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U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JUN 25 2009  
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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.

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).

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 as an alien of extraordinary ability.

On appeal, counsel argues that the petitioner 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.

U.S. Citizenship and Immigration Services (USCIS) 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. 60897-99 (Nov. 29, 1991). 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). We address the evidence submitted and the petitioner’s contentions in the following discussion of the regulatory criteria relevant to his case. The petitioner does not claim eligibility under any criteria not addressed below.

This petition, filed on November 7, 2007, seeks to classify the petitioner as an alien with extraordinary ability as an art director. The petitioner initially submitted awards won, advertisements he designed, news articles, information about the petitioner's employer, evidence of his O-1 non-immigrant visa, and letters of recommendation. In response to a Request for Evidence ("RFE") dated February 4, 2008, the petitioner submitted information about the organizations bestowing awards, additional letters of recommendation, and information about the publications in which articles about the petitioner's work appeared.

While U.S. Citizenship and Immigration Services (USCIS) has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See e.g. Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The regulation at 8 C.F.R. § 214.2(o)(3)(iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides different eligibility criteria than those for the immigrant classification discussed below. INA § 101(a)(46) provides that extraordinary ability in the arts in the nonimmigrant context means "distinction." 8 C.F.R. § 214.2(o)(3)(ii) defines "distinction" 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 relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field 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." While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation at 8 C.F.R. § 214.2(o)(3)(iii), those criteria apply only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214.2(o), does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a non-immigrant visa classification under the lesser standard of "distinction" is not evidence of his eligibility for the similarly titled immigrant classification. Each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply to the classification sought.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (BIA 1988). It would be absurd to suggest that USCIS or any agency must treat

acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision 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).

On April 17, 2008, the director denied the petition, finding that the petitioner did not meet any of the regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 204.5(h)(3).

*(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 submitted evidence of his receipt of a silver award from the Art Directors Club 86<sup>th</sup> Annual Awards, four 2005 Local Gold ADDYs, Best of Show award at the 2005 Miami ADDY Awards Competition, a 2005 Silver ADDY Award, two bronze awards at the 2005 Hispanic Creative Advertising Awards, gold, silver, and bronze awards from the 2005 The Show Awards, acknowledgment by D&AD and inclusion of his ad in the Student Annual 2005, and finalist in the 2005 Festival Iberoamericano de la Publicidad awards. The information submitted from the awards coordinator for the Art Directors Club ("ADC"), [REDACTED] states that the entrants are judged by "advertising and media executives" as part of "an international award show." The e-mail from [REDACTED] states that any number of entrants, who pay for award consideration, may be chosen to be a gold, silver, or distinctive merit winner. The director found that these awards did not qualify the petitioner under this criterion, because the awards were not given to the petitioner alone as opposed to being awarded to the petitioner's organization and that no evidence was submitted to show that the awards specifically recognized art direction. The letter from [REDACTED] awards manager for The Art Directors Club, demonstrates that the petitioner was a part of the team that received that award. As the director noted, however, "the petitioner played an important role on the team that created these projects" and as such, we withdraw the director's finding that such a group award cannot qualify the petitioner under this criterion.

Some of the awards submitted limit the available participants by geographic region or by status as a student. An e-mail from Conor Lawrence, board liaison for The Show, states that competitors for The Show awards are limited to those created by Minnesota agencies. The information submitted about the ADDY Awards indicate that except for one Silver ADDY given at the national level, the awards given were at a local or regional level and not open to the field as a whole. The information submitted about the D&AD Student Awards, as the name suggests, is only open to students currently enrolled or those who were enrolled in school when the ad was created. Competitions that limit their participants through age, region, or experience generally do not convey acclaim within the field as they do not allow all of those engaged in the field to participate.

