U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: Nebraska Service Center Date: APR 11 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 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.

Elizabeth Hayward
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska 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 previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is an Eastern European Folk Orchestra. The petition, filed on April 30, 2001, 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 has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. The AAO concurred with the director's finding and dismissed the petitioner's appeal on September 16, 2002.

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.

On motion, counsel states: "Since the filing of this petition and subsequent appeal, [the beneficiary] has signed a recording contract and recorded her first album with the noted recording label, 'Traditional Crossroads.'" These events, however, came into existence subsequent to the petition's filing. *See Matter of Katigbak*, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date.

The petitioner submits information about the Traditional Crossroads recording label and witness letters from Walter Mahovlich, Director/Manager of [redacted] and Harold Hagopian, Owner/Manager of Traditional Crossroads. Harold Hagopian states: "We have already recorded her first album to be released in the U.S.A. in April 2003 and will organize a tour in the 2003-2004 season of more than 20 concerts in the U.S.A."

Counsel states: "The fact that [Harold Hagopian] has decided to record and promote [the beneficiary] is a testament to her abilities and talents and her sustained acclaim in the United States. Mr. Hagopian obviously believes that [the beneficiary] will be able to sell the CD's in which he is investing."

As we have already noted, a petitioner cannot file a petition under this classification based on the expectation of the beneficiary's future eligibility. *See Matter of Katigbak, supra*. The visa classification sought for the beneficiary is highly restrictive, intended for aliens already at the top of their respective fields, rather than for individuals progressing toward the top at some future point. The assertion that the beneficiary has a promising future (such as Mr. Hagopian's belief that the beneficiary "will be able to sell" her compact discs nationally) does not establish eligibility, for

the regulations clearly call for evidence that the beneficiary already enjoys major success and acclaim.

Although the petitioner has provided evidence on motion that came into existence subsequent to the petition's filing, we shall consider that evidence under the pertinent regulatory criterion for the purpose of being thorough. The plain wording of the criterion at 8 C.F.R. § 204.5(h)(3)(x) requires the petitioner to submit "evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales." According to the plain wording of the regulation, simply signing a recording contract or appearing on tour would not satisfy this criterion. Instead, the petitioner is required to submit evidence of the beneficiary's commercial success through documented compact disc and concert ticket sales. The evidence provided on motion, however, includes no such documentation.

In its prior decision, the AAO noted:

> The petitioner has provided evidence of several of the beneficiary's compact disc recordings, many of which were featured in compilations with other vocalists. The mere fact that the beneficiary has issued recordings of her work does not demonstrate that such recordings are commercially successful. The petitioner offers no evidence that the beneficiary's compact discs have enjoyed a high sales volume. Furthermore, we note that the petitioner has provided no evidence showing that the beneficiary has released any major-label compact disc recordings in the United States from 1995 through the time of the petition's filing.
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> It cannot suffice for the petitioner simply to demonstrate that the beneficiary has performed before audiences; such performances are inherent to the art of folk music, and we cannot conclude that the majority of folkloric musical performers have not performed in front of audiences. To satisfy this criterion, the petitioner must establish that the beneficiary's performances have consistently drawn larger audiences and/or higher box office grosses than most others in her field, at a national or international (rather than local or regional) level. The petitioner offers no evidence regarding the commercial success of the beneficiary's musical performances in the form of documented ticket sales directly attributable to the beneficiary. In sum, the petitioner offers no evidence to demonstrate that the beneficiary has been commercially more successful than the vast majority of other professional folk music singers.

The petitioner's two witnesses have asserted that the beneficiary is a highly talented vocalist, and expressed their belief that she will gain further acclaim when "her fist album" is released and when she begins touring in 2003. Such attestations, however, cannot meet the extremely high threshold of extraordinary ability. Even if it were unanimously agreed that the beneficiary would one day achieve national or international acclaim as a vocalist, this visa classification is reserved for those already at the top of their field, not for those who are expected eventually to reach that level.

The issue to be determined in this matter is whether the beneficiary has satisfied at least three of the regulatory criteria set forth at 8 C.F.R. § 204.5(h)(3). The petitioner's motion has not addressed the

findings set forth in the AAO's September 16, 2002 decision. The focus of counsel's arguments relate to evidence that did not exist at the time of the petition's filing or even at the time of the director's decision. While the new evidence shows that the beneficiary has continued to work in the same field, it cannot retroactively establish the beneficiary's eligibility. *See Matter of Katigbak, supra.* On motion, counsel for the petitioner has offered no discussion regarding the evidence that existed at the time of filing or how it satisfies the regulatory criteria set forth at 8 C.F.R. § 204.5(i)(3). Further, the petitioner's motion has not specifically identified any erroneous conclusion of law or statement of fact contained in the AAO's prior decision.

Therefore, in this matter we again find that the petition was properly denied based on the pertinent statute and regulatory criteria. The petitioner cannot overcome the grounds for denial through the submission of new evidence that did not exist at the time of the petition's filing.

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.

ORDER: The AAO's decision of September 16, 2002 is affirmed. The petition is denied.