U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

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MAR 17 2004

FILE: [redacted] 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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, initially approved the employment-based immigrant visa petition on November 4, 2002. On a service motion to reopen, the director determined that the petition had been approved in error and gave the petitioner the opportunity to submit additional evidence. The director subsequently denied the petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

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 has earned the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. The petitioner's motion to reopen and reconsider was forwarded to the AAO pursuant to 8 C.F.R. § 103.3(a)(2)(iv).

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 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 singer/guitarist. 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 beneficiary is a member of the musical group, Los Tigres del Norte (LTDN), whose musical style is norteño, described as an acoustic music form. The band has been in existence for over 30 years. The beneficiary joined the group in 1996. The petitioner is the agent and manager of the band, and has submitted evidence that, it 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 that the beneficiary meets this criterion based on his receipt, as member of LTDN, of a 1999/2000 Latin Grammy Award for Best Norteño Performance, a 1998 and 1999 Broadcast Music, Inc. (BMI) Latin Award for most performed Latin songs in the BMI repertoire, a 2001 Billboard Spirit of Hope Award, and a 2001 Mexican Heritage Legacy Award from the Mexican Heritage Corporation.

The BMI award is an institutional award given by BMI, an organization that represents songwriters, composers and music publishers, based on the "most performed songs in the BMI repertoire." This award is not a nationally or internationally recognized award for excellence, but is more indicative of commercial success and will be considered under that criterion. The record reflects that the Billboard award was a special award given to LTDN; however, there is insufficient evidence in the record to determine the nature and the basis of this award. The available evidence does not establish that the Spirit of Hope Award is a nationally or internationally recognized award for excellence in music.

The director determined that, although the band has won several awards and achieved a degree of recognition, there is no evidence of the beneficiary's receipt of an individual award that meets this criterion. We withdraw this determination of the director.

The evidence reflects that the beneficiary plays the bajo sexto, which according to Dr. Daniel Sheehy, Curator of the Folkways Collection at the Smithsonian Institution and Director of the Smithsonian's nonprofit record label, is key to LTDN's musical style and an essential instrument to the power and identity of the norteño style of music. The role of the bajo sexto in norteño music is echoed by Oscar Lara, the petitioner's secretary and drummer of the group, who also points out that the beneficiary is the only bajo sexto player in the group; and by Jose Luis Mogollon, Vice President of Operations of Fonovisa Records, the group's recording label and distributor. Mr. Mogollon also states that the beneficiary was featured as the lead or solo vocalist on several songs, including one song on the album, which won the Latin Grammy. The group has performed together for over 30 years, and although they won a Grammy in 1987, appear to have achieved even more success during the years since the beneficiary became a member. The Grammy.com website lists the beneficiary as one of the winners of the 1999 award for Best Norteño Performance. We find that the beneficiary meets this criterion.

The petitioner submits evidence that LTDN was nominated for other Grammies and music awards. However, while simple nomination may help the petitioner to establish continued acclaim, it does not meet the requirements of 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.

To meet this criterion, published materials must be primarily about the beneficiary 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 petitioner submits articles from several newspapers and other media that discuss LTDN and the group's work in the field of norteño music. These include articles from such media as the *New York Times* and *Billboard* magazine, which qualify as major media and a major trade publication. The beneficiary is generally only mentioned as a member of the group. The only article that provides more than a passing mention of the beneficiary appears in *Furia Musical*, apparently a music magazine. However, no evidence establishes *Furia Musical* as a professional or major trade publication or other major media. Further, this one profile in a magazine is not indicative of sustained national or international acclaim. The evidence submitted does not establish that the petitioner meets this criterion.

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

To establish that the beneficiary meets this criterion, the petitioner submits letters from musicians and those who have studied music. They proclaim the beneficiary to be an "extraordinary" bajo sexto player, who, with his band, has helped to revitalize norteño music. Dr. Guillermo Hernández, Professor of Spanish at the University of California at Los Angeles (UCLA), states he is an "academic expert" in the development of the musical ballad in Spanish in the United States and Mexico. He describes the beneficiary as "a leading practitioner of the bajo sexto guitar and [is] one of the most celebrated innovators in the music produced by this instrument."

Karl Perazzo, a professional percussionist, states that the beneficiary is "one of a handful of internationally recognized bajo sexto specialists" who has "managed to keep a very important instrument alive in this style of music." Dr. José Cuellar, Professor of Raza Studies at San Francisco State University, describes the beneficiary in almost the same words, and John McDowell, Chairman of the Department of Folklore and Ethnomusicology at Indiana University, states that the petitioner is an artist of extraordinary ability on the "basis of this unique contribution to conserving and developing the rich heritage of the Mexican people."

