

identifying data deleted
PI - y unwarranted
of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

B2

FILE: [REDACTED]
LIN 07 014 50304

Office: NEBRASKA SERVICE CENTER

Date: APR 30 2009

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

JF Grissom
John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

On appeal, the petitioner argues that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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.

Specific supporting evidence must accompany the petition to document the “sustained national or international acclaim” that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a “one-time achievement (that is, a major, international recognized award).” *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” 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.” 8 C.F.R. § 204.5(h)(2).

This petition, filed on October 13, 2006, seeks to classify the petitioner as an alien with extraordinary ability as a performer. The petitioner initially submitted her employment contract with Cirque du Soleil, media requests, information about Cirque du Soleil’s casting requirements, news articles, pictures, a copy of the petitioner’s website, and letters of recommendation. In response to a Request for Evidence (“RFE”) dated September 20, 2007, the petitioner submitted a revised agreement with Cirque du Soleil, news articles, a

genealogy chart, a schedule of past performances, information about the Circus of Brazil and certification of award, training certificates, and her resume.

On appeal, counsel for the petitioner claims that the case should be remanded for a failure of the director to specifically request all necessary evidence in the RFE, in violation of the regulations. Counsel's argument is not persuasive. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The RFE stated that the petitioner needed to submit evidence in support of her claim for eligibility under each criterion. **The regulation at 8 C.F.R. § 103.2(b)(8) requires that the RFE specify the "type of evidence required"** and does not require any exact document be identified. Although counsel on appeal states that the decision "blindsid[e]" the petitioner with his denial, counsel identified no further evidence in support of the petitioner's claims. Moreover, even if the director committed a procedural error by failing to adequately notify the petitioner, it is not clear what remedy would be appropriate beyond the appeal process itself. As with any claim of a violation of due process, a violation of an immigration regulation will not render a decision unlawful unless the violation prejudiced the interests of the alien protected by the regulation. *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980). Furthermore, we note that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See* Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I. & N. Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I. & N. Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I. & N. Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I. & N. Dec. 151 (BIA 1965). As the petitioner made no proffer as to other evidence available, we will review the record as presented.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" 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." 8 C.F.R. § 204.5(h)(2). The petitioner has submitted evidence pertaining to the following criteria. The petitioner does not claim to meet any of the criteria not discussed below.

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

The petitioner states that she meets this criterion by virtue of her receipt of second place in the 2001 Competitive Circus Showcase at the World Circus Festival (WCF) in Brazil. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is her burden to establish every element of this criterion. Although the petitioner submitted information about the WCF, all of that information came from the WCF's own website and an article from "OZ Air Academy of Circus," a company for whom the petitioner worked. This self-serving information thus does not demonstrate the national or international recognition of this award. In addition, the petitioner presented no evidence to explain how a second place finish in this competition meets this criterion. In her initial submission, counsel for the petitioner stated that the WCF only judges performances that have been invited to compete so that merely being invited would serve as recognition within the field. Although the petitioner provided a copy of her invitation letter, she provided no information regarding the criteria used to invite performers to support her assertion or which otherwise demonstrates that an *invitation* to participate is tantamount to a nationally or internationally recognized prize or award.

In her appellate brief, counsel argues that the petitioner showed that the award was significant and that the director acknowledged the award's significance through his statement that the Circus is a "national competition in Brazil." Under this criterion, it is not sufficient to simply demonstrate that a competition draws competitors from the country as a whole as claimed about the WCF – instead, the petitioner must establish that the competition and the awards provided by the competition are nationally or internationally recognized. The petitioner provided no evidence of the level of recognition of the awards provided by the WCF.

Counsel also claims that the director used "improper, circular" reasoning in requiring the petitioner to show that sustained national or international acclaim at the top of level of her field in violation of the decision in *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994). It is noted that in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, as this case did not arise within the Eastern District of Michigan. Accordingly, we need not recognize *Buletini* as even a persuasive authority in this matter.

