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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

[redacted]

File: WAC 01 289 54296 Office: CALIFORNIA SERVICE CENTER Date: JAN 17 [illegible]

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]

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hagan

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 the arts. 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.

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 CFR 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 CFR 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.

The petitioner is an orchestra conductor. Counsel states that the petitioner "is a conductor of the Armenian Philharmonic Orchestra and used to be the resident conductor of the Yerevan Symphony Orchestra. He has also been the manager and conductor of the National Music Chamber Theater. . . . In a short time, he has quickly risen to the top of his profession as a conductor of the national orchestra."

The regulation at 8 CFR 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. Initially, counsel did not specify which of the criteria that the petitioner claims to have met. The initial submission contained only a small number of documents, which along with counsel's statements appear to be intended to address the following regulatory criteria:

> *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

Counsel asserts that the petitioner "performed at the 'Alderburgh Festival' in Great Britain [in 1997] and in 2000 at the 'Beiteddine Festival' in Lebanon." The record contains no documentary evidence regarding the Alderburgh Festival. A compact disc in the record indicates that the petitioner was the orchestra conductor on *Fairuz: Live at Beiteddine 2000.* The focus of this recording is not on the petitioner, but rather on the singer, Fairuz, for whom the orchestra was part of her musical backing. The musical arrangement was done by Ziad Rahbani, who composed or co-composed almost every track on the album.

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

Counsel states that the petitioner has acted as the director of national musical competitions, but the initial submission contains no corroborating evidence. Documentation from a concert at Aram Khachaturian Concert Hall indicates that the petitioner conducted at three performances, but it identifies another individual as "artistic director and chief conductor."

The most persuasive evidence in the initial submission is documentation from the Armenian Ministry of Culture, Youth Affairs and Sports, indicating that the petitioner left the post of director of the State Music Chamber in April 2001, for a one-year appointment as chief conductor of the A. Spendiarian State Academic Theater of Opera and Ballet.

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

As noted above, the petitioner has submitted a copy of *Fairuz: Live at Beiteddine 2000*, issued by Relax-In and distributed by EMI Music Arabia. The record contains no documentation as to the commercial success of the recording. Also, again as noted above, the focus of the album is not on the petitioner as the conductor (as is the case with some recorded works conducted by, for instance, Arthur Fiedler or John Williams) but on the singer. The petitioner's name does not appear anywhere on the outer packaging of the compact disc.

Counsel states that the initial filing includes documentation regarding the festival in Beiteddine as well as letters from Tibor Varga and Aram Gharabekian, but these documents are not among the evidence now in the record.

The director informed the petitioner that the initial evidence was not sufficient to establish eligibility for the classification sought. In response, the petitioner has submitted further documentation and a letter from Professor Jon Robertson, chair of the Department of Music at the University of California, Los Angeles. Prof. Robertson's letter reads, in its entirety:

> To Whom It May Concern:
>
> I would like to offer my highest recommendation on behalf of [the petitioner]. [The petitioner] is an extremely talented young conductor whose passion for music is wonderfully tempered by intellectual understanding of the art form, which he communicates very clearly.
>
> It is not often that one can fill a prestigious position within one's own country with one's own product, but [the petitioner] would be a wise choice.

The letter appears to be an employment reference. Prof. Robertson's mention of "fill[ing] a prestigious position within one's own country with one's own product" does not make sense in reference to the United States, because the US is not the petitioner's "own country," and the petitioner did not attend UCLA or any other US music school. This reference is coherent only in the context of a recommendation for the petitioner to take a position with an Armenian orchestra or other musical body. The conditional nature of the assertion that the petitioner "would be a wise choice" to "fill a prestigious position" implies that the petitioner does not yet hold that unspecified prestigious position.

Counsel states that "conductor of a philharmonic orchestra is not an everyday position. . . . It is a rare person who has such a fine tuned ear to be able to be a conductor." While it is certainly true that most musicians are not orchestra conductors, it does not follow that simply being an orchestra conductor is evidence of extraordinary ability. To hold otherwise would require the absurd finding that every orchestra conductor is among the very top orchestra conductors.

