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U.S. Department of Justice
Immigration and Naturalization Service

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*OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536*



File:  Office: Nebraska Service Center

Date: **10 APR 2002**

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)

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:

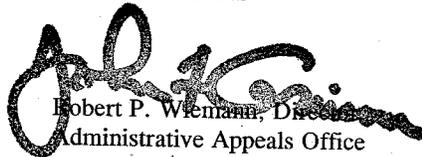
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 that the beneficiary had 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

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(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 sustained national or international acclaim and recognition in his or her field of expertise are set forth in the Service 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 the beneficiary has sustained national or international acclaim at the very top level.

This petition seeks to classify the beneficiary as an alien with extraordinary ability as a musician. 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, international 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 not claimed which criteria the

beneficiary allegedly meets. The record contains evidence which appears to address the following criteria.

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

On appeal, the petitioner submits evidence that the beneficiary was nominated for a 1999 Branson Entertainment Award for keyboard. The record, however, contains no evidence that the beneficiary won this award or the significance of this award. It appears to be a local Branson, Missouri competition, as opposed to a national award.

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.

The record contains a single article about the beneficiary's performance at an elementary school during a break from his tour. The article appears in *The Morning News*. The record contains no evidence that this publication constitutes major media.

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

The record contains evidence that the petitioner contracted with the beneficiary to pay him a minimum of \$1500 per month. The petitioner claims in a separate letter that the beneficiary's salary was approximately \$2000 per month. The record contains no evidence regarding whether this salary is significantly high in relation to others in the field, including those who have attained sustained national acclaim.

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

The petitioner submitted a confirmation letter reflecting that the State Teleradio Company in Moldova purchased eight programs composed by the beneficiary and that the Minister of Culture of Moldova "acquired" a cycle of pieces for mixed choir by the beneficiary. The record also reflects that the beneficiary has performed in a Russian Revue, a charity event hosted by [REDACTED] and other tours. He has also compiled an audio tape of his compositions performed by his group Miraj. The evidence submitted in support of a criterion, however, must demonstrate sustained national or international acclaim. The evidence of selling his compositions and performing reveals that the beneficiary is a commercially successful musician, but does not reflect that he has attained national or international acclaim. The record contains no evidence of the sales figures for the audio tape.

On January 31, 2001, the American Federation of Musicians issued an advisory opinion that the beneficiary is a musician of extraordinary ability as defined in revised regulations for non-

immigrant O-1 visas. First, this opinion is dated after the petition was filed. Prior to the date of filing, the beneficiary had only obtained an O-2 visa as a backup musician for [REDACTED]. Second, as noted by the director, the regulatory requirements for non-immigrant extraordinary artists under Section 214.2(o)(3)(ii) and Section 214.2(o)(iv) are not the same as those for immigrant extraordinary artists under 204.5(h)(3). The non-immigrant classification only requires "distinction" as opposed to sustained national or international acclaim. The record also includes a letter from [REDACTED] lead vocalist for the Osmond Brothers, asserting that he has recently heard the beneficiary and that he has never seen musicians of higher talent than the beneficiary. A petitioner cannot rely on opinion letters from others in the field in place of meeting three of the above criteria.

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.

Review of the record, however, does not establish that the beneficiary has distinguished himself as a musician 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 indicates that the beneficiary shows talent as a musician, but is not persuasive that the beneficiary's achievements set him significantly above almost all others in his 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.