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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 06 2007

SRC 06 040 53249

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.

Laura Dearnick
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability," 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 the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel submits a brief. For the reasons discussed below, we uphold the director's decision.

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.

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. Moreover, the statutory standard requires individual acclaim in the field, not simply unique skills and talent. We will not presume individual acclaim from participation in highly competitive ensemble troupes or circuses.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a performing artist. 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 has submitted evidence that, she claims, meets the following criteria.[1]

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

The director appears to have acknowledged that the petitioner meets this criterion through tumbling and gymnastics awards but concluded that none of the awards were recent enough to be indicative of sustained acclaim as of the date of filing. On appeal, counsel asserts that "sustained" merely means over a period of time, but not necessarily recent. Counsel's argument is not persuasive.

To be "sustained" something must be kept up or maintained. The language contained in the Act supports a finding that acclaim must still be current and that if not sustained up to the present time it is not sufficient to meet the requirements of this visa classification, an employment based classification, for acclaimed individuals coming to the United States to continue in their areas of expertise and prospectively benefit the United States. Section 203(b)(1)(A) of the Act. Clearly, this classification is not intended simply as recognition of past achievement, regardless of current ability or acclaim. That said, as in this case, an alien may meet one criterion primarily with older evidence provided that evidence which satisfies another criterion is more recent. In this matter, however, the petitioner has not established that she meets any other criterion, either recently or otherwise. Therefore, we concur with the director that while the petitioner meets this one criterion, she has not established her eligibility for the classification sought, which requires that an alien meet at least three 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.

Initially, counsel asserted that the petitioner had been recognized "in local, national and international media for her accomplishments as an athletic champion and as performer for Cirque du Soleil." In the request for additional evidence, the director noted that all of the published materials was either local or not primarily about the petitioner. Counsel's response does not address this criterion. Thus, the director concluded that the petitioner does not meet this criterion. Counsel does not challenge this conclusion on appeal. We concur with the director's analysis and conclusion regarding this criterion.

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

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

Initially and in response to the director's request for additional evidence, counsel asserted that the petitioner's performances with Cirque du Soleil shows serve to meet this criterion. The director concluded that the Cirque du Soleil shows were not "showcases" of the petitioner's work individually. On appeal, counsel asserts that performing artists are rarely featured solo.

This criterion applies to visual artists. The petitioner is a performing artist. It is inherent to her occupation to perform. Accordingly, her performances are not considered to be artistic exhibitions designed to showcase her art. Thus, we concur with the director that the petitioner has not established that she meets this criterion.

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

At the outset, it is useful to set forth the requirements for this criterion. At issue are the role the petitioner was selected to fill and the reputation of the entity that selected her. While the petitioner submitted her contract, she relies on the statements of several references to meet this criterion.

Some of the references merely assert that the petitioner is the member of various acrobatic teams. [redacted] asserts that the petitioner "played an integral role" in "Mystère" and that the petitioner's talents are "critical to the success of Cirque du Soleil." [redacted], designer of acrobatic performances for Cirque du Soleil, asserts that the petitioner "was a star in the Mystere show" and "indispensable to the show." [redacted], a fellow performer, asserts that the petitioner "was an irreplaceable star of Mystere" and "the main focus of the show." [redacted], another performer with "Mystère" asserts that it took several attempts to find qualified cast members to replace the petitioner. [redacted], another performer with "Mystère," asserts that they have never been able to replace the petitioner. [redacted], a dancer who worked with the petitioner on "Mystère" asserts that the petitioner stood out "enough to become a star," and has proven difficult to replace. Regardless, as "Mystère" appears to have continued after the petitioner joined La Nouba, clearly the petitioner was not literally indispensable or irreplaceable. Notably, the review of "Mystère" in *Out and About* does not single out the petitioner from the rest of the cast or even mention her by name. While the reviewer enjoyed the Chinese Pole act, he also singles out as a highlight an act performed by Portuguese brothers as well as the bungee-cord team. According to the review, the show utilizes 70 performers.

The record includes similar letters regarding the petitioner's performances for "La Nouba." For example, [redacted] a sound engineer, asserts that he viewed "La Nouba" and the petitioner "stole all the focus." [redacted], Public Relations and Marketing Manager for "La Nouba," asserts that the petitioner "has a very important role" and that the show would not be as strong without her. [redacted], the petitioner's coach, asserts that she is a "key performer" for "La Nouba." [redacted], a human resources representative for Cirque du Soleil, asserts that the petitioner "plays a critical and leading role in the Powertrack and Trampoline act" which has "led her to become a star of La Nouba and Cirque du Soleil."

The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also 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 petitioner's contracts are the primary evidence of her roles and are simply not consistent with the above letters. Schedule B of the petitioner's contract with "Mystère" includes the following description of her roles:

> Participation as all-around artist in all acrobatic numbers created for the Production include, without limitation, Fast Track, Teeter Board and Chinese Poles.

Section 1.2.2 states that if the producer requires the petitioner to assume the position of "team leader," the producer agrees to pay the petitioner an additional $10 per performance in which she serves in that role. The record contains no evidence that she routinely served as team leader.

Schedule B of the petitioner's contract with "La Nouba" provides the following description of her role:

> Participation as an all-around Artist in all acrobatic numbers created for the Production including, without limitation Fast Track and Trampoline.

