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U.S. Citizenship
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Services

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FILE: [REDACTED]
EAC 02 231 51592

Office: VERMONT SERVICE CENTER

Date: MAR 25 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 appeal will be dismissed.

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. The director determined the petitioner had not established the beneficiary's sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, counsel challenges the director's conclusion, relying mostly on evidence that came into existence after the date of filing. The petitioner submits a letter from [REDACTED] Curator of Photography at the Los Angeles County Museum of Art, evaluating the evidence. For the reasons discussed below, we find that the evidence establishes that the beneficiary met two of the regulatory criteria as of the date of filing, one of which he met very minimally. As will be discussed below, however, the evidence is not persuasive that the beneficiary met a third criterion as of the date of filing. According to the regulations and case law cited below, an alien must meet three criteria as of the date of filing in order to be eligible for the classification sought. Thus, we concur with the director's ultimate conclusion.

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). 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 gallery director. 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, is claimed, 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.

Counsel continues to assert that the participation of the beneficiary's gallery at the Armory Show 2002 served to meet this criterion. We concur with the director that it does not. Participation in an art exhibition, even a competitive exhibition, is not an award or prize. While we do not question Mr. [REDACTED] assertion on appeal that there are no awards for gallery directors, evidence submitted to meet a criterion that is not readily applicable to the beneficiary's field must be comparable to the evidence required by the criterion. 8 C.F.R. § 204.5(h)(4). Participation at an art festival is far more relevant to the criterion set forth at 8 C.F.R. § 204.5(h)(3)(vii), which relates to display at an artistic exhibition or showcase. Thus, we will not consider the beneficiary's participation under this criterion; rather, we will consider it below as it relates to the criterion set forth at 8 C.F.R. § 204.5(h)(3)(vii). For the reasons discussed below, however, we find that this evidence does not meet that criterion either.

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.

Initially, counsel asserted that the beneficiary's service on the Board of Directors of the Center for Photography at Woodstock served to meet this criterion. Serving on the board of directors of a photography center is not a "membership" in an association. Rather, we will consider this service pursuant to 8 C.F.R. § 204.5(h)(3)(viii), which relates to a leading role for an organization with a distinguished reputation.

On appeal, Mr. [REDACTED] asserts that the beneficiary is also a member of the Association of International Photography Art Dealers (AIPAD). The record contains no evidence of this membership. Thus, we cannot determine whether the beneficiary was a member at the time of filing. Moreover, Mr. [REDACTED] asserts that a member must demonstrate "a reputation in his community for honesty and integrity, both generally and in his dealings with the public, museums, photographers and other dealers." This is not an outstanding achievement in the field. Mr. [REDACTED] further asserts that the beneficiary must have demonstrated that he is "making substantial contributions to the field of fine art photography through the quality of the photographic art offered for sale, the exhibitions he mounts' or his other worthwhile endeavors." The record does not contain the source of this quote. Regardless, without the official bylaws setting forth the membership requirements for AIPAD, we cannot determine whether it requires outstanding achievements of its members as judged by recognized national or international experts in photography.

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.

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

The director concluded that the published materials were either not primarily about the beneficiary or did not appear in major media or both. Counsel challenges this characterization on appeal.

Initially, the petitioner submitted one-paragraph reviews of exhibitions at the beneficiary's gallery in New York publications such as the *New Yorker* and *Village Voice* and in the magazine *ARTnews*. The petitioner also submitted longer reviews of multiple gallery exhibits that include the beneficiary's gallery. We concur with the director that these reviews do not constitute published material about the beneficiary.

The record also includes an article in *The New York Times* fully devoted to [REDACTED]'s exhibit at the beneficiary's gallery. This article, however, is primarily about Mr. [REDACTED]. The petitioner also submitted articles in a foreign language about Simen Johans. The petitioner failed to submit translations of nearly all of these articles as required by 8 C.F.R. § 204.5(h)(3)(iii) and 8 C.F.R. § 103.2(b)(3). Regardless, they appear to be primarily about Mr. [REDACTED]. The *International Gazette* published an article on younger collectors of photography that quotes the beneficiary. The record contains no circulation or distribution data for this publication. As such, we cannot determine whether it is major media. Moreover, we are not persuaded that an article about young art collectors that quotes the beneficiary is an article about him.

Maariv America ran a cover story on the beneficiary, consisting of a detailed interview with him. While counsel notes that *Maariv* is major media in Israel, the petitioner has not demonstrated that *Maariv America* is circulated in Israel. It is a foreign language paper that appears to be distributed within the United States. A publication in a language that the majority of the population in the country where it is distributed cannot comprehend is not major media.

