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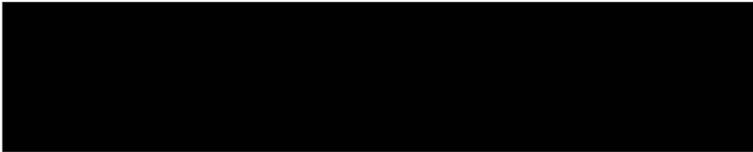


FILE: [REDACTED] OFFICE: NEBRASKA SERVICE CENTER Date: NOV 25 2008  
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IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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.

*J. Grissom*  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a retailer of fashion apparel, seeks to classify the beneficiary 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 and business. The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel argues that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and thus qualifies for classification as an alien of extraordinary ability. More specifically, counsel asserts that the evidence of record satisfies the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (iii), (viii), (ix) and (x).

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.

United States Citizenship and Immigration Services (USCIS) 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, 60898-99 (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 the beneficiary has sustained national or international acclaim at the very top level.

This petition, filed on April 19, 2006, seeks to classify the beneficiary as an alien with extraordinary ability in the field of fashion design. At the time of filing, the beneficiary was employed by Victoria's Secret Stores, Inc. as a Raw Material Research Designer. The petitioner submitted an April 13, 2006 letter from [REDACTED] Director, Human Resources, Victoria's Secret Stores, Inc., stating:

As Raw Material Research Designer, [the beneficiary] will continue to use her outstanding creative instincts and extensive knowledge to research and develop raw materials (fabric, trim, print, color) that are consistent with Victoria's Secret's fashion themes and focus, while adhering to production schedules and business plans established for each seasonal collection. Specifically, [the beneficiary's] duties will include:

- Refining recommended corporate color palettes in conjunction with Design Director and Designers.  
Gathering information from innovative fashion and business sources (fabric shows, trend presentations, etc.), which represent the company's seasonal fashion theme. Presenting trend-right and first-to-market fabrics to Design and related departments and keep vendors apprised of current brand focus and themes.
- Developing a clear understanding of fabrics that support the company's fashion direction, meet quality standards at affordable price points, and are suitable for various printed techniques, finishes and washes.

In the decision denying the petition, the director stated:

The petitioner states that the "[beneficiary] is an individual of extraordinary ability in the arts, specifically in the field of fashion design." . . . A list of duties was provided, however they appear to primarily involve research and procurement. It does not appear that the beneficiary will actually be doing any designing. The petitioner has not explained how selecting the materials *used* by fashion designers qualifies the beneficiary as an alien of extraordinary ability in the field of fashion *design*.

The director's decision questions whether the beneficiary's occupation of Raw Material Research Designer falls within the field of fashion design. According to the beneficiary's job duties, she works in conjunction with the Design Department in the research and development of raw materials that are consistent with Victoria's Secret's brand focus and fashion direction. Nevertheless, we will not limit the scope of the beneficiary's field to include only the occupation of fashion designer. While based on the petitioner's statement, the director's narrowing of the beneficiary's field is unduly restrictive and will be withdrawn. In addressing the petitioner's evidence, we will consider the beneficiary's accomplishments as they relate to the fashion industry.

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, internationally 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. A petitioner, however, cannot establish the beneficiary's eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R.

§ 204.5(h)(3). In determining whether the beneficiary meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. 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). The petitioner has submitted evidence pertaining to the following criteria.<sup>1</sup>

*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 a letter from \_\_\_\_\_ Head of School, ESMOD (“École Supérieure des Arts et techniques de la Mode” or Superior School of Arts and Techniques of Fashion) Germany,<sup>2</sup> stating:

[The beneficiary] studied fashion design at ESMOD International Fashion School in Munich/ Berlin Germany.

[The beneficiary] finished her education in June 2000.

\* \* \*

After three years of intense study, the students have to present their final talent and capability at a fashion show, which is graded for their diploma. . . . The international Jury awards at the end of the show the most creative student with the “Prix Createur” out of the 40 competitors.

[The beneficiary] received the “Prix Createur” for her exceptional diploma-collection in 2000.

The petitioner also submitted a copy of the beneficiary’s prize and a May 2000 article in *Tageszeitung* entitled “The Art of Junior Designers.” The article states:

It was full of fantasy and at the same time practical theses work that the 38 graduates of the ESMOD fashion school in Munich presented at the city’s Elserhalle. The audience was filled with enthusiasm by the imaginativeness of the prospective designers – even if some of the designs were really not meant to be worn on the street. [The beneficiary] was awarded the jury prize for her designs. . . . The internationally renowned fashion school, which was founded in Paris 150 years ago, has had a local campus in Munich since 1989. After three years, the next generation of fashion designers are set free into professional life.