Despite the accolades, none of the petitioner's supporters attest to any major contribution that he has made to the music field. The petitioner asserts that the success of the LTDN has been enhanced by the beneficiary's presence. The band's commercial success does not establish that the beneficiary has made a significant contribution to music.

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

The petitioner claims that the beneficiary meets this criterion based on LTDN's participation in the Smithsonian Institution Traveling Exhibition Service's Corridos Sin Fronteras. A band's concert performance does not meet the requirements of this criterion. 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 is to perform music 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 LTDN's contribution to memorabilia as part of the Corridos Sin Fronteras exhibit is evidence of this criterion. Counsel's assertion is without merit as contributing memorabilia to an exhibit is clearly not a display of one's talents or skills.

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

The director determined that the beneficiary meets this criterion. As discussed above, the beneficiary plays an instrument that is key to the band's success. The band has received recognition from many different forums. The evidence establishes that LTDN is a band with a distinguished reputation. We concur with the director's determination.

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

On the Form I-140, Immigrant Petition for Alien Worker, filed on August 27, 2002, the petitioner indicated the beneficiary's salary was $100,000 per year. The petitioner did not initially claim that the beneficiary met this criterion, and no evidence was submitted with the petition. In response to the RFE, the petitioner submitted a letter from LTDN's accountant who states that as of January 1, 2003, the beneficiary's salary was $2,250 per week or $117,000 per year. As evidence that the beneficiary meets this criterion, the petitioner submitted information from the U.S. Department of Labor's (DOL) Bureau of Labor Statistics (BLS) website, which showed that in 2001, the mean annual wage for musicians was $46,690, and that only 10% of musicians earn more than $93,960 per year. The petitioner also submitted evidence from the 2002-03 edition of the Occupational Outlook Handbook, which shows that minimum salaries in orchestras ranged as high as $100,196 per year in 2000-2001, while the DOL's Employment and Training Administration website reflects that the minimum wage in the Los Angeles PMSA for 2003 was $44,390. The director rejected this evidence as not conclusive that the beneficiary's salary was significantly high relative to others in the field. The director suggested that the petitioner should submit evidence that compares salaries of bajo sexto players.

On appeal, counsel states that there is no evidence of salary comparison for bajo sexto players. Counsel asserts that an informal survey conducted by the firm, comparing norteño and mariachi bands with bajo sexto players, indicates that the average salary is $52,000 per year. Counsel admits that this is an unscientific survey but still provides no documentary evidence of the survey. 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).

We cannot agree with the director that the petitioner is required to establish this criterion by providing evidence tailored so specifically to the beneficiary's musical instrument. We believe that a comparison of salaries for members of bands that have reached the success stage of LTDN would be more instructive. The criterion requires that the beneficiary's salary be high in relation to other high earners in the field. The petitioner represents a well-known group with an international reputation. Comparing the beneficiary's salary with those of other bajo sexto musicians, some still well within the neophyte stage, is similar to comparing minor league baseball salaries to those of the major leagues. Neither is a fair and accurate comparison. This is evident in the salary information presented by the petitioner that in 2001, the minimum salaries of members of some major orchestras was over $100,000. The evidence submitted to support this criterion is conflicting and

not dispositive of the issue. We find that the evidence does not establish that the petitioner has shown that the beneficiary meets this criterion.

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

The petitioner claims the beneficiary meets this criterion based on the commercial success of the band, LTDN. As noted above, the beneficiary is a key member of LTDN. The record reflects that the band won awards in 1998 and 1999 for the most performed Latin songs in the BMI repertoire. Subsequent to the beneficiary joining the band, it has had five albums certified as "gold" by the Recording Industry Association of America (RIAA). According to the RIAA website, an album is certified gold if it sells 500,000 units.[1] We find that the beneficiary meets this criterion.

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.

In review, while not all of the petitioner's evidence carries the weight imputed to it by counsel, the petitioner has established that he has been recognized as an alien of extraordinary ability who has achieved sustained national acclaim and whose achievements have been recognized in his field of expertise. The petitioner has established that he seeks to continue working in the same field in the United States. The petitioner has established that his entry into the United States will substantially benefit prospectively the United States. Therefore, the petitioner has established eligibility for the benefits sought under section 203 of the Act.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

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[1] *See* RIAA.com/gp/certification/criteria.asp.