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U.S. Citizenship
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FILE: [REDACTED]
LIN 03 117 51890

Office: NEBRASKA SERVICE CENTER

Date: MAR 10 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:

SELF-REPRESENTED

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 Plunson

~~Robert P. Wiemann~~ Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

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 in the arts. 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. The AAO affirmed that conclusion, finding that the beneficiary did not meet any of the ten regulatory criteria claimed.

On motion, the petitioner has made numerous submissions, some of which were not made to this office. While 8 C.F.R. § 103.3(a)(2)(vii) allows a petitioner to supplement an appeal, there is no similar provision relating to motions. Nevertheless, the petitioner's motion did constitute a proper motion when filed. In the interest of fairness, we will consider all of the evidence of record, including the evidence forwarded to us from Citizenship and Immigration Services' Office of Congressional Relations.

In his April 19, 2004 letter, [REDACTED] asserts that the petitioner meets "the criteria of the O-1 status." We note that an O-1 visa is a nonimmigrant visa. Anne Van Alstyne, in her letter, asserts that the petitioner meets several of the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B). Those provisions relate to nonimmigrant visas. The instant matter involves an immigrant petition. While the nonimmigrant visa classification and immigrant visa classification both relate to aliens of "extraordinary ability," they contain different standards. The regulatory requirements for an immigrant and non-immigrant alien of extraordinary ability *in the arts*, set forth at 8 C.F.R. § 214.2(o)(3)(iv)(B), are dramatically different. The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines extraordinary ability *in the arts* (including the performing arts) 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.

The regulation at 8 C.F.R. § 204.5(h)(3), however, sets forth ten criteria as evidence of sustained national or international acclaim, of which a petitioner must meet at least three. While these ten criteria appear in 8 C.F.R. § 214.2(o), they refer only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. As stated above, the ten criteria for nonimmigrant artists of extraordinary ability, on which [REDACTED] relies, are different than the immigrant criteria. The distinction between fields, which appears in the regulation at 8 C.F.R. § 214(o), does not appear in the regulation at 8 C.F.R. § 204.5(h). As such, Ms. [REDACTED] assertions regarding the nonimmigrant criteria are not relevant to the adjudication of this immigrant visa petition.

In addition, the petitioner has raised the issue of a shortage of male ballet dancers in the United States. While involving a different classification, the AAO has made it clear that questions of shortages are not within our jurisdiction. *See Matter of New York State Dept. of Transp.*, 22 I&N Dec. 215, 220-221 (Comm. 1998). Finally, the petitioner's claimed national reputation does not indicate that all of its corps artists demonstrate

extraordinary ability as defined in the regulations. Supplementary information at 56 Fed. Reg. 60899 (November 29, 1991) states:

The Service disagrees that all athletes performing at the major league level should automatically meet the "extraordinary ability" standard. . . . A blanket rule for all major league athletes would contravene Congress' intent to reserve this category to "that small percentage of individuals who have risen to the very top of their field of endeavor."

Similarly, not every corps artist with a ballet that tours nationally qualifies for this classification. Rather, as provided in the regulations set forth at 8 C.F.R. § 204.5(h)(3), a petitioner must meet three of the ten regulatory criteria. For the reasons discussed below, we find that the petitioner has now established that the beneficiary meets one criterion by playing a critical role for the petitioner. The record does not support any other criterion. Thus, we affirm our initial determination that the petitioner has not demonstrated the beneficiary's eligibility for the immigrant classification sought.

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 ballet 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, 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, it claims, meets the following criteria.¹

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.

In response to the director's request for additional evidence, the petitioner asserted that the beneficiary is a member in good standing of the American Guild of Musical Artists (AGMA). The petitioner submitted a March 4, 2003 letter from AGMA asserting that the beneficiary is "known to AGMA to be a dancer of distinguished merit and ability." This letter does not confirm that the petitioner is a member of AGMA.

The director determined that AGMA materials established that it is a union that requires an initiation fee and dues payments for membership. Thus, the director concluded that it did not require outstanding achievements of its members. On appeal, counsel asserts that AGMA will not provide additional materials. The AAO concluded that the petitioner had not established that AGMA requires outstanding achievements of its members. Counsel does not challenge this conclusion on motion. We affirm our initial determination on this criterion. First, while previous decisions have not questioned the beneficiary's membership, we note that the record does not include evidence confirming such membership. Regardless, union membership generally requires that the member work in the field in addition to paying initiation fees and dues. Even in a competitive field, the ability to work in the field is not an outstanding achievement. Thus, we affirm our initial determination that the petitioner has not established that the beneficiary meets this criterion.

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.