Regardless, we do not find it violates the reasoning in *Buletini*, 860 F. Supp. at 1231, to examine the evidence submitted as to whether it is indicative of or consistent with national or international acclaim. Significantly, the court in *Buletini* acknowledged that "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini*, 860 F. Supp. at 1234. Consistent with this reasoning, we have evaluated the quality of the evidence submitted by the petitioner and find that she has failed to establish that the award from the WCF is considered to be a nationally or internationally recognized prize or award. We note that this award was received five years prior to the filing of this petition and thus by itself cannot demonstrate *sustained* acclaim. Further, the statute requires that the alien demonstrate extraordinary ability by sustained national or international acclaim "through *extensive*

documentation.” Section 203(B)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i). The petitioner’s receipt of a single second place finish is not considered “extensive” nor is it representative of the sustained acclaim required for the highly restrictive classification.

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

(iii) 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 general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulation, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.¹

The petitioner provided many news articles about the Cirque du Soleil show “Zumanity.” Although the petitioner is mentioned in some of the articles, the published material is about the show and the company, not about her. According to an article from *ISTO E Magazine*, the show has “47 artists from 16 different nationalities that in one and a half hour performe [sic] acrobatics, dancing and contortion numbers with insinuating and erotic moviments [sic].” Another article states that [REDACTED] serves as the mistress of ceremonies. These articles make clear that although some news writers may view the petitioner and her sister as “one of the show highlights,” stories about “Zumanity” are not about the petitioner but about the entire cast and show. The inclusion by many articles of a picture of the petitioner and her sister does not change the focus of the articles or make them about the petitioner as opposed to the show as a whole.

The petitioner also submitted three articles primarily about her. The first, “Supersize Sisters: Standing Out” appeared in the *Las Vegas Review-Journal*. The petitioner submits no evidence that a seemingly local publication constitutes major media as required by the regulation. The second, “Botero Sisters,” appears to be a page from an online blog. The internet is an arena available to any user with access to a computer regardless of notoriety or recognition in the arts. To ignore this reality would be to render the “major media” requirement in the regulation at 8 C.F.R. § 204.5(h)(3)(iii) meaningless. We are not persuaded that international accessibility on the internet, by itself, is a realistic indicator of whether a given website constitutes “major media.” The petitioner submitted no evidence, such as circulation statistics, to demonstrate that the preceding article appeared in a professional or major trade publication or some other form of major media. The third article, “From OZ to Du Soleil,” appeared in *DAQUI* magazine. Again, however, the petitioner submitted no evidence to show that this magazine constitutes major media.

¹ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual’s reputation outside of that county.

The petitioner also submitted an article that appeared in *Folha de Sao Paulo* newspaper. That article appears in a foreign language and only portions of the article were translated. Such an incomplete translation does not comply with the terms of 8 C.F.R. § 103.2(b)(3) which requires that the entire document be translated by a translator who certifies that she is competent to translate from the foreign language into English. As such, this article will not be considered.

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

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

In the initial submission, the petitioner claims that she meets this criterion through her creation of "The Botero Sisters" as focused upon by "Zumanity." According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner's character and act may be unique, there is no evidence demonstrating that this work has had major significance in her field. For example, the record does not indicate the extent of the petitioner's influence on other performers, nor does it show that the field has somehow changed as a result of her work.

The petitioner identified five letters in the record purportedly supportive of her claim of eligibility under this criterion. While letters such as these provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in her field beyond the limited number of individuals with whom she has worked directly. Even when written by independent experts, letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has achieved sustained national or international acclaim.

