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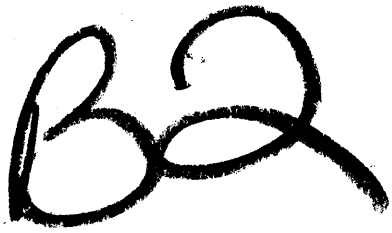

APR 13 2004

FILE: WAC 02 285 55113 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. The petition is now before the Administrative Appeals Office (AAO) 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 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 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 she has sustained national or international acclaim at the very top level.

This petition, filed on September 24, 2002, seeks to classify the petitioner 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.

On appeal, counsel criticizes the director's alleged bias in determining sustained national acclaim from a non-European country. However, nothing in the director's decision reflects that he evaluated the petitioner's claims

of sustained national acclaim in a manner contrary to law or policy or more stringently than in cases of those aliens from a "European" country.

In his decision, the director stated, "Even if the alien fulfills three of the criteria, it does not necessarily mean that the alien has achieved sustained national or international acclaim." This is an erroneous statement and is withdrawn. Clearly, if the petitioner satisfies three of the regulatory criteria, she will qualify for the visa classification. It is noted that the petitioner must do more than submit evidence addressing three of the criteria. The evidence in support of each criterion must qualitatively satisfy the criterion, and indicate through extensive documentation of national or international acclaim that the petitioner meets the criterion. We concur with the director that the petitioner has not met at least three of the criteria.

Through counsel, the petitioner has submitted evidence that, she 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 claims to meet this criterion based on her nomination for several music awards. As evidence, she submits a copy of an October 2001 web page from philmusic.com, thanking the processor for voting and indicating that the nomination form had been processed. The record contains no evidence of who cast this particular vote. The petitioner also submits a certification from the manager of radio station NU107, who states that the petitioner's group was "up for official nominations" in specified categories in the NU107 Rock Awards 2001. These appear to be the same nominations listed on the philmusic.com website. According to the evidence submitted, those eligible for nomination are those "Philippine rock artists who have released singles and albums or who have managed to get radio airplay on NU107." The website lists those who are eligible for consideration in each category, and voting is apparently done by listeners. There is no evidence in the record to establish that nomination for these awards is a nationally or internationally recognized award for excellence, and the evidence does not reflect that the petitioner or her group won the awards for which they were nominated. The criterion requires documentation of the alien's receipt of an award, and nomination alone is not sufficient to satisfy the requirements of the criterion.

The petitioner submits an article that appeared in the January 3, 1997 edition of the *Manila Times*. Its mast reads OPM and underneath is a smaller headline that reads "awards (the best and the works of Pinoy Rock in 1996)." A song by a group in which the petitioner was a member is listed under the category "Best Singles." Counsel submits this as evidence that the petitioner won an OPM award; however, nothing in the record reflects that this was an award or that it is nationally or internationally recognized as an award for excellence in the field.

Counsel states that the petitioner's receipt of a gold record award is also evidence of this criterion. The certificate indicates that the gold record award is based on "sales, popularity and public patronage" of the album. The receipt of the gold record is more indicative of commercial success and will be considered under a separate criterion, discussed below.

Counsel also includes evidence charting the performance of a record by the petitioner's group during September and October 2001. There is no evidence that the chart performance of the record is an award or prize. No evidence submitted establishes that the petitioner meets this criterion.

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.

To demonstrate that membership in an association meets this criterion, the petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or work experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues do not satisfy this criterion as such requirements do not constitute outstanding achievements. The overall prestige of a given association is not determinative. The issue is membership requirements rather than the association's overall reputation.

The petitioner claims to meet this criterion based on her membership in the Organisasyon ng Pilipinong Mang-aawit (OPM) and the Filipino Society of Composers, Authors and Publishers, Inc. (FILSCAP).

The OPM is an advocacy organization that works on behalf of Filipino singers. The evidence submitted about the OPM does not indicate that any specific achievement is required to become a member of the organization. FILSCAP is an organization that protects the rights of musicians in the Philippines. No evidence was submitted regarding its membership requirements. Counsel asserts that recording artists and composers "may only become members of FILSCAP upon showing sufficient materials of their achievements (productions) to the organization." 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). Additionally, merely proving to the organization that one has produced a musical product does not imply that the product constitutes an outstanding achievement. The petitioner does not establish that she meets this criterion.

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.

In order to meet this criterion, published materials must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The record includes numerous articles in various publications. Many of the articles discuss the "all-female punk-alternative rock group" phenomenon that was sweeping the Philippines. The petitioner's band was mentioned in the articles as one of these groups, and the petitioner was sometimes quoted. These articles are not about the petitioner and do not satisfy the requirements of the criterion. Several of the articles appeared in publications identified by counsel as school newspapers such as the *Philippine Collegian* and the *Varsitarian*.