For example, the letter from Linda Harless states that the D&AD awards and The Show are helpful for advertising agencies to identify "young talent." This letter does not indicate that those already established in the industry compete in the contests, but instead that they are restricted to students and other more amateur

members of the profession. In any event, we accept that the silver award from the Art Directors Club 86<sup>th</sup> Annual Awards and the silver ADDY award received by the petitioner are lesser nationally or internationally recognized awards for excellence in the petitioner's field. Therefore, the petitioner has established that he 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 order for published material to meet this criterion, it must be primarily about the alien 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 generally 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.<sup>1</sup>

The petitioner submitted the following of his advertisements that appeared in publications: an advertisement for Q-tips that appeared in the *Graphis New Talent Design Annual 2006*; an advertisement for Fiskars that appeared in the *Graphis New Talent Design Annual 2005*; advertisements for Master Lock and Gibson guitars that appeared in the winter 2005-06 edition of *CMYK*; an advertisement for Bounty and the Fiskars advertisement that appeared in the April 2005 edition of *How*; and a Buglife advertisement that appeared in the *D&AD Student Annual 2005*. The inclusion of these advertisements does not amount to published material about the alien as contemplated by this criterion. On appeal, counsel claims that we have imposed a burden upon the petitioner not found in the criterion by requiring that the published material be primarily about the petitioner, however, the plain language of this criterion requires that the material be *about the alien*. This phrase in the criterion clearly requires that the material submitted be about the alien including about him, his career, and/or his achievements. We acknowledge that published material about the petitioner's work may qualify him under this criterion, however, no such discussion was provided: the material submitted by the petitioner consisted of examples of his work. As such, this material is not primarily about the petitioner. In addition, as the plain language of this criterion requires a title and author of the published material about the alien, it requires more than the appearance of the petitioner's work in a publication. The published material submitted must be evaluated in light of the language in the regulation at 8 C.F.R. § 204.5(h)(3) which provides that "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." The inclusion of one or two advertisements in a multi-page publication of advertisements does not reflect the overall recognition or acclaim indicative of this highly restrictive classification.

Similarly, the petitioner submitted one article entitled "HP Swims With the Sharks," published in the March 2007 edition of *Creativity*. This article is 55 words long and quotes two people, the photographer and the writer, who

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<sup>1</sup> 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.

are not the petitioner. This short blurb is not published material about the petitioner even if he is listed as the artistic director.

Even if the material was primarily about the petitioner, the evidence submitted was insufficient to demonstrate that any of the publications were professional or major trade publications or other major media. Although the petitioner submitted information about the publications in which his advertisements appeared, that evidence does not show that the publications are professional or major trade publications or other major media. The information submitted from the *CMYK* website states that it has an estimated circulation of 70,000 and information stating that *HOW* enjoys a circulation of 40,000 per year. No evidence appears in the record to show how such circulation numbers compare to other publications in the field or in the media at large. Without more to evidence the publications' standing within the industry, we are unable to conclude that these publications constitute professional or major trade publications or other major media. The information submitted about the *D&AD Student Annual* states that 5,000 copies are distributed only to education facilities and members of the organization, and the information submitted about *Graphis New Talent Design Annual* states that it is "the premier international forum for work produced by students about to enter the professional arena." These publications, limited in their reach to less than the entire profession, are clearly not professional or major trade publications or other major media.

The petitioner also submitted the results of a search done on the "Talent Pool" website that included many of the advertisements that appeared in the publications listed above. The Internet is an arena available to any user with access to a computer regardless of notoriety or recognition. 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 published material in "major media." Like the print media above, the petitioner submitted no evidence of usual readership or other evidence that this website constitutes a professional or trade publication or other major media.

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

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

We acknowledge that the petitioner's work was original in that he contributed to new promotional campaigns and advertisements. However, duties or activities which nominally fall within a given criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent to the occupation itself. One would expect a designer to contribute artistically to advertisements and other promotional materials. In addition, 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 talent is admired by those offering letters of support, there is no evidence demonstrating that his work has had major significance in the field. For example, the record does not indicate the extent of the petitioner's influence on other art directors nationally or internationally, nor does it show that the field has somehow changed as a result of his work.

On appeal, counsel asserts that the petitioner demonstrated eligibility under this criterion by virtue of the awards won and "extensive publications featuring [the petitioner's] artistic work." Each criterion under 8

C.F.R. § 204.5(h)(3) is separate and distinct. Counsel's argument that the petitioner's significant contribution to the field is evident through his awards and evidence of his having worked as an art director is not persuasive. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless. Outside of these claims, the petitioner identified letters in the record purportedly supportive of his 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 his field beyond the limited number of individuals with whom he 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 and is within the small percentage at the very top of his field.