██████████, vice president of creation of new projects development for Cirque du Soleil, wrote that that the petitioner "is among the elite in her field," she is "a unique artist," and "[s]he has achieved remarkable success with [the] 'Zumanity' show." ██████████ artistic coordinator for "Zumanity," wrote that the petitioner is "a highly productive individual who is incredibly talented, loyal and accountable in whatever situation she is placed." ██████████ publicist for "Zumanity," wrote that the petitioner is "a part of the Zumanity advertising campaign . . . [because of her] distinctive look and talents." ██████████, director of clown numbers for Cirque du Soleil, wrote that the petitioner is a "one-of-a-kind performer . . . widely recognized by audiences, critics, peers, and high ranking employers." These letters are all written by Cirque du Soleil employees; so these letters are not written by independent experts but are instead by the petitioner's colleagues. The last letter identified in support of her claim was written by her teacher: ██████████ ██████████, a Brazilian performer. This letter states that the petitioner's and her sister's "characters are very gracious, sensual, sexy and very impressive when it comes to comedy. The Botero Sisters characters were well accepted and very successfull [sic] in the theatre, TV and events all over Brazil." These letters all offer high praise for the petitioner's abilities, but none provide any information which demonstrates that her work has made a contribution of major significance to her field.

Accordingly, the petitioner has not established that she meets this criterion.

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

The petitioner states that she meets this criterion through her participation with Cirque du Soleil and also through performances occurring globally before she began working with Cirque du Soleil. The letter from [REDACTED] in which he states that the petitioner has performed globally notwithstanding, the petitioner presented no evidence regarding her performances around the world. [REDACTED]'s letter does not state how he came to learn of the petitioner's global performances and provides no details as to where the petitioner performed. In addition, statements on the petitioner's own website and resumé regarding performances in various locales do not amount to objective evidence regarding the petitioner's work or activities. A statement from [REDACTED] does indicate that the petitioner participated in two plays from 1995-1999, but his statement does not indicate that the plays can be considered artistic exhibition as required by the regulation.

The Director stated in his decision that "[o]bviously, as a performer, the petitioner has displayed her artistic work in the entertainment field." He did not, however, make an explicit finding outside of this equivocal statement as to whether the petitioner met this criterion. In any case, under the AAO's power of *de novo* review, we find that the petitioner does not meet this criterion as we interpret the regulation at 8 C.F.R. § 204.5(h)(3)(vii) as applying to visual artists, such as painters or sculptors, not performing artists such as the petitioner. It is inherent to the performing arts to perform. Therefore, not every production is a showcase or exhibition of the work of every performer. We find that the petitioner's performance in Cirque du Soleil and other similar venues is not a showcase of the petitioner's work but a general commercial production for entertainment. Without evidence that the petitioner's performances were comparable to the exclusive artistic showcases that might serve to meet this criterion for a visual artist we cannot conclude that the petitioner meets this criterion. While we do not find that the petitioner's performances have no evidentiary value, they cannot serve to meet this criterion. For this reason, the regulations establish separate criteria, especially for those whose work is in the performing arts. As we find the petitioner's performances are far more relevant to the "leading or critical role" criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and the "commercial successes in the performing arts" criterion at 8 C.F.R. § 204.5(h)(3)(x), they have been discussed separately within the context of those criteria.

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

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

In order to establish that she performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of her role within the entire organization or establishment as well as the reputation of the organization or establishment. The petitioner claimed eligibility under this criterion based on her work with Cirque du Soleil, Picadeiro Circus School, and Madrugada Circus.

Cirque du Soleil's reputation is well documented in the record as a distinguished organization, however, the petitioner did not submit evidence showing that she performed in a leading or critical role for that organization.

In her initial submission, the petitioner claimed that the “Zumanity” show was created around the characters created by her and her sister and cited an article from *Time* magazine as proof of her assertion. The *Time* magazine piece, however, makes no such assertion and instead devotes a pithy amount of text to the petitioner and her sister while focusing on four other groups that perform as part of the show. In addition, the *Time* magazine piece states: “The shows also have no name-brand stars; anyone can be replaced.” As stated above, the petitioner’s co-workers write letters highly complimentary of her work and her contribution to “Zumanity,” however, those letters do not state either that “Zumanity” relies upon her performance or that she otherwise performs in a leading or critical role. The evidence regarding “Zumanity” shows that it relies upon an ensemble cast and the petitioner has presented no evidence to show that she was responsible for the success or standing of “Zumanity” to such a degree consistent with the meaning of “leading or critical role” and indicative of sustained national or international acclaim at the very top of her field.

