



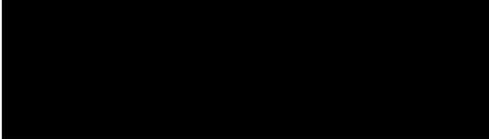
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U.S. Department of Justice

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: WAC-00-061-52675 Office: California Service Center

Date: 22 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:



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 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 that 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, California Service Center, and is now before the Associate Commissioner for Examinations 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 business. 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.

On appeal, counsel challenges the director's statement that the extraordinary classification is a restrictive one, noting that it is not as restrictive as the Department of Labor's "exceptional ability," which requires international acclaim and that the proposed regulations were changed from the "few" who had risen to the very top of the field to the "small percentage."

The director does not appear to have required international as opposed to national acclaim. Nor does the distinction between "few" and "small percentage" appear to dramatically change the classification from a restrictive one to one where anyone demonstrating success in his field is eligible.

Counsel next questions the director's request for a list of five to ten names of the top individuals in the petitioner's field, their incomes and rank as well as reference letters from some of these individuals. We concur that this request went beyond the type of evidence required by the regulations. Nevertheless, counsel raised this complaint in response to the director's request and the director's final decision was not based on the petitioner's failure to submit such a list. As such, we do not find the director erred in her final decision.

Further, counsel asserts that the director attempted to apply a proposed rule which stated that merely meeting three criteria was insufficient, an adjudicator must still determine whether the alien had risen to the top of his field. The director, however, did not apply this standard. Rather, the director stated:

The petitioner asserts that he has submitted documentation to establish that he meets at least three of the criteria listed at 8 C.F.R. 204.5(h)(3). However, the petitioner's reliance on simply meeting a set number of criteria is misplaced. The submission of documentation relating to at least three of the various kinds of evidence listed do not necessarily establish that an alien has achieved sustained national or international acclaim and recognition and does not mandate a finding of eligibility.

In other words, the director stated that it was the petitioner's assertion that he met three criteria. The director did not find that he did so. In addition, the director stated that merely submitting evidence *relating to* three criteria is insufficient. We concur. The evidence must be evaluated as to whether it demonstrates national or international acclaim. As we do not find counsel's arguments

regarding the legal standards used by the director to be persuasive, we will review the director's factual findings.

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 he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability in business. 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 submitted evidence which, he claims, meets 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.

The petitioner submits several "diplomas" issued by the Ministry of the [REDACTED] Production Unit "Mangyshlakneft." The director concluded that the petitioner had not established that these "awards" were recognized nationally or internationally. On appeal,

counsel argues that the awards need only be *lesser* national awards. While the diplomas are issued by the Soviet government, they cannot be characterized as national awards, lesser or otherwise. They are from the Mangyshlakneft production unit that employed the petitioner. It is clear that these awards are merely performance awards from the petitioner's employer as opposed to national awards for which experts from all over the entire country compete, regardless of employer or region.

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.

The director stated that counsel cited several associations of which the petitioner was a member. The director then concluded that the petitioner had not established that these organizations required outstanding requirements of their members. At no time has counsel asserted that the petitioner meets this criterion and the petitioner has not submitted evidence of any memberships exclusive or otherwise.

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.

Similarly, the petitioner did not initially claim to meet this criterion and submitted no evidence of articles about him or even articles which referenced his businesses or his business deals. The director, however, stated that the petitioner's work had been cited but that this evidence was insufficient to demonstrate national acclaim. On appeal, counsel states that the petitioner submitted evidence "about him or citing him." The record, however, contains no such evidence.

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

Counsel argues that original contributions "must be evaluated within their relative context." He argues that the petitioner's operation of a successful business in the newly opened Russian market full of uncertainty resulting from the collapse of the Soviet Union is evidence of the petitioner's original contributions of major significance. The evidence submitted for each criterion must be evaluated as to whether it demonstrates national or international acclaim. Simply operating a successful company in an uncertain business environment is insufficient unless the petitioner's techniques were influential nationwide, earning the petitioner national acclaim. Moreover, the only specific example discussed by counsel in the section of his brief devoted to this criterion is the petitioner's work for the Soviet Ministry of Oil prior to the collapse of the Soviet Union. The letter from Minister N.U. Balgimbayev refers to the petitioner as only "highly qualified."

