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U.S. Citizenship and Immigration Services

**PUBLIC COPY**

[redacted]

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MAR 29 2004

FILE: WAC 02 065 54507 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:

SELF-REPRESENTED

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

This petition 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.

The petitioner is a performer with Cirque du Soleil, an entertainment company that combines "acrobatics, music, light and theater." The petitioner is a guitarist, performing primarily in Cirque du Soleil's production of "Mystère," which the director incorrectly identified in his decision as a band. The petitioner has submitted evidence that he claims meets the following criteria.

*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.

As evidence that he meets this criterion, the petitioner submits copies of two catalogs and an advertisement from the Fernandes guitars website. The petitioner is listed as one of the artists who uses a Fernandes guitar. Such advertisements are not published articles as required by this criterion and are not primarily about the petitioner.

The petitioner also submitted a copy of an article from the November 29, 2001 edition of *Las Vegas Weekly*. This article is about the musicians who provide the musical background for Cirque du Soleil's show "Mystère." While the petitioner is mentioned and quoted in the article, the article is not primarily about him and the author does not focus on him to a greater extent than she does on the other band members. The petitioner submitted a copy of an article from the November 14, 1999 edition of *Showbiz Weekly*, about the petitioner and his work. The petitioner does not, however provide evidence that either of these publications is a professional or major trade publication or other major media as required by this criterion.

The petitioner submitted what he describes as print and media kits for the years 1999 and 2000. The "kits" appear to be a collection of clipped articles that reference Cirque du Soleil or one of its productions. The petitioner is not mentioned in any of the publications. Many of the articles are not about Cirque du Soleil and none of them is about the petitioner.

The director stated in his Notice of Intent to Deny that the petitioner had met this criterion. However, the petitioner's evidence consisted of only one published article that was about the petitioner and did not establish the nature of the medium in which it appeared. Assuming that the article did appear in professional or major trade media or other major media, one article does not establish sustained acclaim. The petitioner does not meet this criterion, and we withdraw the director's determination.

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

To establish that he meets this criterion, the petitioner submitted letters from several fellow musicians and writers in the music industry. They attest to the petitioner's talent as a musician and as a guitarist, describing him in terms that range from "extraordinary" and "exceptional" to "accomplished" and "very good." The authors of the letters do not, however, establish that the petitioner has made a contribution of major significance to music. Mr. Mike Varney, a record producer, describes the petitioner as an "innovator" but provides no further explanation of the petitioner's innovation or contributions to music. Mr. Terrence R. Williams, an immigration specialist with Cirque du Soleil, states that the petitioner's contributions to the field are "extraordinary," yet he details no contributions that the petitioner has made. Mr. Williams writes that the petitioner has had "many teaching opportunities." However, simply teaching a class or music clinic does not,

by itself, establish that the petitioner has made a significant contribution to music. The petitioner has not established that he meets this criterion.

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

As evidence that he meets this criterion, the petitioner submitted letters from several individuals who wrote of his musical performances. Mr. Williams wrote that the petitioner "has had quite a significant showcase of his work for Cirque du Soleil," performing in over 4,150 Mystère shows. He also states that the petitioner has appeared on the soundtrack for "Mystère" and performed on *The Tonight Show with Jay Leno*. We note that the wording of this criterion strongly suggests that it is for visual artists such as sculptors and painters. The purpose of a musician is to perform before audiences, and virtually every musician 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.

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

The evidence reflects that the petitioner is one of the primary musicians in Cirque du Soleil's "Mystère" production. According to the music composer for the production, the petitioner's guitar work is the "centerpiece of the major part of the musical score. He is featured soloist in 8 of the 12 pieces of the show, playing the main melody and solos." The music conductor states that the petitioner's role is "critical" in that he "provides his unique blend of melody and sonic textures to **Mystère**," and that "his sound and musical personality have become an integral part of **Mystère**." The evidence also reflects that the petitioner's musical skill is one of the attractions to the performances. The record establishes that the petitioner has played a leading role in one production staged by Cirque du Soleil. A production, however, is not an organization or establishment as specified by this criterion. The petitioner must show that he played a leading or critical role for Cirque du Soleil. The evidence does not establish that the petitioner 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.*

The petitioner submitted a letter from Cirque du Soleil indicating that his annual salary in 2001 was $93,511, and effective January 1, 2002, increased to $102,300. The petitioner submitted a copy of a web page from "America's careerinfonet" showing the midrange salary for musicians in 1998 was between $13,900 and $54,100. This information is irrelevant as it predates the filing date of the petition by three years and cannot provide an accurate gauge by which to evaluate the petitioner's claim under this criterion. The petitioner also submits a copy of a web page from "Salary.com" that reflects that the high salary for actors and performers in Las Vegas was $52,524 in 2001. The definition that accompanies the information does not apply to the petitioner. Further, it only includes performers in the Las Vegas area. To establish that he meets this criterion, the petitioner must show that his remuneration is significantly high as compared to all others in the music field and not just to those in a discrete location.

The petitioner submits a copy of a U.S. Department of Labor, Bureau of Labor Statistics (BLS) printout that shows in 1999, the mean annual wage for musicians and singers was expected to be $37,510. The petitioner also submits a page from the BLS website that shows that in 2000, the median annual earnings for "salaried

musicians and singers" was $36,740, with the highest 10% earning more than $88,640. According to the information presented from BLS, the earnings of musicians are determined by the "number of hours and weeks worked, a performer's professional reputation, and the setting." The petitioner is a professional musician performing in a show that has an international reputation and stable environment. Comparing the petitioner's salary with local singers and 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. Evidence comparing the petitioner's salary to those who are similarly situated would be more informative for the requirements of this criterion. In his Notice of Intent to Deny, the director determined that the petitioner meets this criterion. However, the evidence of record does not support his determination, and we withdraw the director's determination.

*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 to meet this criterion based on the success of the "Mystère" production and his performance as a leading member of the show. However, according to Mr. Williams, the petitioner shares the stage, not only with his fellow musicians, but also "72 dancers, clowns, and acrobats." The petitioner does not demonstrate that his performance accounts for or plays a major part in the success and acclaim received by the production, and provides no evidence of his commercial success beyond his association with the "Mystère" production. No evidence of record establishes that the petitioner meets this criterion.

*Other comparable evidence.*

The regulation at 8 C.F.R. § 204.5(h)(4) states: "*If the above standards do not readily apply to the beneficiary's occupation*, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." [emphasis added]. The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the 10 criteria specified by the regulation. However, we will address the other evidence presented by the petitioner that he claims falls within this provision.

The petitioner submitted letters from several individuals within the music and entertainment industry who attest to his "extraordinary ability" as a musician. We have addressed several of those opinions in other criteria above. We note that the letters were all written especially in support of this petition. While not without weight, the opinions of experts in the field cannot form the cornerstone of a successful claim. Evidence in existence prior to the preparation of the petition would carry greater weight than new materials prepared especially for submission with the petition. An individual with sustained national or international acclaim should be able to produce unsolicited materials reflecting that acclaim. Furthermore, the opinions of the experts, as with all opinions, must be supported by verifiable evidence. No independent objective evidence appears in the record to establish that the petitioner is a musician of extraordinary ability that is evidenced by 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 beneficiary has distinguished himself as a musician 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 beneficiary is talented guitarist, but is not persuasive that his 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.