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U.S. Citizenship  
and Immigration  
Services

B2



FILE:

EAC 06 039 51376

Office: NEBRASKA SERVICE CENTER

Date:

**MAR 06 2009**

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

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.

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).

*Mari Grissom*

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petition 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 that the petitioner had not established that she sought to enter the United States for the purpose of continuing in her area of expertise. The director further determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with Extraordinary Ability. – An alien is described in this subparagraph if –

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien’s entry to the United States will substantially benefit prospectively the United States.

As used in this section, the term “extraordinary ability” means a level of expertise indicating that the individual is one of that small percentage who has 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 she has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as a fashion designer. The regulation at 8 C.F.R. § 204.5(h)(5) provides:

*No offer of employment required.* Neither an offer for employment in the United States nor a labor certification is required for this classification; however, the petition must be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

The petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, filed on November 22, 2005, that her occupation was that of fashion designer, producer and sales manager, and that her proposed employment was as a fashion designer. In her letter accompanying the petition,<sup>1</sup> the petitioner indicated that she was present in the United States as an H1-B nonimmigrant in a specialty occupation as a fashion designer, and indicated that she was “considered one of the top designer’s [sic] in her field.”

In response to the director’s request for evidence (RFE) dated February 12, 2007, the petitioner stated that she worked as a general manager at RSL Media LLC. The petitioner further stated:

The company publishes a business magazine, *The New York Enterprise Report*, for small to mid-sized businesses, operates a website, and conducts seminars and events to help business owners’ community in the tri-state area.

Currently, I am involved in nearly every aspect of this business. I oversee the sales department, which includes training the sales staff with the Sandler Training System. I also oversee the design department for the magazine, and supervise the art director, who is a contractor. In addition, I also oversee the financial administrative aspects of the company.

Before working at The New York Enterprise Report, I worked for Pinel Swimwear as a Sales manager and Designer. There I helped develop the online store, and the e-marketing strategies. One of my achievements at Pinel involved persuading Sports Illustrated to use one of the swimsuits design[ed] by me in its annual swimsuit issue, and to also place Pinel products in the Victoria’s Secret catalog. Both moves served to effectively promote the Pinel brand, positioning the line among well know[n] brands as Donna Karan, Calvin Klein, Vix and others, and increase sales at a very fast pace.

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<sup>1</sup> The initial documentation submitted by the petitioner was signed by an “immigration consultant.” The regulations, however, do not permit “Immigration Consultants” to appear as representatives before the U.S. Citizenship and Immigration Services (USCIS).

The director determined that the petitioner's career is no longer in fashion design, and therefore she has not established that she sought to enter the United States for the purpose of continuing in her area of expertise.

On appeal, the petitioner asserts that "it is not necessary that my current position be exactly in the field in which I claim extraordinary ability," and that her "expertise in the field of fashion design affords me the ability to hold my current position." The petitioner, however, submitted no documentation to indicate how her position as general manager of a business advice newsletter is a continuation of her claimed extraordinary ability as a fashion designer.

Information submitted about *The New York Enterprise Report* indicates that it "features how-to-articles written by experts to help leaders of small businesses increase revenue, reduce costs and build value." In a February 27, 2007 letter, ██████████ President and Editor-in-Chief of RSL Media, stated:

During her tenure here, [the petitioner] has taken on major responsibilities and has managed various projects. Her expertise in sales has made her indispensable to our company. She oversees the sales department and participates in training the sales team. She works closely with our magazine's advertisers in preparing the ads that are placed in the magazine. She was the coordinator of our team that planned and executed the New York Enterprise Report Small Business Awards and for other conferences. Those events drew more than 1,000 attendees and sponsors.

[The petitioner's] knowledge and talent in design has also played a major part in our company's success. She oversees the art direction process, which is outsourced to a contractor. She is also responsible for website design and development and has helped make our site more dynamic, more-up-to-date, and a better vehicle for disseminating information to our reader base (small business owners).