The petitioner submitted several contracts negotiated by his companies. Any successful company must negotiate contracts. The fact that the petitioner successfully negotiated contracts

for his company does not imply that he attained national acclaim for this success or that other Soviet business leaders were influenced by these successful contracts. In response to the director's request for additional documentation, the petitioner submitted reference letters asserting that the petitioner contributed significantly to the post-Soviet business era by negotiating a means whereby Kazakhstan, suddenly cut off from oil refineries, was able to send its oil out of country for refining. It can be imagined that the division of a country would lead to many such problems. There is no evidence in the record, however, that the petitioner's work to resolve the oil refining problem for Kazakhstan served as an example for other former Soviet Union countries or executives in Kazakhstan facing similar problems.

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

The petitioner claims to have played a leading role for Mangyshlakneft, a government owned oil production company of the former Soviet Republic of Kazakhstan, operating under the auspices of the Soviet Ministry of Oil. The petitioner submitted a letter from Kenes Dzulamanov, the Chief Engineer of the company for five years. [REDACTED] asserts that the petitioner was the Chief Engineer for Construction Management where he was "responsible for managing the work of 30-35 engineers engaged in construction oil wells and pipe lines for oil extraction and transport. [REDACTED] also indicates, however, that Mangyshlakneft employed nearly 4,000 workers. While the petitioner's project may have involved "serious and complex challenges" due to the mountainous terrain in which he worked, we cannot conclude that supervising a single project involving 35 out of 4,000 employees constitutes a critical or leading role for the company as a whole.

The petitioner also submitted a letter from Vladimir A. Belyankin who served as Head of Counsel of Directors of Shagala, a British-Soviet joint venture. [REDACTED] confirms that the petitioner served as General Director of Shagala from 1989 to 1993. [REDACTED] continues:

At that time, the Soviet Union was making its first foray into [the] free market economy of the West. Shagala was one manifestation of this new openness of western style economy. His business acumen and ingenuity successfully guided the Kazakh office to uncharted heights of fiscal responsibility as a time when open market competition was a novel and alien concept. [The petitioner] also called upon his expertise in business and management to guide Shagala into a robust and profitable operation.

Under [the petitioner's] Leadership, Shagala was able to raise Soviet trade with the West to previously unheard of levels and set the standards for future business relationships. [The petitioner] demonstrated that he was able to utilize the managerial skills acquired from his experience in the oil/industrial sector to the new economy of trade with the West. [The petitioner's] tenure at Shagala endured the radical shifts in the economy and political breakdown of the Soviet Union, which made conducting business both risky and challenging. His ability

to plan and execute strategy under the most difficult circumstances was nothing less than extraordinary. His entrepreneurial expertise was clearly at the very top of the business community.

In addition, in 1994, the petitioner purchased 100 shares of Commodities, Ltd., a British company incorporated in 1992, and served as director of that company. The petitioner submitted a letter from Barclays Bank confirming that Commodities, Ltd. banks with Barclays and is "considered a respectable and trustworthy company." In response to the director's request for additional documentation, the petitioner submitted letters from fellow entrepreneurs asserting that the petitioner was instrumental in resolving Kazakhstan's oil refining problems when the Former Soviet Union collapsed and Kazakhstan found itself without its own oil refining facilities. Specifically, the petitioner negotiated between countries to restore the route whereby Kazakhstan sent its oil for refining. Despite the assertion that both Shagala and Commodities were joint British/Russian ventures, the record contains no verification of the petitioner's role for these companies from his British counterparts. While a petitioner need only demonstrate national acclaim, where a petitioner claims to play a leading or critical role for a joint venture, it can be expected that management from both halves of the joint venture will concur. Moreover, it does not follow that every successful joint venture with a good credit history has a distinguished reputation.

