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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2007

EAC 97 178 52767

IN RE: Petitioner: [redacted]
Beneficiary:

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.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the preference visa petition. Subsequently, the Director, California Service Center (hereinafter "the director"), issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. While the appeal does not succeed on its merits, we withdraw the director's decision and remand the matter for the sole purpose of issuance of a new notice of intent to revoke, affording the petitioner an opportunity to respond to inconsistencies in the record and eligibility issues not raised in the original notice of intent to revoke.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

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 that she seeks to enter the United States to continue working in her area of expertise. In the NOIR and the NOR, the director expressed concerns about the petitioner's work history since arriving in the United States.

On appeal, counsel submits a brief and additional evidence. While the director's concerns are not unfounded, the director omitted certain facts that would strengthen the director's basis of revocation. Moreover, the director may wish to consider whether the petitioner has ever enjoyed the type of sustained national or international acclaim required for the classification sought. While an application or petition that fails to comply with the technical requirements of the law may be *denied* by the AAO

even if the Service Center does not identify all of the grounds for denial in the initial decision,[1] a *revocation* can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations in the notice of intent to revoke. *Matter of Arias,* 19 I&N Dec. 568, 570 (BIA 1988). Thus, in order to ensure a thorough analysis of all the evidence and issues in this matter, we must remand the matter for a new notice of intent to revoke that includes all of the relevant factual allegations.

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 (November 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 she has sustained national or international acclaim at the very top level.

According to Part 6 of the petition, this petition seeks to classify the petitioner as an alien with extraordinary ability as a television director, scriptwriter and producer.

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[1] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Continued Employment

The regulation at 8 C.F.R. § 204.5(h)(5) provides:

> *No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work **in the United States**.

(Bold emphasis added.) The "Introduction of Evidence" submitted initially provides that the petitioner worked as a television director, scriptwriter and producer at the Shanghai Center for Family Planning and that she "will continue her work without real retirement." An addendum to the Form I-140 petition provides the "bases of annual income," calculating the income in Chinese RMB on the assumption that the petitioner "will take at least four films per year." On the Form G-325 Biographic Information, signed by the petitioner on August 14, 1997 and submitted with the petitioner's corresponding Form I-485 Application to Register Permanent Residence or Adjust Status, the petitioner indicated that she still worked for the Shanghai Center for Family Planning.

The petitioner was interviewed at the Los Angeles District Office in September 2003 regarding her Form I-485 Application to Register Permanent Residence or Adjust Status, filed concurrently with this petition. At the interview, the petitioner presented her Form 1040 U.S. Individual Income Tax Returns for 2000, 2001 and 2002. Although the petitioner listed her television work under occupation in addition to "housekeeping," the only documented wages during these three years were from housekeeping employment for Hospital Housekeeping Systems and Marriott International Administrative Services. An e-mail letter from the petitioner's daughter to "Dianne" asserts that after the petitioner becomes a lawful permanent resident she plans to establish a studio but also asserts that permanent residency "will offer her mobility to travel to China and to produce films related to intercultural learnings on women and kids."

On May 8, 2006, the director issued a notice of intent to revoke. While the director asserted that the petitioner must be intending to continue in her field "such as to substantially benefit the United States," the director ultimately concluded that there "is no evidence that you have come to the United States to continue work in your field of expertise."

In response, the petitioner submitted her own personal statement discussing her future plans to work in her area of expertise. She also noted that she traveled to China between 1998 and 2000 to direct and produce television shows in China and that she wrote a script based on her housekeeping experiences in the United States. She asserted that she wrote a script for a local Chinese school and incorporated The Visual Voice allowing her to "more freely negotiate, discuss and cooperate with other film and TV

organizations in making TV or film programs." Finally, she discussed several future projects she hopes to complete.

In response to the NOIR, counsel cited *Buletini v. INS,* 860 F. Supp. 1222, 1229 (E.D. Mich. 1994) and other sources for the proposition that aliens of extraordinary ability who work in their area of expertise are presumed to substantially benefit the interests of the United States. Counsel further noted that the regulation at 8 C.F.R. § 204.5(h)(5) requires only a statement detailing plans on how the alien plans to continue working in her area of expertise. Counsel reiterated the claims made in the petitioner's personal statement.

