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U.S. Citizenship and Immigration Services

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OCT 23 2007

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] seeks to classify the beneficiary 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 the beneficiary enjoys the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel notes that the beneficiary is also the beneficiary of an approved nonimmigrant visa petition in a similar classification, asserting on page 3 of the appellate brief that "the criteria for determining extraordinary ability in both the [nonimmigrant] and [immigrant] context are the same." Counsel further asserts that the director erred by not explaining how the beneficiary could be eligible for the nonimmigrant visa but not eligible for the immigrant visa. These assertions, given the previous filings by counsel's firm and the procedural history in this matter, are disingenuous. The initial cover letter acknowledged that the petitioner had to demonstrate the beneficiary's eligibility pursuant to the criteria at 8 C.F.R. § 204.5(h)(3), relating to immigrants, but then discussed the significantly different criteria relating to nonimmigrants in the arts set forth at 8 C.F.R. § 214.2(o)(3)(iv). The director's request for additional evidence and final notice of denial both advised the petitioner and counsel of the correct regulatory criteria. Thus, counsel was on notice that the criteria are not the same. Moreover, even the regulatory definitions of extraordinary ability differ. Specifically, the regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability in the arts (including the performing arts) for nonimmigrants as simply "distinction," which is further defined as follows:

> Distinction means a high level of achievement in the field of 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.

8 C.F.R. § 214.2(o)(3)(ii). The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in the arts (as well as the sciences, education, business and athletics) 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."

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[1] While the petitioner is listed as a limited liability company, the beneficiary signed the petition as well as the Forms G-28 Notices of Entry of Appearance as Attorney or Representative. The record suggests that the beneficiary is the president of this company, which is listed as having a single employee on the Form I-140. As any person on behalf of the alien may file a petition under the classification sought, 8 C.F.R. § 204.5(h)(1), whether the beneficiary is actually self-petitioning is immaterial. The identity of the petitioner, however, is far more relevant to the nonimmigrant petition that was also filed by this petitioner in behalf of the beneficiary.

Thus, we find no inconsistency inherent in the director's approval of the nonimmigrant visa petition and denial of the immigrant visa petition. Regardless, the prior approval does not preclude Citizenship and Immigration Services (CIS) 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 CIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29-30 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22, 25 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103, 1104 (E.D.N.Y. 1989). *See also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 557, 2004 WL 1240482 at *1 (5th Cir. 2004) (finding that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner'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 CIS 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. The service center director's approval of the O-1 nonimmigrant petition on behalf of the beneficiary does not bind the AAO to follow that contradictory decision. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

Also on appeal, counsel asserts that the director erred in issuing a request for additional evidence that does not explain the deficiencies in the original filing but simply reiterates the regulatory criteria. [redacted] requests that we remand the matter to the director for a new request for additional evidence that is more specific. As stated above, however, while the initial cover letter cites 8 C.F.R. § 204.5(h), the criteria the beneficiary is alleged to meet are actually those listed at 8 C.F.R. § 214.2(o)(3)(iv), which do not pertain to immigrants. The director then issued a request for additional evidence, listing the correct criteria for the immigrant classification sought. We find this request to be appropriate in that the initial filing addressed the wrong criteria and the director's purpose in issuing the request for additional evidence was to advise the petitioner of the appropriate criteria. The director then issued a denial advising the petitioner of the deficiencies in the record, to which the petitioner may now respond on appeal. [redacted] does not assert that there exists additional evidence that the petitioner was unable to acquire during the 60-day period in which the petitioner responded to the appeal (the 30 day appeal period plus an additional 30 days to supplement the appeal) that the petitioner could obtain in the 12-week response period for a request for additional evidence. Thus, the petitioner has not adequately explained why a remand for a request for additional evidence would be appropriate in this matter. We acknowledge the submission of new evidence on appeal and will consider that evidence below.