The petitioner also submitted the organizational documentation for a limited liability company, FLEMB, which was founded by OMEGA-A and RADON-672. The petitioner is identified as a director of OMEGA-A on these documents. The record also reveals that in 1995, the petitioner purchased a 50 percent share of UNION, a limited liability partnership. In January 1995, Commodities purchased 120 shares of BASCO, which, according to its balance sheets, was an investment company with no business activities. Finally, in November 1997, the petitioner incorporated Victor Development, LLC in California. The petitioner submitted an exclusive right to sell contract between [REDACTED] and [REDACTED] and a balance sheet for [REDACTED] reflecting assets of \$3,584,076 and a capital contribution of \$1,726,973. The petitioner has not submitted evidence regarding the reputation of any of these other companies.

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

Counsel argues that where a petitioner claims extraordinary ability in business, evidence of the commercial success of his business is comparable evidence to meet this criterion which, by its plain language, applies to performing artists. Of the ten criteria, only two refer to a specific field. It can be assumed that if commercial success was evidence of sustained national acclaim in any field, this criterion would not have been limited to performing artists. It could be argued that in cases involving the field of business, comparable evidence would actually fit under another criterion, evidence of a high salary or other remuneration, which the petitioner does not claim to meet. Nevertheless, 8 C.F.R. 204.5(h)(4) does permit comparable evidence where a criterion does not apply. As such, we will evaluate whether the commercial success of the petitioner's

companies reflects sustained national acclaim as one of the top business leaders in the former Soviet Union.

As stated above, the petitioner submitted several contracts negotiated by the petitioner on behalf of his companies. The successful negotiation of a contract is inherent to working in business and is not evidence of sustained national acclaim. The petitioner must establish the significance of these contracts such that their negotiation can be considered evidence of national acclaim. The petitioner submitted a letter from [REDACTED] and Coal Industry of Kazakhstan, who asserts that Commodities Ltd., headed by the petitioner, is the largest supplier of thermal resources to Kazakhstan. The contract between Commodities and Fund of Economic Reforms reveals that Commodities was involved in supplying oil from Kazakhstan to Bakin's Oil Refining Works and from there to Azerbaidzhan. The record contains other contracts, not negotiated by the petitioner, whereby Commodities agreed to supply Trans-Turas and Luna with millions of dollars worth of oil. The most recent contract is dated 1995. The petition was not filed until December 1999. While counsel refers to a summary of a 1996 decision by the Administrative Appeals Office (AAO) published in Interpreter Releases which allegedly concluded that acclaim need not be sustained in the United States, that decision was not published as a precedent and is not binding on us. The regulations require sustained national acclaim. As such, the petitioner must demonstrate that he sustained his national acclaim up until the date of filing.

Counsel argues that the petitioner's leadership in BASCO resulted in a 400 percent increase in assets from 7 million rubles to 36 million rubles in January 1996. Counsel claims BASCO employed 45 workers. As evidence of this, counsel refers to a balance sheet as of January 1996 which reflects vastly lower numbers.¹ The balance sheet reflects that BASCO had 7,400 rubles in a domestic monetary fund in 1995. By January 1996, BASCO increased its assets to 36,800 rubles by borrowing 29,400 rubles from a creditor. The balance sheet does not indicate the type of business services provided by BASCO and reflects no working assets, no inventory, and no profits. As such, the sole basis for the increase in assets was a loan and BASCO does not appear to have been an operational company. Counsel's credibility is severely reduced as a result of the significant misrepresentation of the evidence regarding BASCO and the other balance sheets as will be discussed below.