In response to the director's request for additional evidence and again on appeal, the petitioner submits more recent media coverage. This evidence, however, does not relate to the beneficiary's eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, we cannot consider the more recent media coverage. In light of the above, the petitioner has not established that the beneficiary met this criterion as of the date of filing.

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.

In 2000 and 2002, the petitioner reviewed photographs submitted for [REDACTED] Houston, Texas. [REDACTED], Executive Director of the Galveston Art Center and chair of the photography accessions committee of the Museum of Fine Arts in Houston, confirms that every two years, "FotoFest invites a select group of international experts in the photography field to come to Houston to review the portfolios of hundreds of photographers from throughout the world." [REDACTED] Meeting Place Coordinator for FotoFest International, asserts that FotoFest is "one of the largest photography biennial events in the world – the oldest and most respected biennial of its kind in the United States." The program for the festival reveals that there were 97 reviewers, albeit from around the country.

Mary Virginia Swanson, founder of the American Photography Institute at New York University's Tisch School of the Arts and currently a consultant in the field, asserts that she served with the beneficiary as a reviewer at Review Americas in Portland, Oregon. The record contains no confirmation of this role from the organizers of that event. Similarly, [REDACTED] a professor at the University of Texas at Austin, asserts that the

beneficiary has reviewed work for the International Center of Photography in New York, but the record is absent confirmation from that center.

Director of the Rhubarb-Rhubarb International Portfolio Festival in England, indicates that she “will be inviting” the beneficiary to review the festival, but the record contains no evidence that the beneficiary had already done so as of the date of filing. Mr. appellate letter lists several events for which the beneficiary had reviewing responsibilities, most of which occurred after the date of filing. Once again, evidence of post-filing achievements cannot be considered evidence of the beneficiary’s eligibility at the time of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The director failed to consider this evidence. While stronger evidence of serving as a reviewer on more exclusive panels for different shows would have been more persuasive, we find that the petitioner’s reviewing responsibilities in Houston suffice, if minimally, to meet this criterion.

Evidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

While counsel does not assert that the beneficiary meets this criterion, we will consider the reference letters submitted and the objective evidence supporting the claims in those letters. , an art critic and regular contributor to the *New York Times* and *Art in America* and the author of several books on photography, asserts that the beneficiary’s gallery has introduced new artists other galleries failed to recognize and that, “in several cases,” the artists went on to earn international distinction. Director of Photography at the Ricco/Maresca Gallery in New York, provides similar information, asserting:

[The beneficiary’s] gallery is the most important gallery in New York City exhibiting young photographic talent. He represents the most distinguished photographers in the field. However, because of his extreme creativity, resourcefulness and unusually talented methodology, he has been able to draw public attention to rising new talent.

Photo Editor for *Mother Jones*, asserts that she is constantly looking for new and extraordinary talent in the field of photojournalism for publication in *Mother Jones*. Ms. implies that the beneficiary’s gallery has been a source for her. She concludes:

His contributions to the industry are immeasurable. It is no wonder his name tops my lists of resources and recommendations to others in the field. He has established himself a permanent place in the field of photojournalism. He has emerged as the authority of discovering talent and demonstrating creativity in this select industry.

Professor of Art and Art History at the University of Texas at Austin, asserts that the beneficiary is a leader in identifying, cultivating and displaying photographic talent. Mr. continues that the beneficiary has succeeded in finding emergent artists.

While the exhibition of work by respected photographers is indicative of the reputation the beneficiary’s gallery enjoys, it is not a contribution of major significance to the field of photography. The evidence supporting the claim that the beneficiary is responsible for the success of emerging photographers is minimal.

██████████ an associate professor at the Minneapolis College of Art and Design, asserts that her work was first exhibited at the beneficiary's gallery and has since been sold to the Brooklyn Museum of Art, the Museum of Fine Art Houston, the Museum of Modern Art and the Metropolitan Museum of Art. Ms. ██████████ resume, however, reveals that she had exhibited her work all over the country, including the International Center of Photography in New York, prior to exhibiting her work at the beneficiary's gallery.

██████████ another professor at the Minneapolis College of Art and Design, asserts that his exhibit at the beneficiary's gallery received "glowing" reviews in the *New York Times*, the *New Yorker* and *Art News*. Mr. Goldes resume, however, reveals that he had exhibited his work all over the country, including the Museum of Modern Art in New York in 1991, before exhibiting his work at the beneficiary's gallery.

██████████ a professor at Columbia College in Chicago asserts that the beneficiary gave him his first solo show in New York. According to his resume, however, he had exhibited his work at one-person shows in other areas, including at the Museum of Contemporary Photography in Chicago. Mr. ██████████ had also previously exhibited his work in shows featuring more than one artist at the Museum of Modern Art in New York.