Although ██████████ indicated in his letter that the petitioner's experience in the "design field" was a factor in her employment as a general manager with his company, he described her design duties as involving art direction and website design. There is no evidence that the petitioner will use her claimed extraordinary ability as a fashion designer. Further, although the petitioner indicated on her Form I-140 that she also served as a producer and sales manager, the documentation that she submitted involved primarily marketing of the swimsuits that she designed. Mr. ██████████ does not describe the precise nature of the sales department, whether its purpose is to market the magazine itself or to teach others how to market their products and services. There is no evidence in the record that the petitioner was involved in training of sales teams, website design or any other managerial experience in providing business advice or production of a magazine prior to her employment with RSL Media.

The evidence does not establish that the petitioner seeks to enter the United States for the purpose of continuing to work in her area of expertise.

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.

The petitioner has submitted evidence that, she claims, meets the following criteria.<sup>2</sup>

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

The petitioner did not initially claim to meet this criterion. However, in response to the RFE, the petitioner claimed to meet this criterion based on the magazine for which she worked receiving a "Journalist of the Year Award." We note first that a "Journalist of the Year Award" is not a prize or award in the petitioner's field of fashion design. Secondly, although he credited his entire team, the award was given to [REDACTED], not to his magazine or to the petitioner.

The evidence does not establish that the petitioner 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.*

In order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner states that her designs have appeared on the cover of seven magazines, was featured in a 2006 Swimwear calendar, and that she has "designed, developed and marketed the entire Pinel swimwear catalog." However, these publications only show models wearing the petitioner's designs, which is the purpose of the petitioner's work. Activities which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. Further, the modeling of the petitioner's work, without more, is not published articles about the petitioner or her work.

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

In response to the RFE, the petitioner referred to her “current job position in the field of ‘publishing’” and her “published material for major corporations, RSL/Media, New York Enterprise Report, Pinel, California Apparel News, etc.” Work published by the petitioner for a “major corporation” does not meet the requirements of this criterion. The published work must be about the petitioner or her work and must appear in major media or a major trade publication.

The evidence does not establish that the petitioner meets this criterion.

*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.*

The petitioner did not initially claim to meet this criterion. However, in response to the RFE, the petitioner claimed to meet this criterion based on her participation in the selection of the winner of RSL Media’s “Small Business/Sales award,” which determined “which nominees had the best practices in sales management.” The award is therefore not in the petitioner’s field of endeavor as a fashion designer or in any allied field. Accordingly, the evidence does not establish that the petitioner meets this criterion.

Further, the regulatory criteria are established to assist the petitioner in demonstrating national or international acclaim, and must be interpreted as a whole with the statute. Not all who sit as a judge on a panel will have extraordinary ability or will qualify under this criterion. The AAO interprets this regulation to require that the selection and participation process for serving as the judge of the work of others in the field be indicative of national or international acclaim in the field. The evidence does not establish that the petitioner was chosen to sit as a member of the judging team because of her national acclaim, or that the team was national in scope.

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

In her letter accompanying the petition, the petitioner stated that she was the “designer and national sales manager for Pinel Swimwear” and that in that capacity, “she is responsible for the design and marketing of the entire line of inventory.” However, the petitioner provided no evidence that her work constituted a contribution of major significance to her field.

In response to the RFE, the petitioner claimed that her “many projects . . . benefits the commercial business world.” She alleged that she “has been directly responsible for many exhibitions” and submitted letters from her current and two past employers, who attested to her ability as a designer and sales manager. None of the employers indicate that the petitioner made a contribution of major significance to any field of endeavor.

The evidence does not establish that the petitioner meets this criterion.

*Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.*

The petitioner did not initially claim to meet this criterion. In response to the RFE, the petitioner stated that her "published" work included the modeling of her swimsuit designs in various magazines and her work for RSL Media. However, the petitioner submitted no documentation to indicate that she authored any article, scholarly or otherwise. Accordingly, the evidence does not establish that she meets this criterion.