The plain language of this regulatory criterion requires “nationally or internationally recognized prizes or awards for excellence in the field of endeavor.” Therefore, the petitioner must demonstrate that the preceding competition was open to designers already working in the field rather than limited to students or “prospective designers.” The preceding documentation indicates that consideration for the beneficiary’s prize was limited

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

<sup>2</sup> The letter from \_\_\_\_\_ indicates ESMOD operates 19 schools in various countries.

to her graduation class of 38 or 40 students from ESMOD's Munich school. The beneficiary's receipt of this prize reflects institutional recognition from her alma mater rather than national or international recognition for excellence in the field. We cannot conclude that the beneficiary's receipt of a student award is an indication 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). A student award may place the beneficiary among the top students at her school, but it offers no meaningful comparison between her and experienced professionals in the fashion industry.

The petitioner also submitted two "Angel Award" certificates from 2004 bearing the signature of the Vice-President of Victoria's Secret Stores, Inc. These fill-in-the-blank award certificates state that the beneficiary's co-workers awarded her an Angel Award for "outstanding teamwork." These award certificates reflect institutional recognition by the beneficiary's employer rather than nationally or internationally recognized awards for excellence in the field.

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

*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.*

In general, in order for published material to meet this criterion, it must be primarily about the beneficiary 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 level from a local publication. 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>3</sup>

As discussed, the petitioner submitted a May 2000 article in *Tageszeitung* entitled "The Art of Junior Designers." This article is about a student fashion show presented by the ESMOD fashion school in Munich and only mentions the beneficiary's name once as an award recipient. The plain language of this regulatory criterion, however, requires that the published material be "about the alien." The petitioner also submitted a captioned photograph in the May 27, 2000 issue of *Bild* that briefly discusses the ESMOD school's student fashion show. The captioned photograph displays a dress designed by the beneficiary and includes three sentences about her. The petitioner's initial submission also included three additional articles that mention the beneficiary by name, but they were unaccompanied by English language translations. Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. There is no evidence (such as circulation statistics) showing that the preceding articles were in professional or major trade publications or some other form of major media.

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<sup>3</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, for instance, cannot serve to spread an individual's reputation outside of that county.

In response to the director's request for evidence, the petitioner submitted an October 16, 2006 press release announcing that the "Victoria's Secret Fashion Show" was to air on CBS on December 5<sup>th</sup>. This press release was issued subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider this evidence in this proceeding. Nevertheless, the press release is not about the beneficiary and does not identify her. Further, a press release, which is not the result of independent media reportage, cannot serve to meet the plain language of this regulatory criterion.

The petitioner submitted a large amount of Victoria's Secret online and catalogue material and Peclers catalogue material. The petitioner also submitted pages from magazines such as *Vogue*, *Harper's Bazaar*, *Elle*, *Vanity Fair*, and *In Style*. There is no evidence establishing that the fashions shown are specifically attributable to the beneficiary or that she was their primary creator. On appeal, counsel argues that the preceding evidence represents "a plethora of published materials in professional or major trade publications or major media about [the beneficiary's] work in the field of fashion design." The catalogue and magazine pages showing various fashions do not identify beneficiary by name and do not constitute published material about her.

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

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

Although the petitioner does not specifically address this regulatory criterion, the record includes evidence showing that the beneficiary's work was displayed at a student fashion show presented by the ESMOD school at the Elserhalle in Munich in 2000. We note that the beneficiary's designs were displayed along with those of the students in her graduating class. In this case, there is no evidence showing that the beneficiary has regularly participated in exclusive shows devoted solely or largely to the display of her fashions alone. The petitioner has not established that the fashions for which the beneficiary was the primary creator have been displayed at significant artistic venues consistent with sustained national or international acclaim at the very top of the field.

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

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

Aside from letters of support from the beneficiary's current and former employers, the petitioner submitted recommendation letters from several of her professional contacts. While the record includes documentation showing that Victoria's Secret and the Gap have distinguished reputations, the letters submitted by the petitioner do not establish that the beneficiary's role for her employers was leading or critical. There is no evidence demonstrating how the beneficiary's role differentiated her from the multiple design personnel working for these companies, let alone their senior management. The documentation submitted by the petitioner shows that the beneficiary performed admirably on the projects assigned to her, but it does not establish that she was responsible for her employers' success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim.