The petitioner submitted local reviews of performances in which the beneficiary appeared, an article about the beneficiary joining the petitioning troupe in *The Utah Weekly*, an article focusing in part on the beneficiary in the *Deseret News*, and an article about the beneficiary and another dancer from Anshan in the *Anshan Daily*. In response to the director's request for additional evidence, the petitioner asserted that the publications "are considered major media, and qualify as the medium for such recognition in the world of dance." The petitioner failed to submit any circulation data for the publications. The director concluded that the petitioner had not established that the publications in which the articles appeared were major media and noted that some of the articles only mentioned the beneficiary in passing.

On appeal, counsel asserted that in ballet, any mention in a review is significant and submitted a review of the petitioner's production of "The Nutcracker" that postdates the petition's filing date.

The AAO concluded that the articles were not primarily about the beneficiary and that the petitioner had not established that the articles appeared in major media. The AAO cited *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971) in support of its conclusion that the review of a performance after the filing date could not be considered evidence relating to the beneficiary's eligibility at the time of filing.

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

On motion, the petitioner asserts that the post-filing review “serves to provide further substantiation that [the beneficiary] does perform in a leading or critical role for this organization, as he did for National Ballet of China in the past.” We will consider this argument below in our discussion of the criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii). The petitioner also submitted evidence that Anshan’s population is 1.1811 million. As far as being considered published material, we affirm our conclusion that articles published after the date of filing are not evidence of eligibility as of the date of filing. Not only is that principle expressed in *Matter of Katigbak*, 14 I&N Dec. at 49, it appears in the regulations at 8 C.F.R. § 103.2(b)(12). Regardless, the petitioner has not overcome the AAO’s concern regarding the lack of evidence that any of the articles, including those that post-date the filing of the petition, appear in major media. While Anshan may have a large population, the record contains no evidence that its newspaper or any of the other publications have a national circulation. Moreover, despite the petitioner’s concern regarding changing standards, this office consistently holds that reviews of a company production that mention the alien only in passing are not primarily about the alien. Thus, we affirm our initial determination that the petitioner has not established that the beneficiary meets this criterion.

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

The director and the AAO both acknowledged the submission of reference letters attesting to the beneficiary’s talent and technique. Both the director and the AAO, however, concluded that the authors do not attest to any specific contribution or explain how the beneficiary has had an impact of major significance on the field as a whole. The petitioner does not address this criterion on motion. We affirm our initial analysis of the evidence relating to this criterion.

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

The director and the AAO both concluded that this criterion relates to visual artists, not performing artists. The petitioner does not contest this conclusion on motion.

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

Throughout the proceedings, the petitioner has focused on this criterion and most of the evidence relates to this criterion alone. We will carefully consider all of the evidence. As stated above, however, this criterion is merely one of the ten regulatory criteria, of which an alien must meet three to be eligible for the classification sought. Thus, even if we conclude that the beneficiary meets this criterion, that conclusion alone would not warrant approval of the petition.

Initially, the petitioner submitted the contract whereby it employs the beneficiary as a corps artist. Exhibit A reveals that dancers with the petitioning company range from first year apprentice artists to principals, with corps artists listed below senior artists, demi-soloists, soloists, senior soloists and principals.

One newspaper review indicates that the beneficiary performed the Russian, Chinese, Dancing Bear and one of the mice in “The Nutcracker.” Other previews and reviews indicate that the beneficiary performed the role of Puck, “the perpetrator of the humorous misunderstandings and plot twists that fill this story” in “A Midsummer Night’s Dream.” Information about the petitioner indicates that the Federation of Rocky Mountain States chose

it to represent the west in 1968 and in the same year the petitioner moved into the renovated Capital Theater in Utah. The company has toured the United States, including a performance at the Kennedy Center in Washington, D.C., Europe and China.

The petitioner also submitted an employment offer from Lynette Harper, company manager for the Tulsa Ballet. The offer is also for a position as a Corps de Ballet Dancer. An employment contract accompanies the letter. In another letter, [REDACTED] asserts that national publications have stated that the Tulsa Ballet "is quickly becoming one of the top five in the United States due to the versatility and strength of its dancers and the quality of works they perform."

The beneficiary's resume indicates that he danced with the National Ballet of China from 1996 through 2001, where he was promoted to soloist in 1997. Xu Gang, National First Rank Dancer for the National Ballet of China, asserts that the beneficiary "played very important roles in ballets" for that company. Wang Caijun, Ballet Master for the same company, asserts that the beneficiary "has danced as [a] soloist in all ballets of our company." [REDACTED] specifies that the beneficiary performed the role of Isaac Lanquedem in "Le Corsaire" and several pas de deux. Nilas Martins and Wendy Whelan confirm dancing with the beneficiary at the National Ballet of China but make no assertions regarding the nature of his role other than that he danced "as a soloist in all of the company's ballets from 1996 to 2001."