As these papers are not major media, or major trade or professional media, they do not satisfy the requirements of this criterion.

The evidence presented by counsel also did not establish that *ChiC*, the *Sunday Chronicle*, the *Manila Standard*, *Mega*, *People Asia*, *Young Star* or the *Sunday Inquirer Magazine*[1] are major media or major trade or professional media. Counsel also included articles that appeared on the philmusic.com website. Although the web is a worldwide source of printed matter, the simple appearance of an article on the web does not indicate that it appeared in major media. To determine the significance of an article on a particular website, evidence that the website receives significant visits ("hits") would establish it as major media in satisfaction of this criterion. Counsel provided no evidence of the popularity of the philmusic.com website as a source of information.

An article that appeared in the November 30, 1993 edition of the *Philippine Star* discusses the all-girl rock bands with a critique of the petitioner's band's performance at a local club. The August 31, 1996 edition of the *Philippine Daily Inquirer* also features an article on the all-girl rock group featuring the petitioner's band, and discusses its debut album. The petitioner is mentioned as the guitarist. An April 12, 1997 article in the same newspaper focuses on the lead singer of the petitioner's group, with the petitioner only mentioned in the accompanying photograph. A May 6, 1998 article in the *Philippine Star* reports that the petitioner's new musical group is beginning a bar tour. The petitioner is listed as the guitarist and is identified in the accompanying photographs. Articles that appeared in the June 30, 2002 and July 12, 2002 of the *Philippine Star* discuss the petitioner's band's new contract with the U.S. record company. The petitioner is mentioned as one of the original founders of the group. None of these articles are about the petitioner, and do not satisfy the requirements of this criterion.

The petitioner submits a document entitled "The Sisters Are Doing It for Themselves." Counsel asserts in her letters accompanying the petition and the RFE that the document is part of a book. She names the publisher and publication date. However, counsel provides no evidence that this document is part of a book. As noted above, the assertions of counsel are not evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Further, the last page of the document indicates that it appeared in the November 20, 1994 edition of the *Sunday Inquirer Magazine*. As noted previously, the petitioner has submitted no evidence to establish that this magazine is major media. Additionally, the document discusses the all-girl bands and the petitioner's band is just one among those discussed.

Another document identified as a songbook with guitar chords entitled "The Best of Pinoy Bands .. Atbp" features one of the songs by the petitioner's band. This book is not published material about the petitioner or her work within the meaning of the criterion.

With the RFE, the petitioner submits numerous documents regarding her band's contract with the U.S. record company, including media reports of the contract and the release of the band's CD under that label. The

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[1] Counsel states in her letter accompanying the director's request for evidence (RFE) dated June 24, 2003, that the circulation of the *Sunday Inquirer Magazine* is in excess of 265,000. As evidence, she refers to the information regarding the magazine supplement that appears in the *Philippine Daily Inquirer*, a major newspaper. However, she failed to submit evidence to establish that this publication is the magazine supplement to *the Philippine Daily Inquirer*.

documents submitted with the RFE contain copies of various web pages that discuss the petitioner's band. As this evidence is subsequent to the filing date of the petition, it cannot be considered in determining visa classification preference. The petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Further, the documents are not about the petitioner as required by the regulation.

The petitioner's evidence does not establish that she meets this criterion.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

The record contains a certification from the manager of RJ Music City stating that the petitioner was one of the judges of a "Battle of the Bands" contest in 1995. The record also contains a certification from the manager of the radio station NU107 stating that the petitioner was one of the judges for the 2000 Nu Rock Awards. The evidence submitted regarding the Nu Rock Awards is unclear. As discussed above under the awards criterion, the record reflects that the nominations for the awards includes rock artists who have produced music and received airtime on the NU107 radio station, and voting is done by the listeners. The station manager states that winners of the awards are selected by a panel of judges. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The statute and regulation require the petitioner to establish sustained acclaim through extensive documentation. Acting as an occasional judge of other musical talents is not sufficient to establish that the petitioner meets the extensive documentation requirements of the statute and regulation.

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

To establish that she meets this criterion, the petitioner submits samples of her work on various CDs. She also submits a statement from the president of the Philippine Association of the Record Industry, Inc., who gives a very brief biography of the petitioner's music career. He indicates that she is a performing artist, composer, musical arranger and producer and lists some of her work. A statement from Alpha Records Corporation lists songs that the petitioner helped to co-produce and which were released through Alpha Records. Neither the statements nor the CDs establish that the petitioner has made a contribution of major significance to the music industry.