Finally, [redacted] asserts that the petitioner has established the beneficiary's eligibility. We will address these assertions on the merits below. For the reasons discussed below, more discussion of the individual criteria than that provided by the director is warranted. Nevertheless, we uphold the

director's ultimate conclusion that the petitioner has not demonstrated that the beneficiary enjoys sustained acclaim.

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.

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 Employment-based Immigrants,* 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 seeks to classify the beneficiary as an alien with extraordinary ability as a contemporary dancer. 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. The petitioner has submitted evidence that, it is claimed, meets the following criteria.[2]

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

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

In response to the director's request for additional evidence, counsel asserted that the beneficiary won the Laureate Prize from the Association of the Parents of Pupils of Higher National Academy of Music and Dance of Paris in 1996. Counsel further asserted that the academy "is considered 'The Superior' organization and one of the largest international schools of higher education of Music and Dance." Counsel references exhibits submitted initially. Counsel reiterates this claim on appeal but provides no additional information.

The initial evidence consists of Internet materials in French and an Internet created translation of the same materials. The regulation at 8 C.F.R. § 103.2(b)(3) provides that foreign language documents "shall be accompanied by a full English language translation which 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." An electronic translation is far less reliable than a translation by a human translator competent to translate from the foreign language into English. For example, we note that all of the Internet translations in the record translate the beneficiary's last name as a type of nut. A human translator would recognize, from context, that the beneficiary's last name is being used as a name.

The electronic translation indicates that the beneficiary, along with 14 other students, was a prizewinner in contemporary dance as recognized by the Association of the Parents of Pupils of Higher National Academy of Music and Dance of Paris, apparently for the class of 1995. The record is absent any other evidence about the significance of the association and the national or international recognition of the award. For example, the record contains no evidence regarding (1) the number of dancers who competed or were eligible to compete, (2) whether the competition is limited to students or is one for which the most renowned and experienced dancers aspire and (3) whether the competition is limited to dancers in the City of Paris.

Without additional evidence, we cannot conclude that the documented prize is a lesser nationally or internationally recognized award or prize for excellence. Moreover, an award issued 11 years before the petition was filed is not consistent with *sustained* national or international acclaim as of the date of filing. Finally, the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the receipt of lesser nationally recognized *prizes* or *awards* for excellence. The petitioner has submitted evidence of only a single award. Thus, 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 response to the director's request for additional evidence, counsel asserted that the beneficiary meets this criterion based on a single interview in a June 2006 issue of *Dancer*. In the article, the beneficiary and another dancer in his current show discuss raising children while working as a dancer.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the petitioner submit published material about the alien "in professional or major trade publications or other major media." Thus, the required initial evidence to meet this criterion must include some evidence demonstrating that the publication is a professional or major trade publication or a form of other major media. The use of the word "other" reveals that even a professional or major trade publication must be a form of major media. The petitioner has not submitted any evidence establishing that *Dancer* is a professional or major trade publication or other major media, such as the circulation data for the magazine.

A single interview in a magazine of unknown significance is not indicative of or consistent with sustained national or international acclaim. For the reasons discussed above, the petitioner has not established that the beneficiary meets this criterion.

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.

While counsel never asserts that the beneficiary meets this criterion, we acknowledge that the beneficiary's resume lists judging responsibilities for the Ecole Nationale de Musique et de Danse in Houilles and Rouen. Going on record without supporting documentary evidence, however, is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). The record contains no evidence from the Ecole Nationale de Musique et de Danse in Houilles or Rouen confirming the beneficiary's judging responsibilities. Thus, we cannot evaluate whether these responsibilities might serve to meet this criterion.

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

In response to the director's request for additional evidence, counsel asserted that the reviews of shows in which the beneficiary has performed serve to meet this criterion. The petitioner has not established that his performances were part of artistic exhibitions or showcases. Regardless, we find that this criterion, set forth at 8 C.F.R. § 204.5(h)(3)(vii), is more relevant to the visual arts. The beneficiary is a performing artist. The beneficiary's dance performances will instead be considered below insofar as the petitioner asserts that the beneficiary has performed in a leading or critical role for distinguished dance organizations.