In light of the above, the petitioner has not established that the beneficiary 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.*

The petitioner submitted a pay stub for the beneficiary from January 2006 reflecting that she earns an annual salary of \$100,000. The record also includes information from the U.S. Department of Labor's *Occupational Outlook Handbook*, 2004-05 edition, stating: "Median annual earnings for fashion designers were \$51,290 in 2002. The middle 50 percent earned between \$35,550 and \$75,970. The lowest 10 percent earned less than \$25,350, and the highest 10 percent earned more than \$105,280." Counsel asserts that the beneficiary's "current compensation is almost twice the median for fashion designers." The petitioner's reliance on median salary statistics from 2002 is not an appropriate basis for comparison for two reasons. First, the earnings data from 2002 does not offer a timely comparison with beneficiary's salary as of 2006. Second, the petitioner must submit evidence showing that the beneficiary's salary places her at the very top of her field, not in the top half. See 8 C.F.R. § 204.5(h)(2). The evidence submitted by the petitioner does not establish that the beneficiary's compensation was significantly high in relation to others in her field.<sup>4</sup> There is no evidence indicating that the beneficiary has commanded a level of compensation that places her among the highest paid designers in the fashion industry.

In light of the above, the petitioner has not established that the beneficiary 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.*

On appeal, counsel argues that the "published material submitted served as evidence of [the beneficiary's] commercial success." Published material, however, falls under the regulatory criterion at C.F.R. § 204.5(h)(3)(iii), a criterion that we have already addressed. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for published material and commercial successes, USCIS clearly does not view the two as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless. Nevertheless, the plain language of this regulatory criterion indicates that it is intended for the performing arts rather than the fashion industry. Further, this regulatory criterion calls for evidence of commercial successes in the form of "receipts" or "sales." The record does not include sales figures for fashions for which the beneficiary was the primary designer.

In this case, the petitioner has failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that she meets at least three of the criteria at 8 C.F.R. § 204.5(h)(3). The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence

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<sup>4</sup> According to U.S. Department of Labor's *Occupational Outlook Handbook*, 2008-09 edition, the highest 10 percent of salaried fashion designers earned more than \$117,120 in 2006. See the Bureau of Labor Statistics internet site at <http://www.bls.gov/oco/ocos291.htm>, accessed on November 7, 2008. The petitioner's \$100,000 salary in 2006 is significantly below this amount.

in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

Beyond the regulatory criteria at 8 C.F.R. § 204.5(h)(3), the petitioner submitted several letters of recommendation praising the beneficiary's talent as a fashion designer. These letters, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. USCIS 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, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of recommendation letters from the beneficiary's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of achievements and recognition that one would expect of a fashion designer who has sustained national or international acclaim at the very top of the field.

While recommendation letters can provide useful information about an alien's qualifications or help in assigning weight to certain evidence, such letters are not a substitute for objective evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Further, the classification sought requires "extensive documentation" of sustained national or international acclaim. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The commentary for the proposed regulations implementing the statute provide 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 (July 5, 1991). Primary evidence of achievements and recognition is of far greater probative value than opinion statements.

Documentation in the record indicates that the alien was the beneficiary of an approved O-1 nonimmigrant visa petition filed in her behalf by Victoria's Secret Stores, Inc. Although the words "extraordinary ability" are used in the Act for classification of artists under both the nonimmigrant O-1 and the first preference employment-based immigrant categories, the statute and regulations define the term differently for each classification. Section 101(a)(46) of the Act states, "The term 'extraordinary ability' means, for purposes of section 101(a)(15)(O)(i), in the case of the arts, distinction." The O-1 regulation reiterates that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines 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). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(3)(iv)(A), but the immigrant classification requires actual receipt of nationally or internationally recognized awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear statutory and regulatory distinction between these two classifications, the beneficiary's prior receipt of O-1 nonimmigrant classification is not evidence of her eligibility for immigrant classification as an alien with extraordinary ability.

While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude USCIS 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 USCIS 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 USCIS 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 USCIS from denying an extension of the original visa based on a reassessment of the beneficiary'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 USCIS 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 has approved a nonimmigrant petition 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).

Review of the record does not establish that the beneficiary has distinguished herself 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 beneficiary's achievements set her significantly above almost all others in her field at a national or international level. Therefore, the petitioner has not established the beneficiary's 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.