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

The petitioner claims to meet this criterion based on her band's appearances in different forums, including MTV Asia, various clubs and other concert performances, and on a local television station. We note that the wording of this criterion strongly suggests it is for visual artists such as sculptors and painters. The purpose of a band and playing music is to perform before audiences, and virtually every band performer will exhibit his or her work in this manner. While music and musicians might conceivably meet this criterion, as for

example, a musical showcase featuring the musical compositions of Beethoven, the evidence does not establish that the beneficiary's talents have been showcased within the meaning of this criterion. Counsel also asserts that the petitioner meets this criterion based on the inclusion of songs by her group in the guitar chords songbook. This argument is without merit as the book contains hundreds of songs, and the songs by the petitioner's band are not highlighted or receive more attention than the other artists' work included in the book.

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

To meet this criterion, the petitioner must show that she has played a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

The petitioner submits statements from several individuals stating that the petitioner appeared with her bands on several occasions, including the Music Museum's 8th anniversary show that aired on national television, that she and her groups regularly appeared at Club Dredd and Mayric's Music House, and that her band made guest appearances on NU107 radio programs and performed in concerts and shows sponsored by the radio station. The petitioner submits no evidence that her appearances on these various shows or in the clubs were critical to the success of the shows. The record does not reflect that she played a leading role for the Music Museum, Club Dredd, Mayric's Music House or NU107.

The petitioner also submitted a letter from the Sari-Sari Group of Companies that indicate the company sponsored one of the petitioner's bands for a one-year period. The petitioner's second group represented Casio. The petitioner submits no evidence that she played a leading role within the Sari-Sari Group or Casio or that she and her groups were critical to the success of these organizations.

The record reflects that the petitioner was a member of three different musical groups, consisting of no more than five members. Each member appeared to have a specific and unique role within the group. The petitioner was the lead guitarist, and occasionally wrote and produced some of their songs. The evidence establishes that the petitioner played a leading role within her various musical groups.

The record does not establish, however, that these groups have a distinguished reputation. The evidence indicates that the petitioner's first group enjoyed some notoriety as one of the all-girl alternative rock groups, and released at least one album. However, no evidence establishes the group's reputation within the music or recording industry, or otherwise establishes its distinguished reputation. As noted above, the evidence does not establish that the OPM award that the petitioner claims that the group won is a nationally or internationally recognized award for excellence and does not establish that the group had a distinguished reputation. Although counsel argues that the petitioner's current band is the first Filipino music artist to be signed to a U.S. record label, that fact alone is insufficient to establish that the group enjoys a distinguished reputation.

The petitioner has not established that she meets this criterion.

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

To establish that she meets this criterion, the petitioner submitted a copy of a cash voucher indicating she was paid 12,000 pesos as a "talent fee" for a music album on which she wrote and arranged songs and on which her band appeared. A 1996 cash voucher indicates she was paid 20,000 pesos for advanced royalties on an album that she recorded with the first group with which she was affiliated. Counsel also submits a copy of a contract in which the master recording of this album was sold to BMG (Pilipinas), Inc. for 350,000 pesos. The petitioner is not listed as the seller or as a beneficiary under the contract. With the RFE, counsel submits copies of various agreements the petitioner and her band have entered into with the record company in the United States. The petitioner submits no evidence of current earnings, and submits no evidence comparing the remuneration for her work to that of others in her trade. The record does not establish that the petitioner's remuneration is significantly high in relation to others in her field.

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

As evidence of this criterion, the petitioner submits a copy of a 1996 gold record award that she received for one of her albums. The award was presented by Alpha Records "in recognition of the phenomenal success in terms of product sales, popularity and public patronage" of the album. The record does not reflect the number of copies of the album that was sold to win a gold record award from Alpha Records, or to otherwise establish the commercial success of the album.

The petitioner also submits copies of the PhilMusic charts for September and October 2001, showing that one of her group's records reached as high as number 4 for music played on radio station NU107. The petitioner presents no evidence that the popularity of this record translated to equivalent sales.

While the petitioner appeared to have a measure of success as indicated by her receipt of a 1996 gold record, she submits no evidence of continued commercial success. Counsel asserts that the record contract is evidence of commercial success; however, recording and releasing a record does not guarantee that it will be commercially successful. Michael Sutton, an A&R representative at Know-It-All Records, the petitioner's recording label, states that the CD by the petitioner's group, in preorders alone, outsold the label's most internationally recognized artist. However, this statement alone is insufficient to establish commercial success as there is no evidence of the commercial success of the label's "most internationally recognized artist."

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 her field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished herself as a musician to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence indicates that the petitioner has achieved some success as a musician, but is not persuasive that the petitioner's achievements set her

significantly above almost all others in her 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.