The petitioner presented news articles about the Madrugada Circus (“Circus”) from “The Northern Echo” and an unidentified source. These articles profile the Circus in advance and promotion of performances in Great Britain and Casablanca. Collaterally related are articles submitted about [REDACTED] “[t]op continental circus boss,” which detail his successes with other projects, but do not state that the Madrugada Circus has a distinguished reputation. Even if the petitioner had established the Circus’s reputation, she provided no evidence that she played a leading or critical role with the Circus. The petitioner submitted news articles that verified her participation with the Circus, but those articles did not state that the petitioner played a leading or critical role as opposed to serving as a general employee. For example, an article in “Advertise Theatre” states that the petitioner and her sister were one of three named artists expected to perform at the Circus National Day. The petitioner submitted a number of articles and schedules that she identifies as being applicable to this criterion. These articles appear in a foreign language and the petitioner provided only a partial translation. As stated above, a full translation is required for any foreign language document pursuant to 8 C.F.R. § 103.2(b)(3); without such a full translation, we are unable to consider these documents. Even only considering the excerpts translated, these articles do not indicate that the petitioner performed in a leading or critical role as she was but one of many acts included in the Circus that received publicity. For example, an article regarding “The Trapeze Truck” lists the petitioner as one of ten artists expected to perform; the inclusion of the petitioner and her sister as the only two “elastic numbers” performers does not establish the petitioner’s leading or critical role in the Circus.

The petitioner submitted no evidence regarding the Picadeiro Circus School’s (“School”) reputation, but instead submitted an article about circus schools which stated that 200 exist and did not mention the Picadeiro by name or otherwise recognize it. Even if the School had a distinguished reputation, the petitioner did not submit evidence of her participation in a leading or critical role. The two articles submitted about the petitioner and her role in the School merely stated that the petitioner performed with the School and did not state either that she participated in a role different from any other performer with the School or that she performed in a leading or critical role for the School.

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

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

In her initial submission, counsel for the petitioner stated that she “typed in ‘clown’” at O*Net to discover that “[i]n Nevada the median salary is \$20.88 per hour [and i]n the United States the median salary is \$15.81 per hour.” A July 11, 2006 letter written by [REDACTED], Immigration Technician for Cirque du Soleil states that the petitioner “earns an annual salary of \$119,500.00.” The petitioner, however, submitted no evidence regarding the remuneration commanded by others in the field so as to provide a comparison with her salary at Cirque du Soleil. Regardless, as the director stated, classification of the petitioner’s occupation as “clown” is too narrow a classification. Instead, as identified in the various articles and letters submitted on her behalf, the petitioner is more aptly classified as a general entertainer or performer. The petitioner submitted no evidence regarding the salary of such entertainers or performers, including other performers in Zumanity, and therefore no meaningful comparison can be made to determine that the petitioner’s salary is significantly higher than others in her field.

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

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

The petitioner claimed eligibility under this criterion on appeal by virtue of the successful performances of the Cirque du Soleil and the “Zumanity” show. Counsel lists the ticket prices charged to see the show and focuses on the popularity of the show. The petitioner did not, however, submit any evidence of commercial success of the show such as the submission of box office receipts or other records of the success enjoyed by “Zumanity.” Regardless, the petitioner has failed to present any evidence to establish that the commercial success of the Cirque de Soleil, or even “Zumanity,” is based solely or even primarily on the petitioner’s performance.

Accordingly, the petitioner has not established that she meets this criterion.

In this case, the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Review of the record does not establish that the petitioner has distinguished herself 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 is not persuasive that the petitioner’s achievements set her significantly above almost all others in her field at a national or international level. 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.