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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

JUN 0 3 2003

File: EAC 01 153 52462 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The record contains Form G-28, Notice of Entry of Appearance as Attorney or Representative, indicating that the petitioner is represented by counsel, and in the absence of affirmative evidence that counsel no longer represents the petitioner, we consider that representation to remain active. Nevertheless, we note that there is no indication that counsel was in any way involved in the preparation or filing of the instant motion.

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. 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. The AAO affirmed the director's decision and dismissed the appeal.

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 achieved sustained national or international acclaim are set forth in pertinent regulations at 8 C.F.R. § 204.5(h)(3):

> Initial evidence: 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. Such evidence shall

include evidence of a one-time achievement (that is, a major, international recognized award), or at least three of the following:

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

(ii) 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;

(iii) 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;

(iv) 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;

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

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

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

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

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

As the AAO noted in its initial appellate decision, the petitioner checked five different boxes in the "Petition Type" section of the Form I-140 petition, although printed instructions on the form clearly state "check one." On motion, the petitioner requests adjudication of the petition under the other classifications checked. There is, however, no provision in statute, regulation, or case law that permits a petitioner to change the classification of a petition once a decision has been rendered. Furthermore, the petitioner cannot seek multiple classifications under a single petition. If the petitioner desires

consideration under more than one immigrant classification, he (or a U.S. employer filing on his behalf) must file a separate petition for each classification sought.

The petitioner specifically requests consideration "under the skilled worker or professional category," relating to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3). Even if a change of classification were permissible at this late stage, a petition for a skilled worker or professional may only be filed by a U.S. employer that has obtained an approved labor certification on the alien's behalf. See 8 C.F.R. § 204.5(l)(1) and § 204.5(l)(3)(i). Because the petitioner is an alien who has filed on his own behalf, he is statutorily ineligible to seek classification for himself as a skilled worker or professional. The petitioner has also sought classification as a "Soviet Scientist," which is a now-obsolete classification for scientists who had worked on certain weapons programs for the former Soviet Union. Being an artist rather than a scientist (despite the petitioner's attempt to define his art as a kind of "science"), the petitioner's ineligibility for that classification is immediately evident.

Because the petitioner is permitted only one classification per petition, and because (as the AAO previously noted) the petitioner did not previously contest the director's adjudication of the petition under section 203(b)(1)(A) of the Act, we shall not discuss the merits of the petition under any classification except that of alien of extraordinary ability.

Much of the evidence that the petitioner submits on motion concerns developments that took place immediately prior to the filing of the motion. Pursuant to *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), aliens seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. If the petitioner was not already eligible as of the petition's March 29, 2001 filing date, subsequent events cannot retroactively establish eligibility.

The petitioner submits copies of payroll documents from Shine Jewelry Manufacturing Company, to establish his continued employment in the field of jewelry manufacture. The AAO, however, had not contested the petitioner's continued activity in the field or his competence in sculpting wax models. The denial rested on a finding that the petitioner has not established sustained acclaim in the arts; not on any finding that the petitioner has ceased working in the arts. The AAO had noted, in its initial decision, the petitioner's failure to substantiate his claimed annual income of $50,000-$60,000. The newly submitted payroll documents show that the petitioner worked 35 hours per week, earning $10 per hour in 1995 and $12 per hour in 1996, which extrapolates to an annual income of less than $22,000.

The petitioner submits documentation showing that he acted as an "extra" in the feature films *Uptown Girl* and *Anger Management*. The AAO had previously noted the petitioner's one day of work on the film *Changing Lanes*. While all three of these films are major motion pictures featuring top Hollywood stars, the petitioner was an "extra" in the films rather than a featured performer. He was on the set of each film for one or two days. Studios routinely issue open casting calls for such extras, needed for crowd scenes and other shots requiring the presence of individuals other than principal characters. Occasional acting work of this kind is not a hallmark of sustained acclaim or extraordinary ability. Furthermore, the two newly claimed films were shot in the summer of 2002, over a year after the petition's filing date; the petitioner's appeal was already pending.

In a letter dated February 17, 2002, [redacted] director of the C.A.S.E. Museum of Russian Contemporary Art, states that the museum has some of the petitioner's works on "permanent exhibition." Mr [redacted] states that the petitioner has continued the tradition of such "Russian Avant-garde" artists as "Malevich, Kandinsky, [and] Rodchenko." Mr [redacted] states that the petitioner "was an active member of [the] Artist Association Union also known as legendary 'Malaya Grouzinskaia 28.'" Mr. [redacted] asserts that an exhibition by members of this union, including the petitioner, produced "long lines of people [at] the entrance to the exhibitions' halls." The record contains no actual documentation of this exhibition, and as noted above, the Soviet government considered the Artist Association Union as a "trade union" which is consistent with its name.