In an attempt to satisfy 8 CFR 204.5(h)(3)(iii), which calls for published materials about the alien in professional or major trade publications or other major media, the petitioner submits a copy of an interview that appeared in the February 25, 2002 edition of *TV Channel* magazine. The title of the article, a quotation from the petitioner, is translated as "I Am Not Famous." This article was not published until six months after the petition's August 16, 2001 filing date, and only days before the director issued the request for additional evidence on March 1, 2002. If the petitioner was not already eligible as of the August 2001 filing date, an article from February 2002 cannot retroactively establish such eligibility. *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.

Most of the remaining documents are concert programs from both before and after the filing date. Many programs identify the petitioner as a conductor with the Armenian Philharmonic Orchestra, but another individual as the artistic director and principal conductor. Some concert programs do not appear to mention the petitioner's name at all.

The director denied the petition, acknowledging that the petitioner has had success as a conductor but finding that the petitioner has not submitted sufficient documentary evidence to establish sustained national or international acclaim at the very top of the field. On appeal, counsel notes the aforementioned interview in *TV Channel* magazine. As noted above, this article did not exist until well after the petition's filing date, and thus even if the petitioner had established that *TV Channel* constitutes major national media, it cannot establish the petitioner's eligibility as of August 16, 2001.

Counsel states that the director has acknowledged the petitioner's satisfaction of 8 CFR 204.5(3)(vii), display at artistic exhibitions or showcases, through the claimed music festivals. The record, however, does not contain any evidence that establishes that the petitioner was a showcased artist at any music festival. The record contains nothing at all relating to the Alderburgh Festival, and the only material in the record that refers to Beiteddine is the Fairuz album recorded there. There is no indication that the recorded performance was part of a music festival, and the concert itself highlighted the singer rather than the conductor and so arguably it was Fairuz whose talents were most conspicuously on "display" on that occasion.

Counsel asserts that the petitioner has played a critical role for various national musical bodies in Armenia. While some of the petitioner's claims in this area are weaker than others, it appears that the petitioner's leadership positions are sufficient to satisfy 8 CFR 204.5(h)(3)(viii).

With regard to commercial success, counsel asserts that the commercial success of orchestras under the petitioner's direction is self-evident and therefore the petitioner "does not believe that commercial success is an issue." It remains that 8 CFR 204.5(h)(3)(x) calls for evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video sales. The petitioner has not produced box office receipts or sales figures and therefore his evidence does not conform to the plain wording of the regulation. Simply claiming that commercial success is obvious cannot suffice in lieu of documentary evidence.

Counsel states that the petitioner "has presented sufficient evidence to establish his level of achievement as a top conductor for a world-recognized philharmonic orchestra." As noted above, the record identifies the petitioner as a conductor, but not the "top conductor," of the Armenian Philharmonic Orchestra. If counsel means to imply that every conductor is a top conductor, then the adjective "top" becomes meaningless. The Armenian Philharmonic Orchestra obviously employs more than one conductor, only one of whom is the principal conductor, and that individual is not the petitioner.

The petitioner submits documentation showing he was the director and conductor of "Elite Generation," a musical competition televised in 2001. A program from the competition includes photographs of the competitors, all of whom appear to be children and adolescents. The petitioner also conducted a symphony orchestra and a chamber orchestra in conjunction with "the final rounds of the First National Piano Competition 'Armenian Legacy: the Young Talents'" in 1999. The petitioner has not established the extent to which conducting orchestral accompaniment at youth competitions is indicative of national acclaim.

Composer Tigran Tahmizian asserts that he has been impressed by the petitioner's conducting work, and that the petitioner "is an artist with a very distinct personality and highest degree of professionalism." These subjective assessments of the petitioner, whatever their source, are not objective evidence that the petitioner is among the best-known conductors in Armenia.

On the appeal form, counsel has indicated that he will supplement the record within 30 days. In the brief submitted with the appeal, however, counsel states only that the petitioner "reserves the right to provide further briefs and evidence to supplement the record." Counsel does not definitively indicate that additional materials will be submitted. Because more than four months have elapsed since the filing of the appeal, and the record contains no subsequent submission, we presume the record to be complete.

The record shows that the petitioner has risen to a high level in his field at a very swift rate, conducting at the national level by the age of 32. The petitioner has not, however, produced the "extensive documentation" demanded by the statute to fulfill at least three of the ten criteria specified at 8 CFR 204.5(h)(3). Success and career advancement do not presumptively establish sustained national or international acclaim.

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 conductor 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. 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.