The petitioner also submitted (1) untranslated Chinese credits for programs the petitioner allegedly directed or produced in China after filing the petition, (2) the petitioner's screenplays in Chinese, (3) a "Co-shooting Agreement" between The Visual Voice and C&S Media International, Inc., (4) the articles of incorporation for The Visual Voice, (5) plans for The Visual Voice including a 10-15 minute production, (6) e-mail correspondence regarding proposed collaborations, (7) a letter from the President of the School Board of the Chinese school that performed the petitioner's play and (8) a letter from [redacted], the first female Chinese-American mayor in the United States, authorizing the petitioner to direct and produce a documentary drama about [redacted]s life in America.

The director acknowledged the petitioner's response, concluding that the petitioner had not overcome the concerns stated in the notice of intent to revoke as the proposed work "will be available once funding has been provided."

On appeal, counsel asserts that the director defined the petitioner's "field" too narrowly and discusses examples of other famous individuals whose art reflects their life experiences. Counsel further asserts that where the petitioner directs and produces is irrelevant as "film production is a cultural activity and has no country boundary." Nevertheless, counsel also asserts that the petitioner is attempting to continue working in the United States as is apparent from her incorporation of The Visual Voice, although counsel asserts that "it may take a long time to have a film on the screen." Counsel then provides examples of famous film directors/producers who initially lacked funding.

Not mentioned by the director, however, is the fact that on June 29, 1999, the petitioner filed a Form I-131 Application for Travel Document. In support of this application, the petitioner requested a travel document that would "allow her to travel to other countries to film, which in some cases, she might leave as long as two years, and come back every now and then, but less than 180 days per year."

Regardless of whether film production is a "cultural activity" with "no country boundary," the regulation at 8 C.F.R. § 204.5(h)(5) unambiguously requires evidence that the petitioner intends to work in her area of expertise "in the United States." While the regulation permits a detailed statement from the alien, such a statement must be consistent with the other evidence of record. In this matter, the petitioner's statement, submitted in response to the director's NOIR, is not consistent with the

original petition, supported by statements that she was still employed in China and intended to continue her employment there, and the document submitted in support of the Form I-131.

While the director's conclusion that the petitioner did not intend to work in her area of expertise in the United States is not without support, the director did not mention the inconsistencies discussed above. Thus, in accordance with *Matter of Arias,* 19 I&N Dec. at 570, we will remand the matter for a new notice of intent to revoke that allows the petitioner to respond to the above inconsistencies.

We note, however, that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Extraordinary Ability

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 the following 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.

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (ii) 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;
>
> (iii) 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;
>
> (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought;
>
> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

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

It should be reiterated, however, that the petitioner must show that the beneficiary has sustained national or international acclaim at the very top level. The director may wish to review whether the record contains any evidence regarding the significance of the petitioner's awards, such as media coverage of the award selections; whether the petitioner's certificates of appreciation from her housekeeping employers are awards for excellence in her field; whether the *local* Shanghai TV Artists Association, whose members must be "qualified TV artists, who has got professional tilles [sic] of middle or high level, who are the influential scriptwriters, directors, actors or actresses with some own works [sic], who has been involved in TV art for over six years, and three or more works have won the prizes" requires outstanding achievements as judged by recognized *national or international* experts in the field; whether the petitioner has submitted evidence that the published materials are "about" the petitioner or that they appeared in "major media;" whether teaching constitutes the type of "judging" contemplated by the regulation at 8 C.F.R. § 204.5(h)(3)(iv); and whether the petitioner submitted the required initial evidence of commercial success. The director may also raise any other concerns.

In light of the above, the matter is remanded to the director for the sole purpose of issuing a new notice of intent to revoke advising the petitioner of the inconsistencies above and any findings regarding the petitioner's purported sustained acclaim in 1997 when the petition was filed.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.