The National Ballet of China programs submitted reveal that the beneficiary performed an unidentified role in "Swan Lake," as a ceramic toy in "The Nutcracker," man number three in "Four Men Variations," and an enchanted princess bluebird in "Sleeping Beauty." The beneficiary's professional certificate ranks him as a "second rank dancer." In comparison, the biographies of two principals with the National Ballet of China, Sun [REDACTED] reveal that they performed leading roles in full-length ballets and [REDACTED] performed the Prince in "Swan Lake" as a guest artist with the New Zealand Ballet. [REDACTED] lists his status as "Ballet Master."

Frank Anderson, Artistic Director for [REDACTED] theater in Copenhagen, asserts that when "setting works" for the National Ballet of China, he cast the beneficiary in lead roles. The article in the *Anshan Daily*, however, indicates that beneficiary fell ill on the eve of the performance and never performed in the Danish Royal Ballet's production with the National Ballet of China. [REDACTED] Artistic Director of the Dutch National Ballet, also asserts that he worked with the beneficiary at the National Ballet of China where he cast the beneficiary "in a leading role in my ballet." The petitioner submitted materials reflecting that the National Ballet of China is the sole Beijing-based national ballet company of China and the Shanghai Grand Theater's ballet in residence.

The director appears to contradict himself on this criterion, first characterizing the companies with which the beneficiary has danced as "local" but then concluding that the beneficiary meets this criterion. On appeal, the petitioner submitted a *Salt Lake Tribune* article by a *Washington Post* correspondent that states that the petitioner "is now demonstrating how fully deserving it has become of the appellation 'national.'" The petitioner also submitted materials reflecting that the Tulsa Civic Ballet has toured in thirty states and attracts dancers from across the United States and abroad.

The AAO concluded that the beneficiary was not a principal dancer for the petitioner and that the record did not establish that the beneficiary's role "has been a leading one or has been critical to the success of the ballet company." On motion, the petitioner asserts that Citizenship and Immigration Services (CIS) has approved other dancers for the classification sought prior to their promotion to soloists within the troupe. As stated above, the petitioner asserts that the beneficiary's post-filing roles are relevant. [REDACTED] states that the

petitioner will promote the beneficiary to a demi-soloist upon the beneficiary's adjustment to permanent resident status, and will perform principal roles. The petitioner further asserts that the reviews published after the date of filing are relevant in demonstrating that the beneficiary continues to play a leading and critical role for the petitioner. The petitioner submits evidence of the petitioner's Edinburgh tour in 2004 and a decision from the Nebraska Service Center reversing itself and approving a nonimmigrant petition. This decision acknowledges that a career as a ballet dancer typically lasts only from age 15 to 40 at the latest.

As stated above, the regulation at 8 C.F.R. § 214.2 (o)(3)(iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides for entirely different criteria than those for the immigrant classification. Thus, a decision by a service center on a nonimmigrant petition seeking classification as an alien of extraordinary ability in the arts is not a persuasive authority for adjudications by this office of immigrant visa petitions seeking classification as an alien of extraordinary ability in the arts. In addition to the difference in criteria, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Thus, the AAO is not bound to follow the reasoning of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

While the beneficiary's post-filing roles demonstrate that the beneficiary continues in his area of expertise, they are not relevant to his eligibility as of the date of filing. In order to meet this criterion, the beneficiary must have already performed in a leading or critical role as of that date. 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

We affirm our initial determination that the beneficiary has not played a *leading* role for an organization with a distinguished reputation. As stated above, he was a second rank dancer in China and has only served as a corps artist in the United States. The record contains no evidence that the petitioner's promotional materials featured the beneficiary's name more prominently than the names of other dancers. That said, in the previous decision, the AAO did not carefully consider whether the beneficiary might have played a critical role for any company.

The program for "A Midsummer Night's Dream" provides a synopsis of the story that suggests Puck, while not a leading role, is a critical role in the story. Given the record as a whole, we conclude that the petitioner has adequately demonstrated that the beneficiary has played a critical role for the petitioner. We will not contest that the petitioner is an organization with a distinguished reputation nationally. For the reasons stated above and below, however, the beneficiary falls far short of meeting any other criterion. As an alien must meet at least three to be eligible for the classification sought, meeting this one criterion does not render the petition approvable.

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

In response to the director's request for additional documentation, the petitioner asserts that the dancer's union, AGMA, regulates compensation for dancers. Even assuming that the most experienced and acclaimed ballet dancers in the United States do not earn significantly high remuneration for their services, we note that exhibit A to the beneficiary's contract with the petitioner reflects that principals earn significantly more than corps artists. Thus, the petitioner cannot meet 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 the petitioner may enjoy some commercial success, the record contains no box office receipts evidencing this success and no evidence that the beneficiary contributes to the petitioner's success above and beyond being a member of the troupe. For example, the record contains no evidence that the beneficiary is featured more prominently than others in the petitioner's promotional materials.

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 himself as a ballet 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 ballet 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.