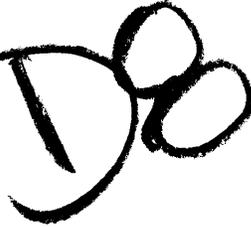


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



**U.S. Citizenship
and Immigration
Services**



FILE: EAC 03 141 53788 Office: VERMONT SERVICE CENTER

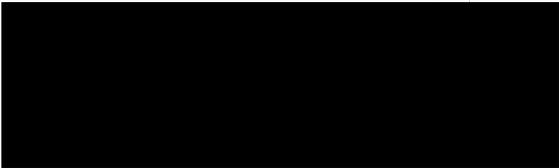
Date **FEB 26 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

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. Wieman, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant 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 is a ballet company and school. The beneficiary is a ballet dancer and performer. The petitioner seeks an extension of O-1 classification of the beneficiary as an alien with extraordinary ability in the arts under section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), in order to continue to employ her as a ballet dancer for three years at a weekly salary of \$150.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary satisfies the standards for classification as an alien with extraordinary ability in the arts.

On appeal, counsel for the petitioner provides one additional piece of documentation and a brief.

Section 101(a)(15)(O)(i) of the Act provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field through extensive documentation, and who seeks to enter the United States to continue work in the area of extraordinary ability.

The beneficiary is a 22-year old native and citizen of Canada. She started her training at the Alberta Ballet School of Dance then continued at Canada's Royal Winnipeg Ballet School. After graduating in June 1999, she joined the Royal Winnipeg Ballet School Aspirant program for two consecutive years. She performed in several Royal Winnipeg Ballet productions and as a guest artist with the Minnesota Ballet and with GroundSwell. She has been working for the petitioner ballet company since September 2002.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary qualifies as an alien with extraordinary ability in the arts as defined by the statute and the regulations.

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation at 8 C.F.R. § 214.2(o)(3)(iv) states that in order to qualify as an alien of extraordinary ability in the arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as

evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence.

The beneficiary has neither been nominated for, nor has she been the recipient of any significant national or international awards or prizes in her field of endeavor. The petitioner asserts that the beneficiary received significant national awards, i.e., commendation from the Alberta Foundation for the Arts. The evidence indicates that the Alberta Foundation for the Arts awarded the beneficiary two scholarship grants in the amounts of \$300 and \$386. The petitioner failed to establish that these grants are significant national awards or prizes in the beneficiary's field of endeavor.

For criterion number one, the petitioner submitted printed programs for productions in which the beneficiary performed. The productions include the following: the University of North Dakota's Department of Music sponsored "First Festival of Women in the Arts," the Banff Arts Festival, Winnipeg's Ballet in the Park, and the Royal Winnipeg Ballet performing Romeo and Juliet on tour in Asia. Counsel for the petitioner asserts that the beneficiary has "performed in leading roles in leading productions" for the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted a letter from Paul Reich, Theater and Dance Consultant, dated June 11, 2003, that states that the beneficiary had three lead roles in *The Nutcracker* but this is not corroborated by objective evidence. The petitioner submitted copies of programs that indicate that the beneficiary has performed in lesser roles. The beneficiary is not mentioned in many of the programs submitted or she is listed as a member of an ensemble. She played the role of servant in *Romeo and Juliet*. The petitioner failed to establish that the beneficiary has performed as a lead or starring participant in any of the productions. The beneficiary does not satisfy this criterion.

For criterion number two, the petitioner submitted a photograph of the beneficiary that was published in the *Winnipeg Free Press* with a caption regarding Winnipeg's Ballet in the Park performances. The beneficiary is not identified in this publication, so it cannot be considered evidence of recognition for her achievements. The petitioner also submitted a review of *The Nutcracker*, presented by the Alberta Ballet, published in the *Calgary Herald* in 1993. The beneficiary is not named in the review. The beneficiary does not satisfy this criterion.

For criterion number three, the petitioner submitted testimonials written by four experts in the beneficiary's field of endeavor. The testimonials state that the beneficiary possesses talent, ability, and strong technique. The testimonials' authors note the beneficiary's performances with the Royal Winnipeg Ballet, but fall short of demonstrating that the beneficiary has performed in a lead, starring or critical role for the Royal Winnipeg Ballet. The chairman of the board of directors of the petitioner's ballet company asserted that the beneficiary has performed for them in a variety of critical roles and is one of their leading dancers. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The beneficiary does not satisfy this criterion.

No evidence was submitted in relation to criterion number four.

As evidence that the beneficiary has received significant recognition for her achievements, the petitioner submitted testimonials that note that the beneficiary received a commendation from the Alberta Foundation for the Arts. The petitioner also submitted letters from the Alberta Foundation for the Arts that notified the beneficiary that she had been awarded scholastic grants in 1994 and in 1996. The petitioner failed to establish that the beneficiary has earned a position of prominence in her field by virtue of her achievements. The beneficiary does not satisfy this criterion.

The petitioner has offered to pay the beneficiary a weekly salary of \$150. In the absence of wage surveys, the AAO is unable to evaluate whether the proffered wage may be considered high in relation to others in the beneficiary's field of endeavor.

After a careful review of the entire record, it is concluded that the petitioner has not shown that the beneficiary is a person of extraordinary ability in ballet.

Counsel for the petitioner emphasized the fact that the beneficiary had been previously approved for an O-1 nonimmigrant visa. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals, which may have been erroneous. *See Matter of Church of Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engineering, Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988). The Administrative Appeals Office is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert denied* 122 S.Ct. 51 (2001).

Counsel cited two unpublished AAO decisions in his brief. Without the underlying record supporting those decisions, the decisions cannot be persuasive in the instant case, which presents its own set of facts. Further, unpublished decisions are not binding in the administration of the Act. *See* 8 C.F.R. § 103.3(c).

The petitioner submitted a favorable consultation from the American Guild of Musical Artists. Consultations are advisory in nature and are not binding on CIS. 8 C.F.R. § 214.2(o)(5)(i)(D).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.