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FILE: WAC 03 005 53413 Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

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.

Mari Johnson

S 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 appeal will be sustained and the petition will be approved.

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. On Part 6 of the petition, the petitioner indicated that her proposed employment would be as a fashion model. The director determined the petitioner had not established the sustained national or international acclaim as a fashion model necessary to qualify for classification as an alien of extraordinary ability. The director further concluded that the record suggested that the petitioner actually intended to work as an actress and that she had not demonstrated national or international acclaim as an actress.

On appeal, counsel asserts that the petitioner's accomplishments as an actress reflect on her acclaim as a model and notes that the petitioner has continued to work as a model. Recently models have frequently acted in movies and on television. This trend has somewhat blurred the line between modeling and acting. The record adequately reflects that the petitioner continues to pursue both types of jobs at the highest level nationally. Thus, we will consider all of the evidence submitted below.

One of counsel's other assertions bears mention despite our ultimate decision to sustain the appeal. Specifically, counsel continues to assert on appeal that the petitioner's nonimmigrant visa as an alien of extraordinary ability is "prima facie" evidence that she has met at least three of the regulatory criteria. Counsel asserts that "the regulations for the O-1 and EB-1 visas of extraordinary ability are virtually identical." This assertion is simply untrue for aliens in the petitioner's field. 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) as "distinction." The regulation at 8 C.F.R. § 204.5(h)(3), however, requires sustained national or international acclaim. While the regulation at 8 C.F.R. § 214.2(o)(3)(iii) contains the same regulatory criteria as 8 C.F.R. § 204.5(h)(3), the nonimmigrant regulations refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. The nonimmigrant regulations contain entirely separate regulatory criteria for aliens in the field of art and the motion picture or television industry, a distinction the immigrant regulations do not make. As such, the petitioner's approval for a non-immigrant visa under the lesser standard of "distinction" is not evidence of her eligibility for the similarly titled immigrant visa. Regardless, each petition must be adjudicated on its own merits under the regulations that apply to the benefit sought. Thus, the petitioner's eligibility will be evaluated under the ten regulatory criteria discussed below.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that she 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 fashion model and actress. 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 meets the 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.

Articles devoted solely to the petitioner and her career appear in *Elle Canada*, *Hello*, *REV*, *The Philippine Reporter*, *Balita USA*, *Canadian Living*, the *Toronto Sun* and the *Toronto Star*. Smaller pieces about the petitioner appear in *O*, *Unwind Magazine*, *Flaunt* and *Flare*. Curiously, the director ignores all of these articles, focusing solely on an article dated after the petition was filed. The director does not make clear whether or not the petitioner meets this criterion. While the articles about the petitioner may not have all appeared in nationally distributed publications, some of them clearly did. Thus, we find 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.

The director acknowledged the submission of evidence relating to the petitioner's income as a fashion model, but concluded that the petitioner's primary income came from acting and did not reflect on her abilities as a fashion model. Submission of the petitioner's tax returns demonstrating sustained income over one year would have been more persuasive. Nevertheless, the record demonstrates that the petitioner has commanded approximately \$5,000 in gross wages for an eight-hour day as a fashion model. Subtracting the \$1,050 commission to her agent, this translates to \$493.75 per hour. The petitioner submitted evidence that the level two hourly wage for models in Los Angeles is \$17.55. While we normally require evidence comparing the petitioner's wage to a national wage, the petitioner's hourly wage is so much higher than the level two wage (28 times higher), we find sufficient evidence that the petitioner commands significantly high remuneration for her services as a model. Thus, 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.

The petitioner played a critical role in [REDACTED]. The film ranked second behind "Black Hawk Down" in its opening weekend, displacing "Lord of the Rings," with a \$17.5 million take and ultimately grossed \$115 million internationally. Thus, it enjoyed commercial success.¹ The petitioner is prominently pictured on the film's promotional materials and is featured in printed previews of the film. As such, the record sufficiently establishes the petitioner's role in the film's success. After the date of filing, the petitioner appeared in a leading role in [REDACTED]. Once again, the promotional materials feature the petitioner prominently. While this evidence does not relate to her eligibility at the time of filing, it does demonstrate her continued work at the top of her field. In light of the above, we find the petitioner meets this criterion.

In review, while not all of the petitioner's evidence carries the weight imputed to it by counsel, the petitioner has established that she has been recognized as an alien of extraordinary ability who has achieved sustained national acclaim and whose achievements have been recognized in her field of expertise. The petitioner has established that she seeks to continue working in the same field in the United States. Therefore, the petitioner has established eligibility for the benefits sought under section 203 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

¹ While the film was not critically acclaimed and there is no evidence it was nominated for any awards, the film's reputation is more relevant to the criterion relating to a leading role for an organization with a distinguished reputation set forth at 8 C.F.R. § 204.5(h)(3)(viii). We do not need to address that criterion as the petitioner meets the requisite three.