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

Initially, in response to the director's request for additional evidence and again on appeal, counsel asserts that the beneficiary has performed in "lead" roles for various productions with [redacted] and is performing as a featured performer in [redacted] show in Las Vegas. On appeal, counsel references the beneficiary's self-serving resume as evidence of the 14 productions in which the beneficiary has performed a leading role and notes that they are listed in the various cover letters and briefs. As stated above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190). Moreover, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). While counsel asserts that some of the performances "do not have any articles or exhibits attached to them as none were kept by [the beneficiary] nor are they currently available thru [sic] online searches," the nonexistence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

[redacted] director and choreographer of [redacted] in France, asserts that the beneficiary "was consistently selected by me to dance the lead in many of my creations and shows." The record, however, does not support this statement. Exhibit pages 1 through 71 are all Internet materials about Ballet Preljocaj and individual shows produced by this company. While the beneficiary is identified as a dancer, he is not singled out from the other dancers in any of these materials. While the beneficiary claims on his resume to have performed the lead in Romeo and Juliet, for example, the dancers who portrayed Romeo are identified on Exhibit page 9 as [redacted]. Exhibit pages 145 through 167 are all newspaper reviews of [redacted] performances. The beneficiary is not even mentioned in most and even those reviews that do mention him do not single him out as the lead. The foreign language reviews are accompanied by incomplete uncertified translations that do not comply with the regulation at 8 C.F.R. § 103.2(b)(3).

Finally, while the petitioner has demonstrated that the beneficiary is one of the dancers who performs in Celine Dion's Las Vegas show, the record is absent evidence that he plays a leading or critical role for the show that singles him out from others among the ensemble such that the beneficiary can be said to play a leading or critical role for the show, promoted as featuring Celine Dion.

In light of the above, the petitioner has not demonstrated 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.

Initially, the petitioner submitted a letter from [redacted] Company Manager of CDA Productions, confirming that the beneficiary is a dancer for the [redacted] how, "A New Day," and that the beneficiary earns an annual salary of $87,100. Counsel previously asserted that the beneficiary received a raise and now earns an annual salary of $98,000. Counsel reiterates this claim on appeal. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,*

19 I&N Dec. at 534 n.2; *Matter of Laureano,* 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

[redacted] has consistently asserted that the median salary for dancers in the United States is $8.61 per hour and $22.95 per hour in Nevada. As the beneficiary performs 90 minutes per day five times per week 40 weeks per year, counsel concludes that the national median hourly wage would result in an annual salary of only $2,583 and the Nevada hourly median wage would result in an annual salary of only $6,885. The petitioner has never submitted the actual wage data to which counsel refers.

It cannot be credibly asserted that the beneficiary's annual salary represents an hourly wage for his actual performance time only. While the petitioner has not submitted the beneficiary's contract with CDA, it can be presumed that the beneficiary must spend at least some additional time rehearsing. Without the contract explaining how the $87,100 is calculated, we cannot compare the beneficiary's annual wage with median hourly wages.

Moreover, we are not persuaded that comparing the beneficiary's wages with the median wage can establish that the beneficiary earns significantly high remuneration consistent with sustained national or international acclaim as an artist within the small percentage at the top of his field. Far more persuasive would be evidence that the beneficiary earns a wage comparable with the most renowned and experienced contemporary dancers nationwide.

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.

While counsel has never asserted that the beneficiary meets this criterion, the record contains some testimony regarding the commercial success of [redacted] It would appear, however, that the commercial success is indicative of [redacted] acclaim, and not the acclaim of the ensemble of dancers that accompany her. Even if the petitioner established that the success of [redacted] show is, in part, attributable to the beneficiary, and we reiterate that the record contains insufficient evidence in this regard, the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires evidence of more than one commercial success.

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. Section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i); 8 C.F.R. § 204.5(h)(2).

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