The petitioner had previously submitted documentation about various gallery shows that included his work. The AAO stated the following about that evidence:

> The petitioner submits letters from the directors of various galleries in New York City, indicating that the petitioner has shown his work there. Given that there are hundreds of art galleries and art dealers in New York City alone, such gallery displays cannot constitute *prima facie* evidence that the petitioner is a nationally or internationally acclaimed artist.

Rather than refuting the above finding, the petitioner responds by submitting a copy of a previously submitted letter from the owner of an art gallery in New York City. If the AAO finds evidence to be insufficient, the petitioner cannot remedy this deficiency simply by resubmitting the same evidence with little or no comment. The same can be said of other materials submitted on motion which are nothing more than copies of previously submitted documents and letters.

In a new letter, [redacted] director of Jadite Galleries, states that the petitioner "is having an exhibition of his paintings . . . from December 5 – 20, 2002." The petitioner states "[t]he nationwide magazines Gallery Guide and New York Art World.Com Magazine . . . will publish the paintings," but Mr [redacted] one-sentence letter does not mention these magazines and the petitioner submits no other corroborative evidence. This exhibition had not yet taken place even when the petitioner filed his motion, let alone prior to the March 2001 filing date.

In an effort to establish that he has been the subject of major media coverage, the petitioner submits an affidavit, jointly signed by [redacted] and [redacted] The affiants attest that, on October 20, 1989, they watched a television program "from 8:00 PM till 9:00 PM" about the petitioner on Moscow Central Television Channel 2. Another document in the record, from an unidentified source, states, in its entirety:

RUSSIA
CENTRAL TV CHANNEL "2"
OCT 20, 1989 P.M. 8:30
"30 MINUTES WITH ARTIST"
TV PROGRAM:
"[the petitioner's name]"

This unattributed document, together with the affidavit attested in Newark, New Jersey, offers little information about the television program (for instance, the means used to select the artists profiled), and it does not indicate that the program was broadcast nationally rather than only locally. Neither document represents strong evidence that the broadcast took place at all, and the two documents contain contradictory assertions regarding the starting time and length of the program. The petitioner submits nothing from the television station purported to have broadcast the program, nor does the petitioner offer any explanation as to why corroboration from that station is not available. Even if the petitioner had more persuasively established that this broadcast had taken place as claimed, it does not address or rebut the AAO's finding that the petitioner appears not to have attracted any media attention since he entered the U.S. in 1994.

In dismissing the petitioner's appeal, the AAO raised several specific issues and discussed particular deficiencies in the evidence that the petitioner had submitted to support his claim. On motion, the petitioner has not addressed or overcome the AAO's previous findings. Many of the materials submitted on motion are simply copies of documents that the AAO has already considered, and several of the remaining materials concern events that occurred long after the petition's filing date. The few remaining relevant materials submitted on motion are not sufficient either to establish eligibility on their own, or to show that the AAO had previously erred in dismissing the appeal.

Several months after submitting the above motion, the petitioner has submitted further exhibits for consideration. The new submission, dated January 26, 2003, deals with (1) a gallery show in December 2002; (2) a then-upcoming gallery show in April 2003; (3) information about the author of a previously submitted letter; and (4) the petitioner's work as an extra on the Comedy Central series *Chappelle's Show*, taped on January 13, 2003. Almost everything in this submission pertains to developments that took place months after the filing of the motion.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already-submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation that allows a petitioner to submit new evidence in furtherance of a previously filed motion. By filing a motion, the petitioner does not secure for himself an open-ended period in which to supplement the record with evidence that plainly did not exist at the time the motion (let alone the underlying petition) was filed. Any consideration at all given to the latest submission is entirely discretionary. Nothing in this submission contradicts or overcomes the basic findings that led to the denial of the petition and, later, the dismissal of the appeal. The latest submission is entirely consistent with the AAO's finding that the petitioner is a moderately successful artist who has also secured occasional acting work as an extra.

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. The petitioner, on motion, demonstrates that he is an active, productive and successful artist who has won admirers in the field. Review of the record, however, does not establish that the petitioner has distinguished himself as an artist 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. The petitioner has not demonstrated that the AAO's dismissal was in error, or that the petition otherwise warrants approval.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

This decision is without prejudice to any petition filed in a different classification, by a party authorized to file a petition under that classification, including the required fee and any other necessary evidence to establish eligibility under that classification. Inadmissibility issues, such as those that may arise from the petitioner's lengthy unauthorized stay in the United States, are generally considered at the adjustment/visa application phase rather the petition phase.

ORDER: The AAO's decision of August 29, 2002 is affirmed. The petition is denied.