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

The petitioner claims to meet this criterion based on the modeling of her work on seven magazine covers, the swimsuit calendar, in the *New York Post*, the *Swim Journal*, "and multiple issues of California Apparel News." The petitioner submitted a copy of June 8, 2005 issue of the *New York Post*, which featured the "Latin Swimwear Hall of Fame." However, nothing in the publication attributes any of the work to the petitioner. The petitioner also submitted copies of several women's purses, handbags, attachés and similar items. The petitioner made no representation that these designs were her own work and nothing in the documentation attributes these designs to the petitioner or indicates that they were showcased in any specific medium.

In response to the RFE, the petitioner submitted a copy of the May 2005 magazine *Island SunTimes*, which features a model on the cover in a bikini. The magazine does not attribute the design to any particular company or individual. The petitioner also submitted copies of photographs of displays at the Pinel stores and Pinel swimwear at trade shows. The petitioner submitted a copy of the cover of the Swimsuit 40<sup>th</sup> Anniversary edition of *Sports Illustrated*, which attributed the design of a swimsuit worn by the model in an interior photograph to the petitioner. Other Pinel designs appeared on the covers of *Fucsia*, *Vogue*, and *Apparel News*. None of these designs, however, were specifically attributed to the petitioner.

A February 21, 2007 letter from the president of the company, [REDACTED], in Miami, Florida indicated that the petitioner was the lead designer on the 2004 and 2005 swimwear collections for the USA markets. We note that the petitioner's business card indicated that she was the national sales director for Pinel Swimwear U.S.A., and presumably responsible for the sales and displays of all Pinel swimwear in the United States. Therefore, although the petitioner was the "lead designer," the only evidence she presented of her personal design appeared in *Sports Illustrated* in 2004. Accordingly, a single design is not consistent with the petitioner's claim of sustained national and international acclaim as evidenced by the showcasing of her work.

Although the director determined that the petitioner meets this criterion, his determination is not supported by the evidence of record. The wording of this criterion indicates it is intended for those in the visual arts such as sculptors and painters. While the fashion shows and sales displays may arguably fall within this language, the petitioner submitted documentation that only one

swimsuit was her own work. Therefore, we withdraw the director's determination and find that the evidence provided does not establish that the petitioner meets this criterion.

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

To meet this criterion, the petitioner must show that she performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

In documentation submitted with the petition, the petitioner stated that her work has appeared on the covers of magazines, newspapers and catalogs, and that "these companies rely on finding unique and fresh designs to showcase as the engine to ensure the continued viability in an industry that is ever changing and ruthless." However, as discussed above, although the various magazines attributed the designs on their covers to Pinel, they did not identify the petitioner as the designer. Further, there is no evidence to support the petitioner's statements that her work was critical to the success of the magazines.

The petitioner also alleges that she served in a critical role for Pinel Swimwear, where she increased sales to 70%. The petitioner, however, provided no baseline as a measure to the increase in sales.

In response to the RFE, the petitioner stated that all of her work had been with major corporations. Nonetheless, the petitioner must establish not only that the companies with which she worked enjoyed a distinguished reputation but also that she served in a leading or critical role for the company. We note that in her February 21, 2007 letter, [REDACTED] stated that the petitioner was assigned as Pinel's lead designer on the 2004 and 2005 swimwear collections in the United States. However, the petitioner submitted no documentation to establish that Pinel Swimwear is a company with a distinguished reputation.

The evidence does not establish that the petitioner meets this criterion.

The petitioner alleges on appeal that "the establishment of three of the ten criteria does not have to be done within any particular time frame in my career." While this is true, the petitioner must establish that she has achieved sustained national or international acclaim. Documentation of achievements distant from the date of the petition is not evidence that the petitioner has achieved sustained acclaim. 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 her field of endeavor.

Furthermore, contrary to the petitioner's assertions that "It especially is not required that they [the stated criterion] be done at my current position," the petitioner must establish that she intends to work in her stated area of expertise. Although when she submitted her petition, the petitioner apparently worked at Pinel as a swimsuit designer and sales manager, she changed

jobs and job responsibilities subsequent to the date the director issued the RFE. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Although the petitioner and her employer allege that her design skills were factors in her selection for her current position, there is no evidence that she is actually using those skills in her current position.

Review of the record does not establish that the petitioner has distinguished herself as a fashion designer 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. 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.