An article on ██████████ reflects that his first book was published in 1993, before he exhibited his work at the beneficiary's gallery in 2002. The translation of one article about Simen Johan indicates he got his break in New York at a gallery run by a rock club. There is no evidence that the beneficiary's gallery is run by a rock club. The ██████████ appears to have gotten his break at a different gallery in New York.

██████████ Senior Curator of Photography and Media Arts at the Corcoran asserts that the Corcoran displayed the work of ██████████ prior to its exhibition at the beneficiary's gallery. While the Corcoran's exhibition of ██████████ work will follow its exhibition at the beneficiary's gallery, as discussed above, ██████████ work was published prior to its exhibition at the beneficiary's gallery.

Finally, Mr. ██████████ provides numerous examples of media coverage of artists "discovered" by the beneficiary. All of this coverage post-dates the filing of the petition and has little relevance to the beneficiary's eligibility as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

While the above letters and the pre-filing media coverage of the photographers exhibiting their work at the beneficiary's gallery attest to the reputation of his gallery, they do not suggest that the beneficiary had made a contribution of major significance to the field of photography as a whole.

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

The petitioner submitted a letter to the beneficiary from the 2002 Armory Art Show accepting his exhibitor application. The letter indicates that 300 galleries "from around the globe" applied for 150 exhibitor spots. A press release regarding the show indicates that there would be 164 exhibitors from 20 countries. Seventy-nine of the exhibiting galleries were based in the United States. The release continues that the show is "the leading international art fair in the United States and the world's leading art fair devoted exclusively to contemporary art." ██████████ Director of the Armory Show, indicates that only three of the galleries represented at the show in 2002 were photography-based galleries. She does not, however, indicate how many photography-based galleries applied to be exhibitors. On appeal, Mr. ██████████ attests to the significance of the show.

It is inherent to the field of visual art to display the art. While the Armory Show may be prestigious, it does not appear to be exclusive. Over half of the galleries that apply are invited to participate. Thus, we do not find this evidence to be comparable to the type of display at an exclusive artistic showcase or exhibition that we would require of a visual artist seeking to meet this criterion.

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

The director failed to consider the evidence relating to this criterion, focusing mostly on the beneficiary's remuneration. We note that this criterion is a separate criterion from the remuneration criterion and while it might be typical for an alien playing a leading or critical role for a distinguished organization to receive high remuneration, failing to meet the remuneration criterion does not preclude meeting this criterion.

In addition to the petitioner's service on the Board of Directors of the Center for Photography at Woodstock, the petitioner is the director of his own gallery. The record contains no evidence regarding the national reputation of the Center for Photography at Woodstock. The media coverage of the photographers exhibiting their work at the beneficiary's gallery, the caliber of photographers he has attracted, and the beneficiary's participation in the prestigious Armory Show attest to the distinguished reputation of his gallery. As the director of the gallery named after himself, he clearly plays a leading role for that gallery. Thus, we find that the beneficiary satisfactorily 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.

The petitioner did not initially claim that the beneficiary meets this criterion, although it was the focus of the director's decision. As with the published material submitted in response to the director's request for additional evidence and on appeal, the evidence of the beneficiary's most significant remuneration postdates the filing of the appeal. Specifically, the gross receipts of the beneficiary's gallery increased from \$686,000 in 2002, the year the petition was filed, to \$1,215,341 in 2003. While the gallery's gross receipts were quite high in 2003, the beneficiary's personal remuneration was not as extravagant, \$113,097 in 2002 and \$202,519 in 2003. Counsel asserts on appeal that the 2003 *GuideStar Nonprofit Compensation Report* lists the 90th percentile of income for chief curators as \$149,109. Assuming that a "chief curator" is comparable to a director of a high-end art gallery, that remuneration is still more than the beneficiary earned in 2002 when the petition was filed. Thus, the petitioner has not demonstrated that the beneficiary met this criterion as of the date of filing.

Comparable evidence pursuant to 8 C.F.R. § 204.5(h)(4)

The regulation at 8 C.F.R. § 204.5(h)(4) provides that where the above criteria do not readily apply, a petitioner may submit comparable evidence. Counsel asserts that the accolades of the petitioner's references serve as comparable evidence. First, counsel has not demonstrated that at least three of the above criteria do not readily apply to the beneficiary's field. Moreover, counsel has not explained how the subjective opinions of the beneficiary's references are comparable to the ten types of objective evidence of sustained national or international acclaim set forth at 8 C.F.R. § 204.5(h)(3). Those ten regulatory criteria reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act. Opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed

prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition.

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 the beneficiary as a gallery director 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 beneficiary is acquiring recognition in the field, but is not persuasive, especially as of the date of filing, that the beneficiary's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established the beneficiary's 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.