As with the previous contract, the producer agrees to pay the petitioner an additional $10 per performance in which she serves as team leader. More significantly, while [redacted] asserts that the petitioner is the only back up for "Green Bird," a March 1, 2005 addendum indicates that the petitioner became the "*alternate* back-up for the character of the 'Green Bird.'" (Emphasis added.) Moreover, while [redacted] asserts that the petitioner is only the back up because the role relies on more acting than acrobatics, it remains that the producer agreed to pay the petitioner an additional $30 per performance in which she appears as "Green Bird," strongly suggesting it is a much bigger role. The photographs taken from the DVD of "La Nouba" reflect several acrobats serving in a similar role to that of the petitioner and the photograph of the credits reveal 22 Power Track/Trampoline artists. They are followed in the credits by the musicians, suggesting that no acrobat received lower billing.

The description of the petitioner's roles for "Mystère" and "La Nouba" in her contracts does not rise to the level suggested by the petitioner's references. We emphasize that the fundamental issue for this criterion is the role for which the petitioner was selected, not her skill in fulfilling her role. 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). The petitioner has not resolved the inconsistencies between her contracts and the reference letters.

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

Initially, counsel asserted that the petitioner earned $58,208, higher than the "90% percentile" in Florida, $49,130. Counsel further asserted that the petitioner's contract was amended to include a provision whereby the BBC and DVD productions would pay her $250,000 in the event she is interviewed "behind the scenes." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted her 2004 Form W-2 Wage and Tax Statement reflecting wages of $43,602. In addition, the petitioner submitted an amendment to her contract with "La Nouba" reflecting that she would be compensated only $250 if interviewed for a BBC documentary, 100 times less than the amount claimed by counsel. The petitioner also submitted evidence that the Level 4 wage for entertainers, performers, sports and related workers in the Orlando area was $49,130 for 2005.

In the request for additional evidence, the director noted that the petitioner's 2004 W-2 did not reflect wages of $58,208 and concluded that even if she earned such wages, it was not significantly above "average performers." The director further noted a lack of evidence that the petitioner was contracted to perform any "behind the scenes" interviews for BBC and DVD productions. The director expressly requested *national* wage data.

In response, the petitioner submitted the letter from [redacted], in which she asserts that the petitioner "is one of the highest paid performers in the show, earning $65,900." The petitioner also submitted her 2005 Form W-2 reflecting wages of $65,560. These wages are relevant as the petition was filed in November 2005. The petitioner also submitted new wage data for entertainers, performers, sports and related workers in the Orlando area, which shows that the level four wage dropped to $39,728 per year in 2006.

The director reiterated the concerns stated in the request for additional evidence but then acknowledged the Form W-2 showing that the petitioner earned $65,560 in 2005. Thus, the director no longer appears to question counsel's initial assertion that the petitioner earned at least $58,208. The director noted that the petitioner had failed to submit the requested national wage data and concluded that earning $25,000 more than "the average performer" was insufficient.

On appeal, counsel reiterates that the petitioner earned $65,560 and claims to resubmit the petitioner's 2005 Form W-2. While this evidence was not included on appeal, it is already part of the record, as

acknowledged by the director. Counsel asserts that the Department of Labor defines a Level 4 worker as "fully competent." Counsel does not attempt to address the director's concern that the petitioner failed to provide national wage data.

We concur with the director that the petitioner must demonstrate that she earns remuneration that is significantly high nationally, not merely in comparison with other cast members in a particular show or even members of the field regionally. Thus, [redacted]s assertion that the petitioner is one of highest paid members of the cast is insufficient. Moreover, the record does not support this assertion as the petitioner's contract clearly suggests that permanent team leaders and cast members who are hired specifically to play character roles earn more.

The record does not support counsel's initial implication that level 4 wages reflect the top 10 percent of wages in that field, rather than the average wages of fully competent employees as acknowledged on appeal. Thus, the wage data provided does not even reflect the top 10 percent of salaries in the field regionally, let alone nationally.

In light of the above, the petitioner has not demonstrated that her remuneration compares with the remuneration of the most renowned members of her field.

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

Initially, counsel asserted that both "Mystère" and "La Nouba" are commercially successful, with "La Nouba" being featured in a BBC documentary and released on DVD. While the petitioner submitted favorable reviews of both shows, she did not submit the primary evidence required for this criterion, box office receipts and evidence of the actual DVD sales, although the director did not question the commercial success of either show. The director requested evidence that the petitioner "is the reason for the top draw of these shows."

In response, counsel reiterates the claim that the petitioner plays a "leading critical role" for "La Nouba" and, therefore, is responsible for its commercial success. The director concluded that the record only established that the petitioner shared the stage with many performers and could not be said to have played a major part in any commercial success of the Cirque du Soleil shows.

On appeal, counsel asserts that the petitioner is the "focal point" of the entire production and that "La Nouba" would be "doomed for failure" without her presence. Counsel is not persuasive. As discussed above, the record is not persuasive that the petitioner plays a leading or critical role for "La Nouba" above and beyond the ensemble cast. As noted above, the reviews submitted do not single out the petitioner or her act as essential to the show. The petitioner has not demonstrated that she is prominently featured in the show's promotional materials or is otherwise a personal draw for the show.

In light of the above, the petitioner has not demonstrated that she meets this criterion.

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.

Review of the record, however, does not establish that the petitioner has distinguished herself as a performing artist 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 indicates that the petitioner shows talent as a performing artist, but is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.