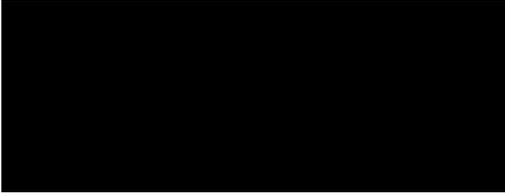


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Office: VERMONT SERVICE CENTER

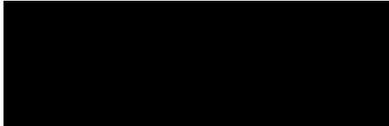
Date: **DEC 27 2005**

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IN RE:

Petitioner:

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:



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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The director's decision will be withdrawn, and the petition will be remanded for further action and consideration.

The petitioner seeks to classify the beneficiary 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 as a "designer." The director determined the petitioner had not established that the beneficiary has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

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):

Initial evidence: A petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise. Such evidence shall include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

(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 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;
- (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.

The petition was filed on December 26, 2002. The evidence accompanying the petition failed to demonstrate that beneficiary meets at least three of the criteria that must be satisfied to establish the sustained national or international acclaim necessary to qualify as an alien of extraordinary ability. Without issuing a request for evidence, the director denied the petition on February 9, 2005.

The director's decision stated: "In summary you have provided minimal evidence of the beneficiary's extraordinary ability Therefore, you have not persuasively shown that the beneficiary qualifies as an alien of extraordinary ability. Therefore, the beneficiary is ineligible for classification under section 203(b)(1)(A) of the Act."

In such an instance, where the evidence initially presented does not fully establish eligibility, a request for evidence or a notice of intent to deny is appropriate. The regulation at 8 C.F.R. § 103.2(b)(8) provides, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted

either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence.

On appeal, counsel asserts that the director erred by denying the petition without issuing a request for evidence in accordance with the regulation at 8 C.F.R. § 103.2(b)(8). Counsel notes that Citizenship and Immigration Services (CIS) has recently reemphasized the requirements set forth in the regulation at 8 C.F.R. § 103.2(b)(8) in a policy memorandum. In the policy memorandum by William Yates, Associate Director of Operations William Yates, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, HQOPRD 70/2, (February 16, 2005), CIS set forth its policy regarding when requests for additional evidence (RFE) were necessary. The memorandum provides that no RFE is required where the alien is statutorily ineligible or approvable. According to the memorandum, in all other instances, such as when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of a RFE or NOID is usually discretionary but strongly recommended.

While we agree with the director that the evidence of record is not adequate to demonstrate the petitioner's eligibility for the benefit sought, the director should have issued a request for evidence in accordance with the regulation at 8 C.F.R. § 103.2(b)(8). Therefore, this matter is remanded to the director for the purpose of issuing a RFE, or in the alternative a NOID, informing the petitioner of the deficiencies in the record as they relate to the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director may request any additional evidence deemed warranted and should allow the petitioner 12 weeks to respond. As always, the burden of proof in visa petition proceedings remains entirely 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.