The petitioner in the instant case cannot expect to establish a priority date for visa issuance for the beneficiary when at

the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer.

Id. (Emphasis in original.) Finally, when evaluating revisions to a partnership agreement submitted in support of a petition seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Act, this office relied on *Matter of Katigbak*, 14 I. & N. Dec. at 49 for the proposition that “a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts.” *Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176.

In the classification sought, the petitioner must establish that he enjoyed sustained national or international acclaim as of the filing date of petition. To hold otherwise would have the untenable result of an alien securing a priority date based on the speculation that his work might gain acclaim while the petition is pending. Thus, we concur with the director’s conclusion that evidence of achievements after the date of filing cannot be considered in this matter.

The petitioner has submitted evidence that, he claims, meets the following criteria.¹

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

In 1994, the petitioner was selected as British Miniaturist of the Year during an annual competition originating in 1992. The competition was conceived by Marion Fancey and appears connected to “The Event,” a British dollhouse and teddy bear fair. According to the materials submitted: “The competition encourages new talent. Indeed, although ‘new professionals’ can enter, those who have been established for some time are actually not allowed to enter.”

Among other concerns, the director concluded that the award was limited to emerging talents and could not be considered evidence of “recognition in the field at the highest level.” On appeal, counsel incorrectly characterizes this concern, asserting that the director required that the award be internationally recognized. Counsel challenges such an interpretation, citing *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994).

In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Regardless, the director's decision does not contradict the reasoning expressed in *Buletini*. Specifically, we do not read the director's decision as dismissing the petitioner's award based on a national rather than international reputation, a position which we agree is not supported by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i). Rather, the director was concerned that the award is limited to emerging talents in the field.

Notably, the court in *Buletini* did not hold that the submission of evidence relating to a given criterion was sufficient. Rather, the court acknowledged that INS, now CIS, "must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini*, 860 F. Supp. 1234.

The evidence submitted to meet a given criterion must be indicative of or at least consistent with sustained national or international acclaim if that statutory standard is to have any meaning. We concur with the director that an award that excludes the most experienced and renowned members of the field from competition cannot serve to meet this criterion. Moreover, the petitioner has not explained how an award issued in 1994 is indicative of *sustained* acclaim as of the date of filing in this matter, 12 years later.

For each of the above reasons individually, we find that 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 submitted evidence that his company, Small Time, is a member of the British Toymakers Guild (BTG). In addition, the petitioner is a member of the British Watch and Clock Makers' Guild. Finally, the petitioner submitted evidence of his membership in the International Guild of Miniature Artists (IGMA). The petitioner submitted Internet materials providing the following membership information about BTG:

Applicants for full membership submit examples of work for scrutiny by a Selection panel. The Guild has always insisted that it's [sic] members['] work meets its criteria of quality[.] This has ensured that the Guild maintains it's [sic] reputation among the trade and buying public as representing the creators of well-designed and well-made toys, gifts and miniatures.

The Internet materials regarding the British Watch and Clock Makers' Guild state:

Membership [in] the British Watch and Clock Makers' Guild is by election and is available to those who are professionally engaged in any branch of horology and allied crafts.

The director concluded that the petitioner had not established that either guild requires outstanding achievements of its members.

On appeal, counsel references letters from [REDACTED] Guild Manager of the BTG and [REDACTED], who organizes the IGMA shows. Mr. [REDACTED] asserts that “member” is the highest tier of membership in the BTG and that selection for membership in the BTG demonstrates that the petitioner’s “craftsmanship meets the highest standards both for design and manufacturing skills in his chosen field of creating miniature clocks and assorted miniature accessories.” Ms. [REDACTED] asserts that she only invites “the highest quality artists to participate” in IGMA shows. She provides no information regarding membership in the IGMA itself.

We will consider the petitioner’s show exhibitions below. At issue for this criterion, according to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii), is the standard for membership in the associations of which the petitioner is a member. Ms. [REDACTED] provides no information regarding the membership criteria for IGMA and the record contains no evidence relating to this issue.²

Regarding Mr. [REDACTED]’s letters, the fact that “member” is the highest tier of membership in the BTG does not necessarily imply that all members must demonstrate outstanding achievements to secure full membership. Both his statement and the information in the Internet materials submitted by the petitioner reveal that the BTG does require that prospective members meet certain quality standards for membership. We are not persuaded, however, that meeting professional quality standards designed to ensure well-designed and well-made products is an outstanding achievement that places the petitioner within that small percentage at the top of the field. Rather, anything less would suggest a lack of competence in the occupation.

Further, the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of the *petitioner’s* membership in qualifying associations. The membership certificate from the BTG is issued to the petitioner’s company. Thus, this membership cannot serve to meet the plain language of the regulatory criterion set forth at 8 C.F.R. § 204.5(h)(3)(ii).

Finally, the British Watch and Clock Makers’ Guild appears open to those engaging in the profession or a related profession.

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

² The petitioner submitted Internet materials from IGMA which reflects that their website, www.igma.org, includes a “Join IGMA” page. We have reviewed that page, which is publicly available on the Internet. It contains no suggestion that membership is exclusive to those who demonstrate outstanding achievements. The membership application, which is available for download, suggests that the only requirement for membership is the payment of dues, which is not an outstanding achievement in the field of art.

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 director concluded that the petitioner meets this criterion. While much of the published material is limited to photographs of the petitioner's miniatures rather than materials about the petitioner himself, the record does contain journalistic coverage of the petitioner relating to his work. Thus, we concur with the director's conclusion on this issue.

