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U.S. Department of Homeland Security

Citizenship and Immigration Services

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Administrative Appeals Office
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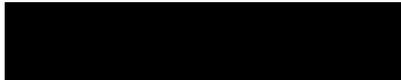


File: EAC 03 064 50916

Office: VERMONT SERVICE CENTER

Date: OCT 8 - 2003

IN RE: Petitioner:
Beneficiary:



Petition: Petition for Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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 Citizenship and Immigration Services (CIS) 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a mime company, seeking O-1 classification for the beneficiary as an alien of extraordinary ability in the arts pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), to employ the beneficiary as a mime artist for a period of three years.

The director determined that the petitioner had not established that the beneficiary qualifies as an alien of extraordinary ability in the arts. The director denied the petition.

On appeal, counsel for the petitioner asserts that the beneficiary is qualified for the classification sought.

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides classification to a qualified alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim or, with regard to motion picture and television productions, has a demonstrated record of extraordinary achievement, and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability.

In order to qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade

journals, magazines, or other publications;

(3) Evidence that the alien has performed in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, governmental agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

8 C.F.R. § 214.2(o)(3)(iv). No claims have been made that these standards do not readily apply in this matter.

It is noted that CIS's decision in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. The evidence submitted in support of each criterion must be indicative of the beneficiary's prominence and distinction in her field of mime, dance and choreography.

In addition, regulations define *extraordinary ability* in the field of arts to mean distinction. Distinction, in turn, is defined as 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. 8 C.F.R. § 214.2(o)(3)(ii). Pursuant to 8 C.F.R. § 214.2(O)(3)(ii), arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts.

The beneficiary is a 31-year old native and citizen of Japan. The record reflects that she trained in jazz dance at the Nakagawa Yukiko Jazz Dance Studio in Tokyo from 1987 to 1991. From 1988 through 1992, she was a member of the Himawari Theater Company in Tokyo, where she studied Kabuki dance, ballet and musical comedy. In 1995, she graduated from Tamagawa University in Tokyo with a bachelor's degree in Drama. In 1996, she joined the Hiromi Dance Company in Tokyo then came to the United States to study at the Alvin Ailey American Dance Center and the Peridance Center in New York. In 2000, she began studying mime and physical comedy at the petitioner's mime company. She performed in the petitioner's "Reel to Real" performance at the Lincoln Center twice in 2002. She continues to perform with the petitioner's Studio Ensemble. According to CIS' database, the beneficiary entered the United States on October 16, 1998 as an L-1 nonimmigrant intracompany transferee and last entered on March 2, 2002 as an H-1 nonimmigrant temporary worker.

After careful review of the record, it must be concluded that the petitioner has failed to establish that the beneficiary meets the O-1 eligibility requirements. There is insufficient evidence that the beneficiary has been nominated for, or has been the recipient of, any significant national or international awards or prizes equivalent to that listed at 8 C.F.R. § 214.2(o)(3)(iv)(A). According to the beneficiary's resume in the record, she received awards for her Kabuki and jazz dance performances, but the petitioner failed to establish the significance of these awards.

For criterion number one, the petitioner asserts that the beneficiary satisfies the criterion by virtue of having performed twice at the Lincoln Center for the Performing Arts, as well as other venues including the Puffin Room in Soho, New York City. The director determined that the beneficiary was not a lead or starring participant in the Lincoln Center productions because she performed with five others and she was not listed in the performance program. In review, the beneficiary is listed as a performer at the Lincoln Center in two program brochures, but the evidence is insufficient to establish that she played a lead or starring role in productions or events that have a distinguished reputation. The Lincoln Center has a distinguished reputation, but the beneficiary did not play a lead or starring role at the

Lincoln Center. Rather, she was one of five performers in one segment of a full-length performance. Further, the petitioner has failed to establish that the beneficiary *will* perform as a lead or starring participant in productions or events that have a distinguished reputation. The petitioner established that the beneficiary has contracts to perform at a bar mitzvah in Queens, New York and at an elementary school in Chiba, Japan. She has a contract to perform at the opening of the Time Warner Building in New York City and at the Chofushi Green Hall in Tokyo, Japan. She was invited to perform at Wichita State University in Kansas. The petitioner failed to establish that these future venues have a distinguished reputation; hence, failed to establish that the beneficiary satisfies criterion number one.

For criterion number two, the petitioner asserts that the beneficiary has achieved national or international recognition for achievements evidenced by published materials about the beneficiary in *OCS News*. *OCS News* is a bi-weekly Japanese newspaper published in the United States with an approximate circulation of 20,000. The record of proceeding contains one review and several announcements of the beneficiary's performances published in *OCS News* plus several other announcements in *The New York Times*, *The Village Voice*, and *Time Out New York*. The record contains a copy of a review published on the Wolf Entertainment Guide website, and a translation of a review published on the ASAHI website. The petitioner failed to establish that these items are evidence that the beneficiary has achieved national or international recognition for her achievements.

For criterion number three, the petitioner has not established that the beneficiary performed in a lead, starring or critical role for organizations that have a distinguished reputation in the past, or that the beneficiary will perform in a lead, starring or critical role for organizations and establishments that have a distinguished reputation in the future.

For criterion number four, counsel for the petitioner asserts that the beneficiary has received commercial or critically acclaimed success. Counsel argues that the performance in which the beneficiary participated at the Lincoln Center was so commercially successful that it is now being promoted both nationally and internationally. Counsel states that the beneficiary's performance at the Puffin Room received substantial critical acclaim in *OCS News*. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the critical review published in *OSC News* is abbreviated. The record contains insufficient evidence to establish that the beneficiary has a record of major commercial or critically acclaimed successes.

Similarly, the record does not demonstrate that the beneficiary has received significant recognition for her achievements reported in trade journals, major newspapers, or other publications in satisfaction of criterion number five. The petitioner failed to establish that the beneficiary has received significant recognition for achievements from organizations, critics, governmental agencies or other recognized experts in the beneficiary's field. The petitioner submitted a number of testimonials that speak highly of the beneficiary's talent and technique. While the beneficiary has received some recognition for her work in the field, the petitioner failed to establish that the beneficiary has achieved distinction in her field of endeavor.

For criterion number six, no evidence of the beneficiary's salary history was provided, nor were salary surveys supplied to CIS so that the current salary offer could be evaluated.

The petitioner submitted a favorable consultation from the American Guild of Musical Artists. Such consultations, however, are advisory in nature and are not binding on CIS. 8 C.F.R. § 214.2(o)(5)(i)(D).

After a careful review of the entire record, including the opinion of the American Guild of Musical Artists, it is concluded that the petitioner has not shown that the beneficiary is a person of extraordinary ability in the arts.

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 director's decision will not be disturbed.

ORDER: The appeal is dismissed.