The letters submitted on behalf of the petitioner are all complimentary of the petitioner's ability; however, they do not state that the petitioner's work was of major significance to the field as a whole. The letter from [REDACTED] the petitioner's former co-worker, states that the work done by the petitioner was "very powerful and unquestionably of a higher caliber than most other art directors." Other complimentary letters include the letters from [REDACTED] and [REDACTED] professors at the petitioner's alma mater. Although these letters are highly complimentary of the petitioner's abilities, they do not state that the petitioner made a contribution of major significance to the field even when viewed in conjunction with awards won and inclusion of the petitioner's advertisements in publications. The letter from [REDACTED] co-founder of the petitioner's employer, states that the petitioner has "an uncanny ability to bring artfulness to his work only seen in the very best art directors" and that the petitioner was able to create advertising campaigns that helped his employer land several large accounts. This information is more relevant to the discussion of the criterion at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed further below. [REDACTED] also states that the petitioner's campaign "has since been copied by several other advertisers, such as BlackJack cell phone." No evidence to support [REDACTED]'s assertions appears in the record, including a copy of the advertisement supposedly copying the petitioner's campaign. In addition, as opposed to counsel's assertion on appeal, these opinions are not independent as they are from the petitioner's professors, former co-workers, and current co-workers. None of this evidence shows or suggests that the field has somehow changed as a result of the petitioner's work or some other indication that his work was of *major significance* to the field. Evidence of work experience and the esteem of one's co-workers cannot qualify an alien under this highly restrictive visa classification.

Accordingly, the petitioner has not established that he 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 the performance of a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of his role within the entire organization or establishment and the reputation of the organization or establishment. The petitioner claimed eligibility under this criterion through his work with the advertising agency of Goodby, Silverstein & Partners ("the agency"). In support of the claim that the agency has a distinguished reputation, the petitioner submitted news articles

that illustrate the agency's standing and reputation. This evidence, as the director found, is sufficient to demonstrate that the agency has a distinguished reputation.

To establish the petitioner's role with the agency, counsel refers us to the letters submitted by [REDACTED] and [REDACTED] partner and vice chairman at the agency. Both letters state that the petitioner played a leading role in advertising campaigns and pitches, such as for Sprint and Hewlett Packard. Both the letters submitted and the news articles about the agency state that the agency enjoys a large clientele made up of some of the foremost companies in the United States that earn the agency hundreds of millions of dollars in revenue each year. The news articles also reflect that the agency has at least 200 employees ([REDACTED] letter states that the agency employs 430). Although [REDACTED]'s letter states that the petitioner was instrumental in landing the Sprint account, one that "effectively doubled [the agency's] business," the letter contains no further information about the petitioner's role in the agency's business as a whole to show that his role is leading or critical. No evidence demonstrates how the petitioner's role differentiated him from other designers employed by the petitioner, let alone its other employees including creative directors and senior management. The information submitted indicates that the petitioner is in a junior position having worked for the agency for only two years, overseen by more senior personnel. None of these letters indicate that the petitioner, an art director in a lower position within the agency than his references, was responsible for the petitioner's overall success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim at the very top of his field. On appeal, counsel asserts that the petitioner is the reason that the agency "has embraced 'new media'" as suggested in a news article in *The San Francisco Chronicle*. However, neither [REDACTED]'s letter nor any other evidence in the record indicates that it was the petitioner who pushed the agency in the "new media" direction. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I. & N. Dec. at 534 n.2; *Matter of Laureano*, 19 I. & N. Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. at 506.

Counsel also asserts on appeal that the petitioner served in a leading or critical role by winning multiple awards that "add luster to the agency's reputation and brings new clientele." According to the article in *The San Francisco Chronicle*, the agency "won a wheelbarrow full of awards" that included, but were not limited to, the petitioner's awards. The petitioner failed to provide evidence that his particular awards brought in new business or that his projects have attracted new clientele. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I. & N. Dec. at 534 n.2; *Matter of Laureano*, 19 I. & N. Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. at 506. Although we agree with counsel's statements that an art director, even if not in senior management, could play a leading or critical role, the petitioner has failed to submit evidence showing that he performed in a leading or critical role for the agency.

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

In this case, the petitioner has failed to demonstrate that he received a major, internationally recognized award, or that he 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 himself 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 is not persuasive that the petitioner's achievements set him significantly above almost all

others in his field at a national or international level. Therefore, the petitioner has not established his eligibility pursuant to section 203(b)(1)(A) of the Act and his 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.