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

Initially, counsel referenced 15 letters attesting to the petitioner's talent to meet this criterion. The unique aspect of the petitioner's work is that he designs working miniature clocks and that he is able to work in 1/24th scale in addition to the more traditional 1/12th. The director concluded that the petitioner had not established that his "original styles, methods or techniques . . . are recognized as having major significance to the field of miniature art." On appeal, counsel asserts:

The director denies that [the petitioner] has made contributions of major significance to the field of miniatures, but the record is replete with references to [the petitioner's] unique contributions. Time and again the experts state that no one in the field is making working miniature clocks of nearly the same quality. There can be no greater contribution to an art form than to create unique pieces that are in demand by persons around the world.

We will consider the letters below. As stated above, however, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.*

In evaluating the reference letters, we note that letters containing mere assertions of widespread acclaim and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim.

Many of the letters are from show organizers discussing the significance of attendance at their shows. Thus, these letters relate to the display criterion at 8 C.F.R. § 204.5(h)(3)(vii) and will be considered below in that context. The authors' general assertions, however, that the petitioner can be

presumed to be at the top of his field through attendance at top shows are not evidence of contributions of major significance.

██████████, Director of the Kensington Dollshouse Festival, asserts that she first observed the petitioner's work at an exhibition and was impressed by the beauty of his clocks in addition to the working mechanisms that accurately keep time. She explains that "most clock makers would either make clocks that didn't work, or if they did work they would just put a watch face & movement in the clock, rather than the craftsman making the clock face and workings themselves." She asserts that no one else makes clocks at the petitioner's level and that he has "made a name for himself in this area."

██████████ confirms that he was impressed with the petitioner's work and purchased a piece for his own private collection. Mr. ██████████ opines that the petitioner is among the finest in his field.

██████████ asserts that the petitioner is the only artist, to her knowledge, that uses working clock mechanisms. She continues that he has also "designed and created clock chimes to be used in conjunction with his working clocks." She also praises his research and accuracy in reproducing famous clocks in miniature. Finally, she notes that the petitioner is capable of working in 1/24th scale, which is "finer and more delicate work than the more common industry norm of 1/12th scale."

Other references affirm that the petitioner's work is sought after by collectors in the field. Some affirm purchasing the petitioner's work themselves for their private collections and have recommended the petitioner to other collectors, who have also been pleased with the petitioner's work. The letter writers also confirm the unique nature of the petitioner's design and creation of working miniature clocks.

The reference letters adequately demonstrate that the petitioner's work is unique and original and deemed worthy of purchase by collectors. We note that the petitioner seeks an employment-based visa. Thus, his field includes only those making a living as a miniature craftsman and not hobbyists in general. As such, the ability to sell his work does not necessarily set the petitioner apart from others in his field.

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. The record is absent evidence that the petitioner's creation of working miniature clocks is a contribution of major significance to the craft of miniature making. Such a contribution would need to go far beyond merely establishing his area of unique specialty.

Without evidence of a significant influence on the craft of miniature making, the petitioner cannot establish that he meets this criterion.

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

██████████, founder and organizer of the London Dollhouse Festival, asserts that the petitioner has been accepted and invited to attend U.S. festivals “because there is no one at this time among the many talented US miniature makers who makes the same wide range of working miniature clocks.”

██████████e asserts that the Kensington Dollhouse Festival exhibits the work of top miniaturists from around the world. The organizers review the work of each artist each year for admission. Ms. Stokoe confirms that the petitioner “has been exhibiting at the Festival for many years.”

██████████, Senior Partner for Miniatura, affirms that demand for the show outstrips space available and that the petitioner is a regular exhibitor with the show. As stated above, Ms. ██████████ asserts that she only invites “the highest quality artists to participate” in IGMA shows.

██████████ of Puppenhausmuseum in Basel, the largest museum of its kind in Europe, confirms that they purchased work by the petitioner “for the display of our museum [sic].”

In addition to the above letters, the petitioner submitted evidence that the petitioner’s work has been purchased for private collections. Private collections cannot serve to meet this criterion in and of themselves. That said, the record contains several published dollhouse magazines that include photos from private collections featuring the petitioner’s work. The petitioner is credited in the captions.

Given the evidence in the aggregate, we are satisfied that the petitioner 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.

Counsel did not previously assert that the petitioner meets this criterion. On appeal, however, counsel asserts that the director erred in failing to consider that the petitioner’s work commands a high price.

The record includes catalogs listing the prices for some of the petitioner’s work, letters from experts affirming that the petitioner’s work commands a high price and the petitioner’s business plan, submitted as evidence of his intention to continue working in his field of expertise. Evidence that individual pieces made by the petitioner are priced “high” does not necessarily imply that the petitioner’s ultimate remuneration is significantly high in relation to other miniaturists who make a living in the field. Fine art is generally “expensive” in comparison to factory created items to compensate for the supplies and the amount of time that work by hand requires. The record contains no evidence regarding the petitioner’s compensation over time, such as an annual tax return. Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence that would allow a comparison of the petitioner’s remuneration with that of other miniaturists. The record lacks evidence regarding the remuneration enjoyed by the top miniaturists nationally in Great Britain.

In light of the above, the petitioner has not established 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. For the reasons discussed above, while the petitioner has established that he meets two criteria, the evidence falls far short of meeting the necessary third criterion.

Review of the record does not establish that the petitioner has distinguished himself as a miniaturist 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 miniaturist, 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.