Counsel also asserts that the petitioner's leadership of FLEMB resulted in a 500 percent increase in assets from 900 million rubles to 6 billion rubles in January 1996. Counsel further claims that FLEMB employed 200 workers "at its height." Unlike the balance sheet for BASCO, the balance sheet for FLEMB reflects an operating wood processing company. According to the balance sheet, the assets of FLEMB increased from 923,216,000 rubles to 5,903,870,000 rubles in the twelve months prior to January 1996. While 2,171,969,000 rubles of the increase in assets was due to new loans (much of which was subsequently borrowed by the company's "daughter" enterprises), 2,004,034,000 rubles of the asset increase was due to an increase in "advance

¹ The record includes balances sheets for three companies, one of which indicates that the numbers are in thousands of rubles. The balance sheet for BASCO does not so indicate.

payments from customers.” Those numbers could indicate either an increase in business or an increase in delinquent customers. The latter is consistent with the balance sheet which reflects no profits during the accounting period, although the balance sheet does reflect an increase in advance payment to suppliers and contractors. Regardless, the increase in assets does not appear to be noteworthy since the company’s liabilities increased even more during the same period. As a result, the net worth of FLEMB decreased from 209,857,000 rubles to 209,368,000 rubles.²

The January 1996 letter from P.P. Nefidov, Vice President of The Stockholder’s Bank, confirming an offer to permit FLEMB to enter contracts for a longer period of time based on their review of the company is only evidence that the bank does not consider FLEMB a credit risk. The letter does not reflect that FLEMB as a company is unusually commercially successful.

Finally, counsel asserts that the petitioner’s “extraordinary business acumen and intuition” at UNION resulted in an increase in assets of 400 percent to 1.2 billion rubles as of January 1996, with the founders able to retain a dividend or bonus of 1 billion rubles, “indicating a substantial net profit.” As with BASCO, counsel has grossly inflated the numbers.³ More seriously, counsel mischaracterizes the nature of the numbers on the balance sheet. The balance sheet reflects an increase in assets from 223,074 rubles to 1,237,655 rubles, reflected mostly as an increase in main assets. When purchasing assets, however, there should be an equal reduction in cash or an increase in loans.⁴ UNION’s increase in assets, however, is offset by the liability entitled “payments to founders” of 1,000,386 rubles. A liability, by definition, is an amount payable at a future date. See Barron’s Dictionary of Accounting Terms, 257 (3rd ed. 2000). A previously paid dividend is not a liability and would not be reflected on a balance sheet. By listing the “payments to founders” as a liability on the balance sheets it is clear that UNION borrowed these funds from the founders to purchase the new assets and, thus, the “payments to founders” amount is actually a shareholder loan to be repaid by the company. As further evidence that counsel seriously misrepresented UNION’s finances, specifically that the company had a “substantial net profit,” the balance sheet lists no profits for the “statement year” and only 33,878 rubles as “profits used” for the statement year. Even these numbers are suspect as the equity remained at 2,845 rubles from 1995 to 1996.

² While these numbers reflect the total equity as reflected on the balance sheet, the charter capital and added capital listed do not add up to these total amounts in the translated balance sheet. The original Russian language document, however, includes an additional amount relating to equity not reflected in the translation but which makes the total correct. As such, the reliability of the translation is suspect.

³ The balance sheets for UNION do not indicate that the numbers are in thousands of rubles.

⁴ Assets equal equity plus liabilities. An increase in assets, therefore, must be accompanied by an equal increase in equity (net worth) or liability for the finances to balance. As UNION’s net worth remained constant, there must be an increase in liabilities.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988).⁵

The record contains no evidence relating to Victor Development, LLC's commercial success. The petitioner formed B4B Systems, LLC after the date of filing. As such, any success that company may have enjoyed is not evidence of the petitioner's eligibility at the time of filing. In light of the discussion above, the petitioner has not demonstrated that any of his businesses have been commercially successful, let alone sufficiently commercially successful to warrant national acclaim as one of the top business leaders of Russia or Kazakhstan.

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 petitioner has distinguished himself as a business executive 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 petitioner shows talent as an entrepreneur, but is not persuasive that the petitioner'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.

⁵ Were the petitioner to file a motion in this case, it would be incumbent upon him to resolve the inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).